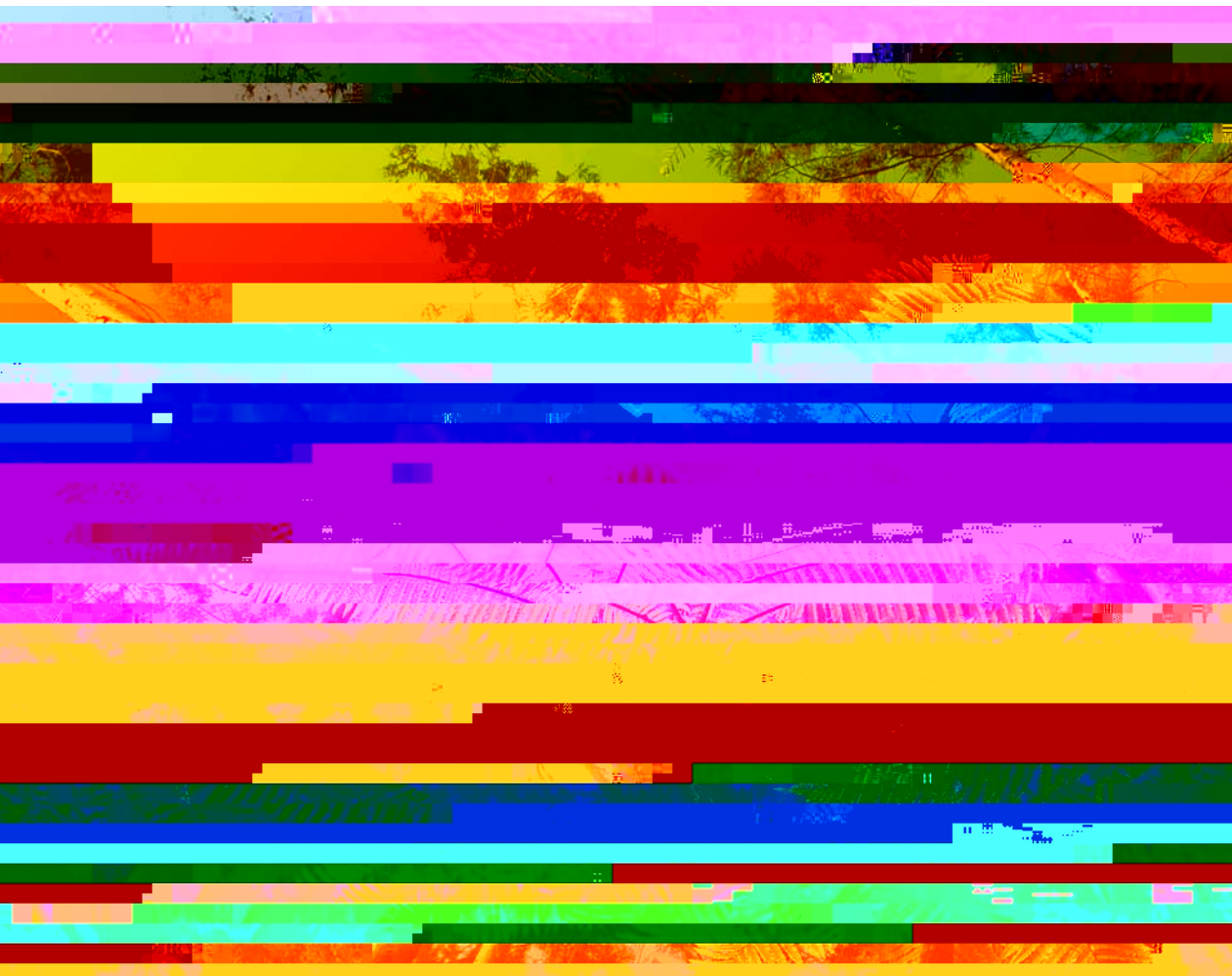
Legal Frameworks for REDD

Design and Implementation at the National Level

John Costenbader
Editor



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Foreword

The IUCN Environmental Law Programme (ELP) sends this book to print just weeks before Parties to the United Nations Framework Convention on Climate Change (UNFCCC) will meet in Copenhagen for the 15th Conference of the Parties (COP) to finalize a new climate agreement to replace or supplement the Kyoto Protocol. Perhaps the best-developed of the new options expected in that agreement, Reducing Emissions from Deforestation and Forest Degradation (REDD) poses a unique opportunity for the world to simultaneously 'get things right' for both climate and forests. In recent years, policy research has grown rapidly in the area of options for designing and implementing REDD regimes, while far less analysis of the legal ramifications of such options has occurred. This is particularly the case at the national level, where perhaps the greatest need for legal and policy understanding relating to REDD is felt already. It is this gap that the ELP aims to address with its latest publication.

This book builds on related experience of the IUCN Environmental Law Centre in the areas of Payments for Ecosystem Services (PES), Land Use, Land Use Change and Forestry (LULUCF) under the Clean Development Mechanism (CDM) of the Kyoto Protocol, Access and Benefit-Sharing under the Convention on Biological Diversity (CBD) and climate governance under the UNFCCC. Distilling a wide range of information and insights on REDD and forest carbon PES from legal and policy experts, the publication presents a detailed overview of regulatory design and implementation options specifically for a non-lawyer audience. The report is based on substantive findings from four national case studies carefully chosen for their varying geographies, forest cover and deforestation rates, and stages of REDD preparations.

The study concludes with the finding that although legal clarity is an essential prerequisite for successful national REDD regimes, such clarity does not necessarily require countries rewriting their existing legislative and regulatory frameworks, at least not immediately. Indeed, before creating any new laws, many countries can take essential first steps by removing existing legal norms providing incentives for deforestation and forest degradation. By phasing such work in the coming years in their programs to achieve full REDD functionality, countries will be able to design and implement regulatory systems providing the best fit for their unique national circumstances, be they entirely new legal instruments or amendments, harmonization or reinterpretation of existing laws.

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Acknowledgements

This publication would not have been possible without the time, creativity and dedication of many individuals. The IUCN Environmental Law Centre (ELC), editor and authors gratefully acknowledge all those who contributed to this book.

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List of Acronyms

ABS	Access and Benefit-Sharing
A/R	Afforestation and Reforestation
AFOLU	Agriculture, Forestry and Other Land Use
BAU	Business as Usual
CBD	Convention on Biological Diversity
CP	Commitment Period
CSR	Carbon Sequestration Rights
CDM	Clean Development Mechanism
CER	Certified Emissions Reduction
COP	Conference of Parties
FCPF	Forest Carbon Partnership Facility (World Bank)
GHG	

Part I

Introduction

John Costenbader*

Forests cover about one third of the Earth's land surface,[1] and provide services and resources supporting human subsistence and well-being. Forest ecosystems are central to the livelihoods, economic development, and cultural values of many citizens in developing countries. Forests also host a great part of the planet's terrestrial biodiversity and demand conservation and sustainable use.

From an economic perspective, carbon (or its reduction in emissions) is a "model commodity", as it only has one characteristic, which is its price. Once it is sold on an international market, regardless of where a reduction occurs, it will lack identifying characteristics or unique features that sellers could use to compete amongst each other. Therefore, sellers will be forced to compete based on price.[10] Such price competition, despite potential trade barriers and regulatory restrictions in importing Annex I countries, is expected to favour tropical forest countries among developing countries, as especially good conditions[11] good conditions for forest growth in such countries should allow them to offer lower prices.. Nonetheless, stiff competition among developing tropical forest countries selling credits is likely to occur. Countries with more stable investment environments, land ownership and use rights, and clear, well enforced regulatory frameworks are expected to reap the greatest opportunities from REDD.[12]

For successful REDD regimes, national governments should guarantee that forests remain intact and standing on a permanent basis. This outcome is more likely to occur via: fair and effective treatment of ownership and land ownership and use rights; benefit sharing; monitoring, reporting, and verification (MRV); access to information; and guarantee of public participation in future REDD national legal frameworks. Although the greatest attention currently focuses on changing the

1. D a a . a a [13,14]

Globally, a variety of direct and indirect deforestation drivers contribute to the current rate of global deforestation. Deforestation is driven chiefly by agricultural conversion, forest product and natural resource extraction and infrastructure development.[15] Forest degradation is largely driven by the overuse of forest resources. In both scenarios, perverse incentives in regulations over land

schemes relatively worthless, as the incentives provided could not compete with agricultural profits.[17]

The persistent availability of various subsidies, tax incentives, and under-priced public lands and natural resources for agricultural activities, including timber and first generation biofuels, ensure that government measures supporting income generation from forest conservation cannot effectively function. Similarly, government financial policy works against REDD objectives when providing funds to roads, hydropower development, and other public works that can fragment, and lead to mass migration into, forest areas. Governments have used land ownership and use rights policies to encourage land uses other than forest conservation, and often fragments of such policies remain in tax and property codes, undermining new national carbon sequestration goals. As Table 1 shows, countries examined in the case studies (Brazil, Cameroon, Guyana and Papua New Guinea) and Indonesia (which is included in the table due to its significant forest carbon emissions) show a range of the deforestation and forest degradation drivers described above, as well as unique policy and law variables that have historically fed into those drivers.

Tab 1: I a e b e a 8

C ·	Ma ( )	K · e a a ab
B a	• Land ownership and usage incentives • Agriculture and cattle pasture • Bio-fuel plantations • Roads • Hydropower	• From the 1960s to the 1980s, the Brazilian government promoted occupation and development of public lands in the Amazon with massive infrastructure, land titling tax incentives and "free-trade zones". • Recent programmes such as the National Institute for Colonization and Agrarian Reform in Brazil, and federal law encourages land exploitation by enabling land users to obtain legal title (usucapião) over land they have developed and used for five e ed years. • The devaluation of the Brazilian ea made Brazilian beef more competitive, but also doubled the price for beef, creating an incentive for ranchers to expand pasture areas.
Pa · a N G a	• Illegal logging	• Although forestry laws are in place, 90 percent of all logging in PNG is estimated to be performed illegally, due to lack of prior and informed consent by traditional landowners and the failure of the PNG Government to follow and enforce its own forestry laws.

S ce : Brann (2002); Government of Indonesia (2007); Westholm a . (2009); Pfaff (1997); Brazilian Art. 1239,

However, national constitutions often recognize the importance of environmental protection and the services that forests and other ecosystems provide, thus creating an enabling environment for REDD and other PES forms. Additionally, more detailed constitutions (such as in Brazil) can provide enabling provisions for such programmes as REDD, but implementing legislation is necessary to institute these constitutional provisions so as to provide a more detailed legal basis for the implementation of these programmes and to avoid ambiguity. From another perspective, one should bear in mind that a national constitution is usually the supreme law of a country, and any legal provision found in conflict with the constitution subsequently may be struck down as unconstitutional. Thus, while it is not necessary that REDD or other environmental services be mandated constitutionally, at a minimum legal due diligence must be performed to ensure that the constitution will not prevent the development of such schemes (for instance, in term of constitutional limitations to decentralization). Finally, national constitutions can provide useful guiding concepts for REDD, such as general rules on land and forest ownership and use rights, and the recognition and protection of local and indigenous communities' rights and interests.

3.2 REDD a

Countries may decide to enact a single law or regulation to cover REDD comprehensively, as well as to promote and implement it as a national policy. To date this approach has only been taken by Indonesia, which adopted a REDD regulation in May 2009, and in July 2009 an accompanying revenue-sharing regulation. Having one legal document on REDD has a special advantage of clarity in attracting international investment, as opposed to a combination of relevant environmental laws. Even when a single legal instrument specifically addresses REDD, it will still be necessary to conduct a comprehensive analysis of all relevant existing legal and institutional frameworks (ila[illegible]

[illegible]

economic incentives and by removing incentives supporting deforestation and forest degradation. This process may prove less contentious politically, and more cost-effective from a legal viewpoint, but requires careful coordination to avoid overlap and conflicts.

3.4 O a e a e

Depending on the type of the national REDD regime, national REDD law(s) or legal provisions will also need to be supported by existing policies and incentives in other sectors. As mentioned previously, any existing perverse incentives such as in agricultural, tax or investment law should be amended to avoid legal confusion and conflict with REDD objectives. In the case of federal systems, whether a single REDD law or REDD legal provisions are put in place, there should be harmony between federal laws and state laws in full respect of relevant constitutional provisions.

Next, supporting programmes established in the general REDD legal framework should be given legal and regulatory effect, such as: land-tenure evaluation programmes; capacity-building initiatives; information and public participation safeguards; benefit-sharing mechanisms; and MRV guidelines. New institutions and funds must be created (or existing institutions charged with new tasks and funds adapted to the context of REDD) to administer the new regulatory framework for REDD at the national level.

Given the infancy of REDD experiences, however, it is important to allow time for governments to experiment and learn from experience in pilot projects, as well as to build capacity of the administration and relevant stakeholders. A preliminary "trial and error" phase of REDD will offer governments an opportunity to refine more precise legal instruments needed for implementation at the national and sub-national level of REDD activities.

4. C b e REDD a a ba

This book addresses broadly the key legal issues underpinning national incentive-based systems for reducing carbon emissions from deforestation and forest degradation, and focuses specifically on considerations and guidance in developing national legal frameworks on REDD. Chapter 1 examines legal issues related to land ownership, access and use, demonstrating connections between land title and use rights, permanence of carbon sequestration, and REDD project risk. Legal issues related to participation of relevant stakeholders (mainly investors, landowners, and local and indigenous communities) in REDD activities are examined in Chapter 2, focusing both on participation in REDD-

as well as diverse national perspectives on REDD in UNFCCC negotiations. Additionally, the cases show a wide range in REDD readiness levels, particularly as far as national legal frameworks are concerned. Guyana and Papua New Guinea are at an early stage in REDD planning, with recent climate policies expressing general national aspirations and existing national forestry laws providing only hypothetically-related binding legal provisions. Cameroon lacks laws specifically addressing REDD, but has REDD pilot project experience to help inform the development of a new REDD legal framework. The case of Brazil demonstrates that federalism, while allowing for more diverse state experiences in testing REDD programmes, can also result in a complex mix of federal and state laws on climate and forestry that increase transaction costs and add legal uncertainty to project proponents.

1 Ownership of Land, Forest and Carbon

Annalisa Savaresi*, Elisa Morgera**

1.1 I . e

Forest ownership is normally associated with land ownership.[1] In developing countries, where REDD projects are being envisioned, often land title is not validly vested in local users, and land use arrangements are poorly defined and recorded. Both in Brazil and Indonesia – the countries with the largest carbon emissions in the forest sector – the relationship between customary and statutory rights in land is problematic.

rights may not significantly differ from full ownership. Much depends on the specific content of the

chapter on benefit sharing in this volume will illustrate, these arrangements need to be supported by measures enabling forest dwellers and users to gain from sound forest management. In fact, the hypothesis that people would conserve forests if they controlled them may not hold when alternative land uses provide higher benefits than forests.[11]

The challenge to identify and secure rights in land is a common feature of many developing countries. Growing population density, agriculture-related increases in land value, and technological advances are likely to enhance the benefits from creating more precise property rights in land.[12] Over the years, several tropical forest countries have attempted to introduce legal frameworks supporting the formal acknowledgement of customary land rights. These experiments have faced many challenges and

difficult. As a result, customary owners had no remedies to take action against breaches of concession agreements. REDD projects in Papua New Guinea face analogous challenges. The need to protect customary owners from abuses has already become manifest in a recent episode relating to fraudulent forest carbon contracts.

S ce : Forest Trends (2006); Vegter (2005); Australian Conservation Foundation and the Centre for Environmental Law and Community Rights (2006); Sydney Morning Herald (2009).

The processes that shaped the development of land rights in developing countries are very salient to the debate on REDD. Secure forest and land rights are an indispensable precondition to ensure the long-term permanence of forests and of the carbon sequestered therein. The implementation of REDD projects is likely to bring up the cost of land and attract outside investors. Carbon investments are more likely in countries with well-defined forest and land rights, which are commonly regarded as a crucial indicator of "readiness for REDD".[13] In this context, REDD may provide a powerful impetus to define forest and land rights in tropical forest countries. However, processes aimed at clarifying forest and land rights could go in either direction for non-titled land owners: they could be granted legal rights to their traditional lands, or they may be evicted, as more powerful stakeholders reap the benefits of REDD.

In this connection, the Stern Review on the Economics of Climate Change mentions that defining property rights to forestland and determining the rights and responsibilities of land owners, communities, and loggers is essential to effective forest management for carbon sequestration.

text box below. Some opponents have argued that the reform remunerates unlawful practices and creates the expectation that rule makers will adopt such measures again in the future, undermining the implementation of existing norms.[20] A first step to controlling deforestation and forest degradation should therefore be to eliminate provisions that require forest clearing for establishing and securing property rights, thus effectively delinking secure land rights from deforestation.[21]

B 1.2 La B a a A a

During the 1970s and seC estseC 5 p3

1.2.3 S a . e a a

In many developing countries, forestland is held in state ownership, and access rights are sold to large private logging companies through concessions. Under these agreements, logging companies obtain long-term rights to access and manage forests, harvest timber, and exclude other users. In return, the companies pay royalties or other fees to the government. In many tropical forest countries, governmental agencies have not developed the governance structures and management capacities necessary to ensure effective forest protection. Causes of illegal activities include flawed policy and legal frameworks, lack of enforcement capacity, insufficient data and information about logging operations, and corruption.[22]

To solve these problems, several countries have undertaken reforms increasing local control over forestlands, devolving management and/or use rights to local governments or communities. As a result, and despite the continuing central role of the state, the share of forestlands under local control is increasing.[23]

1.3 Na · · a b ea b · a b

Land ownership does not necessarily coincide with the right to alter forest vegetation and carbon

and Queensland,[36] CSRs give rise to what is commonly called an "interest in the land" under property law. This interest can be registered on land title. In Victoria, CSRs are defined as "the right to commercially exploit carbon sequestered by trees".[37] Although they do not constitute an interest in land, CSRs may be registered on land title.[38] In the Australian Capital Territory and in the Northern Territory, there is no specific legislation, but CSRs may be created through personal agreements between contracting parties. These agreements, however, may not be registered on land title. This lack of consistency between CSR regimes complicates transactions for entities that seek to operate across States. Most States enable parties to register CSRs under the "Torrens Title" system. The system enables parties to register land titles that are paramount over interests not recorded. A CSR registered on land title attains indefeasibility, binding future landowners for the period of registration. Registration on land title serves the purpose of informing prospective land purchasers of the existence of the CSR, and facilitates the creation of associated covenants relating to the maintenance of vegetation.

of forest owners or of the public. The government may or may not have the power to sell the carbon stock or give it away, and to require forest owners to protect or enhance carbon sequestration.[39] In any given case there will be questions about how much regulation of private ownership is politically or constitutionally acceptable, and about the share of benefits that needs to be returned to forest owners.[40]

New Zealand was the first country to allocate forest carbon ownership to government. This experiment proved extremely contentious, as illustrated in the text box. While public ownership has the advantage of clearly assigning liabilities, providing a certain security in transactions, it may have the drawback of alienating forest stewards. This may in turn discourage carbon sequestration.

B 1.6 P· b ● ●a b N Z a a

In 2002, the Government of New Zealand announced that it would retain sink credits in respect of all forests planted in the country after 1990, for at least the first commitment period of the Kyoto Protocol. This decision caused a great political stir. Organizations representing the forest industry argued that forest owners should also own the carbon stored within their forests. Starting with 2004, a surge in deforestation figures in New Zealand was linked to forest owners' attempts to avoid liabilities associated with the implementation of governmental policy. In 2007 the policy decision was eventually reversed, and credits and liabilities for forest carbon were devolved to forest owners as part of a new emissions trading scheme (NZ ETS).[41] The scheme was passed into law in September 2008. However, following a general election in November 2008, the government put on hold the operation of the scheme and appointed a committee to review the legislation. The existing scheme provides separate regimes for two categories of forests: forests planted before 1990 and forests planted after 1989. Pre-1990 forest owners are automatically included in the scheme and incur emission obligations if, following harvest, they convert their forest to a non-forest use, instead of replanting. The Government initially allocated free credits to such owners, who are required to report deforestation on an annual basis. In case of net deforestation, forest owners are obliged to surrender credits to cover for the emissions. Owners of forest planted after 1989 can choose whether to enter the NZ ETS or not. If they do, they are obliged to take responsibility for net changes in the carbon stocks of their forests. They receive credits if those stocks increase, and are required to surrender credits if stocks decrease, as a result of activities or events such as harvesting or fire. In post-1989 forests, both the landowner and the forestry right holder/lessee must agree to enter into the NZ ETS.

ownership may either be a separate proprietary interest, or a proprietary interest linked to forest or land ownership. The creation of carbon credits separated from land ownership would facilitate circulation on the market. Property rights registered on the land title would grant right holders with remedies against any inconsistent land uses. Where a REDD project creates carbon offset credits, ownership interests in carbon as a distinct entity have theoretical advantages over interests linked to forest or land ownership.

B 1.7 F ca b

T ca b a :

A The carbon sequestered in the forest may not be sold independently of the forest. However, the owner may undertake the obligation to manage the forest in a way to increase the carbon stock. This obligation could be in the form of:
1. a contract;
2. a covenant that runs with the land, binding anyone who owns the property in the future;
3. a covenant that attaches to a person;
4. an easement or servitude, which may attach to a dominant estate or to a person. In the latter case, the carbon sequestered in the forest may be transferred independently of any land transfer.

B. The carbon sequestered in the forest is the object of a separate, alienable property right, such as a usufruct right or profit à prendre, governed under the laws concerning land ownership. The owner can sell that right without conveying land ownership. In this context, two options may be envisioned:
1. The owner of the carbon has the right to affect the use of the forest to protect the existing forest carbon stock, or to enhance it;
2. The owner of the carbon has no inherent right to affect how the forest is used. However, the land owner may separately grant this right through a contract, or through a covenant or other legal mechanism that “runs with the land” and binds any property owner.

C. As in (B) above, but the right is governed under general contract law

T ca b a b c, a :

A. The government holds the forest carbon stock as trustee for the benefit of forest owners or of the public, with no power to sell it or give it away. In this context, two different options may be envisioned:
1. The government has no particular power to require landowners to protect or enhance sequestration; or
2. The government has the power to regulate the use of land to protect or enhance carbon sequestration.

u

B. The government has the power to sell or give the forest carbon stock away. In this connection, two main options may be configured:
   1.

carbon sequestration potential and there are no transactions, the State will naturally bear all risks, as originally envisaged in New Zealand. In situations where carbon rights are freely traded on the market, contracts may specify who bears the risks, as with CSRs in Australian States. In this connection, contracts may include clauses addressing permanence, including general obligations such as controlling pests, maintaining firebreaks or other fire management systems. Even in contractual situations, however, legislation may set out the basic rules on risk assumption. For example, the law may determine who bears the risk when the contract is silent on the issue. This may be regulated according to general contract law.

Legislators may set up specific rules for REDD. Legislation may draw distinctions based on intent or culpability, detailing who bears the risk for loss of carbon due to acts of nature, negligence or intentional acts. The law may recognize degrees of negligence or may apportion responsibility where multiple causes contribute to the loss.[44] The Mexico Payment for Environmental Hydrological Services Programme, for instance, provides an example of specific consequences for non-compliance associated with different levels of culpability.

B 1.8 T Pa E a H ea S e P a M e

The Mexican Programme for the Payment for Environmental Hydrological Services provides economic incentives to reduce deforestation in areas suffering from water scarcity. The programme established a system of payments for services, such as the protection, management and restoration of watersheds, in areas where commercial forestry is not competitive. Payments take place through a trust fund financed by a fee charged to federal water users. To be eligible, forests need to have more than 80 percent density and to be located in overexploited aquifers, with nearby population centres of at least 5,000 inhabitants. Each forest owner cannot register more than 200 ha, in order to avoid the risk of monopolization of payments. Contracts provide a tree-harvesting ban in the forest surrounding the protected areas, to prevent intra-property leakage. In case of intentional land-use change, the forest owner receives no payment. If deforestation occurs for other reasons (e.g., forest fire or timber theft), then the owner is paid only for whatever part of the forest was preserved. Monitoring is carried out on the basis of satellite images. Between 2003 and 2005, satellite images showed that less than 0.01 percent of areas protected by the programme were deforested, in comparison with a national average deforestation rate of one percent per year. Forest fires and non-intentional land-use changes caused the majority of losses.

S ce: Karousakis (2007).

Domestic law may provide general remedies to recover damages from losses in carbon stocks caused by third parties. Damages may be calculated on the basis of the monetary loss suffered by the owner. Legislators may also devise a specific regime for seeking damages related to losses in carbon sequestration.

44 *Ib d.*, p. 42.

Calculating damages can be complicated, as the mere loss in commodity value may not reflect the total damage and, most notably, damage to the forest carbon stocks. Because of the rate at which trees grow, the amount of carbon stocked in a forest varies quite considerably over its life cycle. If, for example, the measure of carbon sequestration is set in five-year periods, and the forest suffers damage by fire at the end of the first cycle, the amount of sequestered carbon loss would be relatively small. However, the fire would reset the ecological succession clock to zero and, in the next five years, the forest would again sequester relatively little carbon. Thus, besides destroying the existing carbon gain, the fire would delay future gains.[45]

Calculating damage to forests' carbon sequestration capacity requires a good understanding of the rate at which trees grow on the site throughout their life cycle. Legislation may help solve these questions by setting standards for calculating damages. The calculation of damages may be based on the cost of restoring the carbon stock. Alternatively, legislation could provide a specific formula for calculating damages, based on the extent of the affected forest area, or the number of trees that have been damaged or lost. The provision of such a formula could simplify the proof of loss, particularly when there is no national market value for sequestered carbon.[46]

Another possibility is that legislation sets high compensation thresholds to deter forest damage,

harvesting rights;[48] mining rights or mining exploration rights. These entitlements must be identified and conflicts resolved before a project can proceed.

As the case of Cameroon exemplifies, domestic law may protect customary users' rights to access and use forest resources, even when forests are exploited for commercial purposes. The quantification of carbon losses associated with these practices may make the monitoring and quantification of carbon sequestration rather complicated. It is therefore preferable to solve such use conflicts before activities start, both to ensure the successful establishment of REDD projects and compliance with the rights of existing forest users.

Due diligence may be conducted to ensure that the land is free from licences, leases, or concessions incompatible with REDD. Where such encumbrances exist, it is necessary to reach appropriate agreements with relevant right holders. Customary rights must be taken into account, even when they have not been formalized. In this regard, it is necessary to comply with the requirements set out by domestic and human rights law, especially in connection with indigenous peoples. REDD initiatives need to pay special attention to the rights of indigenous peoples.[49] In this connection, the UN REDD Programme has formally incorporated the *UN Dec a a* into its operational policy instruments.[50] The case of Indonesia exemplifies some of the issues that may arise with reference to these groups.

B 1.9 I a REDD I a

Indonesia has recently passed REDD legislation that raised criticisms for its treatment of indigenous peoples. Even before the recent reform, however, the United Nations Committee on the Elimination of Racial Discrimination had repeatedly urged Indonesia to review its laws "to ensure that they respect the rights of indigenous peoples to possess, develop, control and use their communal lands".[51] The controversy referred to Law 41 of 1999 on Forestry, which vested exclusive authority over forests in the Indonesian state, without making any special provision for the rights of indigenous peoples. The same law also empowered the state to issue

concessions over any forest land at its discretion.[52] This arrangement has reportedly had severe negative consequences for indigenous peoples.[53] In 2009, the United Nations Committee on the Elimination of Racial Discrimination found that recent legislation on REDD replicated provisions that were prejudicial to the exercise and enjoyment of the rights of indigenous peoples.[54] *Re• a Red c f E f Def e ı a a d F e ı De• ada P ced e*[55] reiterates that indigenous forests are "State forest".[56] The same provision is also made in *Re• a ı e l ƒ e e ı a f De ı a A c ı e Red c f E - f Def e ı a a d De• ada ,* which was adopted in December 2008[57] These measures seemingly allow the state to create publicly and privately held forestry concessions and "carbon sinks" in forests traditionally owned by indigenous peoples, without taking into consideration their customary rights.[58] Indonesia seems to have dismissed the United Nations Committee on the Elimination of Racial Discrimination's concerns and has not amended the contested provisions. Because of this, REDD activities in Indonesia may therefore have a negative impact on the rights of indigenous peoples. Concerns are heightened by the fact that a substantial percentage of Indonesia's remaining forests are within indigenous peoples' traditional territories.[59]

At the regulatory level, potential conflicts with existing land uses may be prevented by clearly identifying areas of land eligible for REDD. Land selection should be transparent and accommodate existing land rights. Regulations over REDD should specify which governmental department is

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maintained and transferred. These uncertainties are likely to lead to increased transaction costs e.g., from fees incurred to figure out the legal status of every project anew, especially in overlapping federal-state jurisdictions. It is therefore advisable that regulations be adopted to solve the specific questions raised by forest carbon ownership and associated liabilities. The answers to these questions will naturally vary from one jurisdiction to another, due to their implications on the laws of property, taxation, and natural resource use. In this connection, the experiences of Australia and New Zealand have set interesting precedents that may be a useful reference for the regulation of forest carbon rights in REDD projects.

2 Participation, Balancing of Rights and Interests, and Prior Informed Consent

Elisa Morgera*

As most REDD activities are likely to take place in three tropical regions of the planet – the Amazon Basin and Mesoamerica, the Congo Basin in central Africa, and South East Asia – millions of forest-dependent indigenous and local communities (or "communities") that inhabit large portions of tropical forests may be concerned with REDD. Awareness that REDD and communities are inevitably linked has been growing,[1] as has the understanding that this relation should be appropriately addressed in the legal architecture for REDD.

Besides communities, other key actors have rights and interests that should be taken into account in the regulation of REDD at the national level; first of all, landowners and outside (possibly foreign) investors. Many other actors may of course be involved to a lesser extent, such as farmers, cattle ranchers, miners, carbon brokers, environmental NGOs and universities. Overall, the larger the geographic area of a given REDD activity, the higher the number and diversity of stakeholders with which national, regional and local authorities will have to interact. A sound legal basis for participation in the regulation and development of REDD initiatives at the national level will be an essential precondition for a fair and effective balancing of different rights and interests.

This chapter will start by highlighting the importance of, and experience already accrued in, developing national legal provisions on public participation related to REDD. It will then identify the main legal issues related to three key groups of actors, namely: outside (and foreign) investors, landowners and communities. It will then concentrate on policy recommendations and legal options at two levels of participation: public participation in REDD decision making (including at the policy and law-making stage, as well as at the project design and implementation stages); and participatory approaches to the undertaking of REDD activities.

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* LLM, PhD, Lecturer in European Environmental Law, University of Edinburgh School of Law. The author wishes to thank Claudio Torres Nachón (LL.D. Candidate, Faculty of Law University of Ottawa; visiting doctoral researcher, University of Oslo; member of the IUCN Environmental Law Commission) for research assistance and inputs provided in the preparation of this chapter. The author is also thankful to Annalisa Savaresi and John Costenbader for their insightful comments on previous drafts of this chapter.

1 *See* for instance, Peskett, L. et al. (2008). "Making REDD work for the Poor". A Poverty Environment Partnership (PEP) Report. IUCN; ODI; UNDP; SIDA; ADB; DFID; Ministère de l'Ecologie, de l'Energie, du Développement durable et de l'Aménagement du territoire; UNEP-WCMC; Lawlor, D. and Huberman, D. (2009). "Reduced Emissions from Deforestation and Forest Degradation (REDD) and human rights". In: Campese, J. et al. (Eds.) *Rights-based approaches: Exploring issues and opportunities for conservation*, pp. 269–286, at 278 (Box 2). Bogor, Indonesia: CIFOR; and IUCN.

There is quite some experience in devising national legal provisions on participation in decision making in the forest sector that may be considered and adapted to the specific context of REDD.[8] Similarly, from a comparative analysis of national forest legislation, several legal options emerge to facilitate the direct participation of certain stakeholders, particularly local and indigenous communities, in the actual management of forests. Options include the allocation of control and management rights to communities (community-based management), sharing of control and management rights between public authorities and communities (co-management), leasing of forest land to communities, or the legal recognition of traditional management by indigenous communities.[9]

Key message: National legal provisions on participation in the forest sector should be created, or strengthened and adapted to ensure transparent and informed decision making, build partnerships, facilitate law enforcement, and prevent con

prior to access to genetic resources; respect customs, traditions, values and customary practices of indigenous and local communities, [and] respond to requests for information from indigenous and local communities" (para. 16(b)).

A whole section of the Guidelines is further devoted to public participation, according to which "relevant stakeholders should be consulted and their views taken into consideration in each step of the process, including: when determining access, negotiating and implementing mutually agreed terms, and in the sharing of benefits; and in the development of a national strategy, policies or regimes on access and benefit-sharing" (para. 18). National consultative committees were considered "appropriate consultative arrangements" (para. 19). Stakeholder

2.2 W a a e a REDD ae ?

It is essential that participation at the national level ensures dialogue and knowledge sharing among the public sector, the private sector and civil society, so that comprehensive consideration of

in REDD activities obligatory, and on the other hand, it obliges foreign actors to partner with local entities.

Third, foreign and local investors may be constrained through contracts, which may include clauses aimed at balancing the specific rights and interests of concerned communities, landowners and any other relevant stakeholders.

Investors in turn will expect from host countries' governments a clear and predictable legal framework to provide security for investment. They will thus expect certainty as to procedures, documentation and standards for REDD activity approval, appropriate duration of concessions/licences to recoup initial costs and make a profit, and the possibility to renew concessions/licences upon satisfactory performance – which is also a mechanism to ensure investors' long-term accountability.[16] The fact that project implementation mechanisms are unclear – as in the case of Indonesia, where REDD-specific legislation is in place[17] – can be a great barrier to investors' participation in REDD activities. Overall, national legislators will need to think of ways to provide access to new business opportunities, share responsibilities and share benefits with investors.[18]

Key message: National legal provisions on the participation of outside investors in REDD activities need to be clear as to applicable restrictions, in particular to guarantee respect of the rights and interests of other stakeholders such as landowners and communities, while also providing predictable procedures and secure rights to investors.

2.2.2 L ea a

Local landowners may serve as private land stewards that should be compensated for their activities to reduce emissions from deforestation and forest degradation on their land.[19] The role of local landowners in REDD will depend on the decision of national governments as to whether land ownership includes forest carbon ownership or not, as discussed in the previous chapter. In a broad approximation, legislation will need to clarify whether project developers will be required to obtain the consent of concerned landowners (as in the case of forest concessions in PNG mentioned above) or whether landowners should also be active participants in REDD activities.[20] In this respect, it is interesting to note how Mexico's 2003 *Ge e a La f S ı a ab e F e ı De e ı e ı* attempts to provide a specific legal basis for rewarding forest owners for their environmental stewardship: the law provides that in the framework of international treaties and applicable national legislation, the relevant ministry must promote the

in REDD discussions and in environmental impact assessments; the lack of culturally appropriate

B 2.2 R a a a . a ' a - ' .

According to the **ILO C N . 169,** national governments must:

- consult indigenous peoples, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly, such as those on their traditional lands (Art. 6(1)(a));
- establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in bodies responsible for policies and programmes (Art. 6(1)(b));
- to this end, ensure that consultations be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures (Art. 6 (2));
- design projects for the development of the areas indigenous peoples inhabit, so as to promote improvements of their conditions of life and work and levels of health and education, with their participation and co-operation (Art. 7(2));
- ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on these peoples of planned activities. The results of these studies shall be considered as fundamental criteria for the implementation of such activities (Art. 7(3));
- obtain indigenous peoples' free and informed consent if their relocation from the land they occupy is considered necessary, and provide full compensation for any resulting loss or injury (Art. 16).

According to the **UN D a a R . I . P** , national governments should:

- obtain the free, prior informed consent of indigenous peoples concerned and agreement on just and fair compensation before forcibly removing them from their lands, possibly providing the option of return (Art. 10);
- respect the right of indigenous peoples' participation in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions (Art. 18);
- consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them (Art. 19).

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According to the **UN D ◆ a a R. D** ,[35] national governments should respect the right to development (Art. 2), which may imply the participation of forest-dependent communities in land-use zoning and decision making on the management of forest carbon revenues.[36]

According to the **I a a C a E◆ ◆, S ◆ a a C· · a R.** [37] and the **I a a C a C a P ◆a R. :**[38]

- the right to means of subsistence may imply that forest-dependent communities should not be denied access to food, medicine and fuel wood in forests in the context of REDD activities;[39]
- the right to culture and religion implies that acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on the opportunity to participate in the decision-making process and on whether a minority will continue to benefit from its traditional economy.[40]

S ce : Lawlor and Huberman (2009); Shelton (2009).

O a a (IPO) f a , a d e ca c c a a (CSO) de ed b e affec ed I d e Pe e 'c e ;

b) U e c a d a e e ca a d c a a e f e affec ed I d e Pe e 'c e a d e ca c d [ ]; a d

c) P de e affec ed I d e Pe e 'c e a ee a f a ab e e [ ] a c a a e a e eac a e f ec e a a d e e a .[42]

In this context, the Seventh Session of the UN Permanent Forum on Indigenous Issues held in 2008 produced a set of recommendations to adapt these standards to the specific context of the Forest Carbon Partnership Facility, further clarifying that:

- Displacement and exclusion of indigenous peoples from their forests, which may be triggered by projects funded by the Partnership Facility, should be avoided at all costs.
- Indigenous communities' choice not to participate in REDD or in the projects supported by the Partnership Facility should be respected.[43]

Key message: National legislation should support the recognition of the internationally protected rights of local and indigenous communities as "public forest stewards" and holders of relevant traditional knowledge, and reward them through participation in REDD activities. To this end, national legislation should put in place specific procedures for culturally appropriate participation (consultation, prior informed consent) and benefit sharing.

Requiring PIC rather than consultations may be a matter of contention. The Inter-American Court of Human Rights has on two occasions addressed the question. Prior informed consultations were considered necessary when the issuance of natural resource concessions to third parties in respect of the ancestral territory of indigenous people might affect the existence, value, use, or enjoyment of their rights. When the natural resources concerned were directly linked to communities' subsistence activities, the Court held that no activities affecting communities could occur without their prior informed consent.[44] This interpretation may entail that when proposed REDD activities may undermine communities' subsistence practices, PIC, rather than mere consultations, should be required by national law.

42 OP 4.10. "Indigenous Peoples – Social Assessment: Consultation and Participation," (July 2005) Operational Manual, The World Bank, par. 10.

43 UN Doc. E/2008/43. E/C.19/2008/13. "United Nations Permanent Forum on Indigenous Issues: Report on the seventh session (21 April–2 May 2008)". Official Records Supplement No. 23 at 7.

44 Shelton, *a* note 6, based on a combined interpretation of *A a T Ma a a (S) I d e C . N ca a a*, Inter-American Court of Human Rights, judgment of 31 August 2001 and *Sa a a a Pe e . S a e*, Inter-American Court of Human Rights, judgment of 28 November 2007.

B

obligation binding both the administration and REDD activity proponents. Such legal provisions

- *M ea a e e eeded ab \ \ e REDD+ ead e \ a e • ;*
- *T ed e a f f a / \ a \ . W / de \ e f a a / \ a \ ;*
- *M c*

2.3 Pa e a e a . a REDD

2.3.1 Acc a

Access to information is a prerequisite for effective public participation in decision making. The FCPF "Readiness Mechanism for National Consultation and Participation for REDD" has explicitly recognized its relevance for REDD.[54] National legislation should therefore ensure that responsibilities for providing information to concerned stakeholders are clearly allocated. These responsibilities can be placed on public authorities, at the national and local level, as well as on private operators (investors and brokers).

REDD-related information should certainly include how REDD works, its potential for benefiting communities, options for benefit-sharing mechanisms, and identification of potential outside investors,[55] as well as information on environmental and social impact assessments of proposed REDD activities.[56] All information on the financial cycles of REDD projects, and fundamental operational and methodological information on any particular REDD project should also be accessible. Finally, information to be shared should include REDD-related legal rights and the modalities of exercising them.[57]

National legislation should specify the rights, duties and procedures for accessing REDD-related information, as general clauses are often more difficult to apply because they leave excessive discre
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In Suriname, for instance, institutional reform has included the creation of a specific Department for Consultations and Outreach in the newly formed National Forest Carbon Unit, which is tasked with disseminating information on REDDs to the general public and specific target groups.[60]

On the other hand, national legislation should establish a public right to access REDD-related information: this requires a mechanism by which concerned individuals can obtain upon request

implementers and their compliance with relevant requirements. During the implementation of REDD activities, stakeholders should have opportunities to signal unexpected impacts, whether social or environmental, taking place as direct consequences of the REDD activity.

Finally, participation should be ensured at the stage of monitoring REDD activities.[72] In this respect, it will be necessary to ensure that monitoring is also transparent and participatory. It should be based on pre-determined benchmarks and indicators to assess whether outcomes contribute to pre-defined objectives. It will also be necessary to impose a legal duty to report and disseminate the result of monitoring and post-project analysis.[73]

Key messages: National legislation should identify exactly the levels of decision making at which participation will be guaranteed, including REDD policy and law making, programming, project selection, impact assessment, concession granting, project implementation review and monitoring. National provisions on impact assessments should be reviewed to ensure that biodiversity- and community-related issues specific to REDD can be fully taken into account.

2.3.2.2 H · a e a ee· ?

National laws should provide specific mechanisms for public participation in REDD-related decision making, both at the central and local levels. As the Eliasch Review noted, "national-level policy and legislative reform can take place relatively easily in capitals, but implementation and enforcement will require linkage deep into the forests. Truly participatory processes that bring forest communities into decision making also require mechanisms that can reach down to the community and individual level."[74]

Several options can be taken into account in this regard in developing national legislation. One is mandating regular admittance of the public to REDD-related meetings: the law should then ensure that meetings are held close to the area affected by the proposed REDD activity, to reach out to local stakeholders. Another option is legally mandated consultations: the law may establish a duty for public authorities to use a public notice and comment period prior to the adoption of a REDD-related decision. This will entail: the publication of proposed rules or decisions close to the site concerned by the expected decision; publication of information on the process for receiving and reviewing comments at a reasonably early time; the obligation for public authorities to take into account the comments received; and the obligation for public authorities to provide reasons in writing about the decision made, to allow public scrutiny over how comments have been taken into account.[75]

One practical example at the national level can be identified in the creation of the above-mentioned Department for Consultations and Outreach in Suriname, which is also tasked with working closely

72 UN-REDD Programme, *a* note 27, p. 18.

73 Shelton, *a* note 6.

74 Eliasch, J. (2008). *C a e C a e: F a c G ba F e . T e E a c Re e* , p. 201. London, UK: Office of Climate Change.

75 Christy & *a* ., *a* note 5, pp. 104–110; Morgera and Wingard, *a* note 60, pp. 18–19.

with other departments of the Forest Carbon Unit to conduct consultations and share learning materials to build capacity in decision making and facilitate community training.[76]

A third option is the establishment of a permanent multi-stakeholder body: the law may create an *ad c* body to allow ongoing public participation in REDD-related decision making as well as monitoring implementation of decisions. One such body could be simply advisory; or it could rather be a managing or decision-making entity. In any of these cases, the law should provide guidance as to its powers, placement in the government structure and composition, possibly ensuring balance between governmental and non-governmental representatives. The law should further ensure representation of local and indigenous communities, and transparent and bottom-up procedures for their selection. In the case of advisory bodies, the law should at least establish the obligation for the authority to consider and respond to the advice of this multi-stakeholder body.

The suggestion to create a national multi-stakeholder REDD working group has already been put forward.[77] While this solution may help to raise awareness about REDD at the national level, one should also consider that in many countries multi-stakeholder forest committees may already exist and could possibly serve REDD-related purposes, thus saving the costs of creating a brand-new institution. Overall, multi-sectoral bodies may also facilitate the integration of REDD and forest policy into larger development and poverty-reduction policies, if representatives of relevant sectoral branches of the government are also represented in these participatory mechanisms.

National legislation could finally establish some overarching principles so that consultations include the legitimate indigenous authorities and ensure broad representation of indigenous peoples including women[78] and young people, with due account of customary laws, norms and practices, as

Participation for REDD" has explicitly included among key principles for effective consultations the need to "establish mechanisms for grievance, during the consultation process, and throughout the implementation of REDD policies and measures". [80]

Usually, laws simply refer to the general means for dispute resolution, but more specific provisions may be needed to ensure a fair and efficient process for resolving disputes not only among REDD stakeholders, but also between stakeholders and public authorities. The law can set up alternative, more targeted dispute-prevention and resolution mechanisms, which can be more accessible than courts, affordable, more easily understood and possibly more effective, as ordinary judges may well lack the expertise necessary to address REDD-related disputes.

These dispute-prevention and resolution mechanisms should be equitable, transparent, accountable, legitimate, independent, free for claimants, and confidential where desired. These mechanisms should be made known to all the relevant individuals and communities, and should be expressly linked to more general policies, programmes and/or projects that can be adjusted to avoid repetition of harmful actions.[81]

National legislation can, for instance, provide for administrative appeals as a mechanism for the review of conduct of government officials at a higher level of the same government authority that authorized REDD activities. Legislation can also provide for the creation of alternative means for resolving disputes: REDD project proponents could be called upon to create an internal dispute-resolution mechanism (in the case of community-based projects) or complaint system (in the case of investors' projects). In these instances, the law should provide for a right to appeal such decisions to a court of first instance. Finally, legislation could call upon public authorities or private investors to make available to local communities affected by REDD activities dispute-prevention mechanisms through arbitration, mediation, and conciliation. Access to redress could also be provided, when decisions cannot be reversed.[82] National legislation could finally ensure financial and technical support to access justice.[83]

are foreseen, as are expedited and simplified processes for transferring forest management rights to communities.[85] In Guyana, Clause 11 of the Forests Bill also provides for community forestry management of State forests through an agreement with a community group, which must be registered as an NGO, as discussed in the relevant case study.

Different legal tools may be available at the national level for the implementation of REDD activities, depending on land and forest carbon tenure, other relevant rights and type of participants. Licences, leases, concessions or agreements could in fact be used. Notwithstanding the type of legal instrument, national legislation can ensure that certain REDD activities are led by communities, supported by public authorities, or are led by outside investors with some form of participation for communities.

National legislation may provide a basis for or give priority to community-led REDD activities.[86] To this end, such a preference could be spelt out by attaching priority to communities in the process for allocating REDD concessions (on the basis of geographical limitations and requirement for actual residency in areas with or adjacent to sites identified for REDD activities). The administration could also be legally ma[illegible]

consultation with concerned stakeholders. Legislation could further allow monitoring of compliance by the administration as well as by the public. It could, in addition, empower the State to cancel a concession for poor performance by the investor, in particular when social conditions and requirements for consultation or collaboration with communities are not respected.[88]

Overall, security of rights is the paramount objective to be achieved by national legislation in all these instances: guarantees should be in place against the threat of unjustified unilateral termination or changes in midstream, inappropriate duration of rights in relation to the timeline to accrue benefits, or unclear rights to exclude others from the resource and enforce rules against outsiders.[89] Security is an essential precondition for all participants in REDD activities – governments, communities, landholders and outside investors – to have a true stake in preventing deforestation and forest degradation.

Key message: National legislation should clearly spell out transparent and accountable mechanisms for community-led REDD activities or for community participation in investor-led REDD activities. Security of rights of all interested stakeholders should be the principal aim of these legal provisions.

2.5 C

As the Eliasch Review noted, "There will always be trade-offs between speed, simplicity and scalability of policy and programme development and implementation, and how closely involved all stakeholders can be. But the environmental and social sustainability of policies to reduce deforestation will depend on the buy-in of all interested stakeholders, and of those who live in and around forests in particular".[90]Participation may significantly contribute to ensuring that potential co-benefits of REDD (such as poverty alleviation, human rights protection, biodiversity conservation, provision of other environmental services)[91] are maximized and the potential negative impacts avoided or minimized. National legislation providing for participation and equitable balancing of different rights and interests is therefore necessary to this end, but it is just a first step in a complex process that requires goodwill and sufficient training on the part of public authorities, as well as good faith on the part of outside investors, landowners and communities. Lessons learnt in the context of good governance reforms in the forest sector may provide a useful starting point for specific discussions on participation in the context of REDD.

88 *Ib d*.
89 Christy e a ., a note 5, pp. 98–100.
90 Eliasch, a note 76, p. 195.
91 Chapter 11: "How do we achieve REDD co-benefits and avoid doing harm?", in: Angelsen, A. (Ed.) (2008). M A ead REDD: I e , O a d I ca , p.112. Bogor, Indonesia: Center for International Forest Research (CIFOR), which stresses that national action is ultimately necessary for the achievement of co-benefits.

3 Benefit Sharing

John Costenbader*

3.1 I . e

One of the most challenging hurdles for successfully connecting national governance systems with the REDD component of a future UNFCCC agreement (hereafter "REDD regime") will be the receipt of financial inflows from international sources and distribution to relevant national actors. In an environmental law context, the term "benefit-sharing" has a long history in a program of work under the Convention on Biodiversity (CBD) aiming to distribute financial results from the utilization of genetic resources to local inhabitants from whose lands such resources were taken. Similarly, government, private landowner and forest community actors most relevant to national forest governance, as well as outside investors and other supporting actors, will require equitable benefit-sharing arrangements to compensate them for their participation in REDD regimes. Given clear and effective legal frameworks, successful benefit-sharing can help guarantee public support, promote environmental integrity and thus inspire investor confidence.

Analysis of REDD preparatory efforts to date suggests countries have paid insufficient attention to the apportionment of revenues amongst forest governance actors, and most benefit-sharing arrangements lack clarity as a result.[1] Additionally, financial experts warn of the potential impacts of large carbon finance revenue streams in developing countries with feeble rule of law and inadequate public financial management capacity, or where human rights norms are disregarded.[2] In addition to the concerns of local and indigenous communities relating to ownership and participation issues addressed in previous chapters, such groups are at risk of benefit-apportionment processes overlooking them or of losing any benefits promised them via intermediaries. In turn, such a result could undermine local populations' participation and support of forest conservation projects, and potentially the permanence of any carbon sequestered over the long term.

This chapter will focus on clarifying the legal aspects of benefit-sharing frameworks, although little national or sub-national law on the topic has been developed to date. The chapter will first provide a background on the broader notion of Payments for Ecosystem Services (PES) initiatives, of which REDD is a multi-level variety. Then the chapter will identify approaches for REDD accounting frameworks and the significance of such decisions on benefit sharing. The third and fourth sections of the chapter will focus on payment in-flows from international sources and payment out-flows to local actors.

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B 3.1 B -S a D

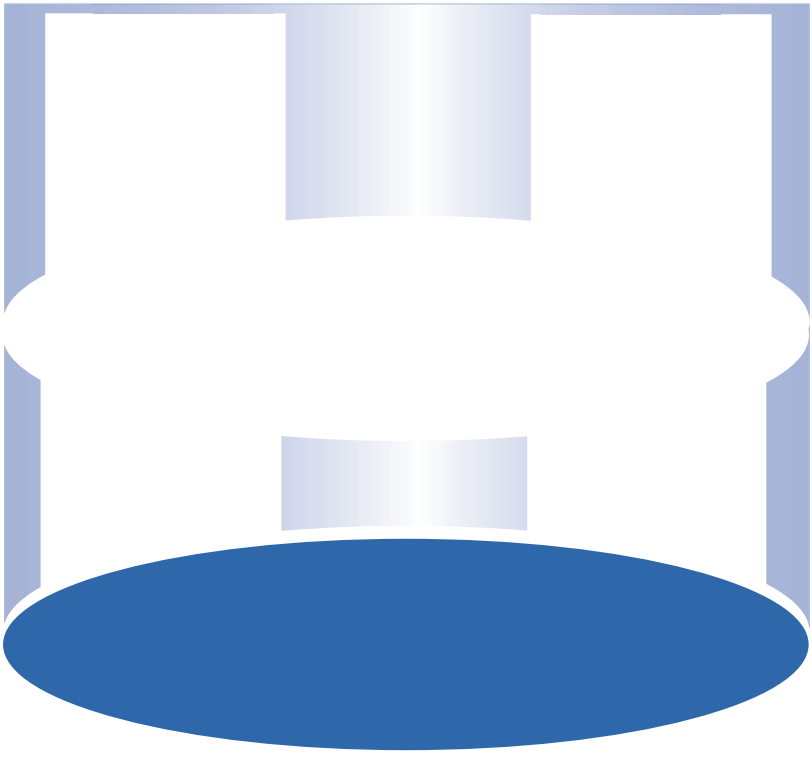
Although REDD incentives to national actors are often considered in terms of financial

Public payment systems require far more comprehensive procedures, beginning with the legislation allocating and funding administrative agencies to manage the PES system, as well as defining the scope of such entities' work. Under public payment schemes, contracts must be made via centralized authorities in the national government, which then disburse payments to state and local-level governments, and to project administrators and local or indigenous communities. Legislative and regulatory rules must define the services offered for purchase in public PES systems, as well as the eligibility of buyers and sellers, performance criteria, monitoring standards, payment terms and protocol for breach of contract, thus integrating the full terms of the contract and ensuring its performance.[8] Furthermore, public PES systems can offer a wide range of in-kind benefits, such as government services, no-interest loans, goods or tax credits, which can require greater regulatory planning and oversight than the cash payments generally only offered under private transactions.

3.2.3 REDD a a - a , - PES

on the first two schemes that are most likely to find their way into a future REDD regime – a publicly regulated fund, and a private market under a regulatory emissions cap.

An international REDD regime has been described as a multiple-level PES scheme (see Figure 3.1), with a first set of international PES payment "in-flows" coming from international public or private sources to national or sub-national level authorities. Most likely such payments would be coordinated between a national fund and national REDD Designated National Authority (DNA), as under the current Clean Development Mechanism (CDM) of the Kyoto Protocol. Subsequently, a second set of PES "out-flow" payments would be made between the relevant national or sub-national authorities, and project-level participants.[9] Of course, this schematic is rudimentary and does not fully encompass the spectrum of potential design options still undecided in a future REDD regime, which, depending on the finance mechanism and management scheme chosen, may include direct international to sub-national payments.



Key messages: An internationally-financed and regulated REDD regime will require more comprehensive national legal frameworks than typical private or government-regulated systems. National legal provisions should be created or strengthened to ensure institutions and mechanisms facilitate benefit-sharing from the international to national or sub-national levels, via either national regulations for public systems or contractual safeguards for private systems.

3.3 Na a · b- a a a

Coordination of accounting and reporting related to international financial in-flows with the national

- ***Pros***: early involvement; wide participation by poor countries and those with weak governance; attractive to private investors; easy participation; can target poor groups.
- ***Cons***: domestic leakage concerns; cannot address broader deforestation drivers; weak government involvement.

A **b** **( ) a** **ac** would allow payments to go directly to projects that achieve reductions, and also to the national level if there is a proven overall reduction. Project and national accounting would need to be harmonized, and any emission reduction credits issued at the sub-national level would be deducted from the national accounting. This would likely lead to deficits at the national level, which would be offset through the rewards allocated when the country consistently makes proven national reductions.

- ***Pros***: phased or joint private/public approaches possible; differentiated compensation mechanisms possible; flexibility allows sub-national projects to be compensated (where independently verified) even if no net reductions achieved at national level.
- ***Cons***: challenges of harmonization between the two levels; high MRV costs (requires disaggregated national data).

S ce : The Center for People and Forests (2009); Angelsen & *a* . (2008).

Sub-national governments may be the most appropriate entities for assessing net changes in terrestrial carbon stocks, regardless of the institutional control over lands and vegetation. Decentralization, however, may lead to increased corruption and 'elite capture' at local levels, as powerful groups with government connections dominate target communities.[11] In addition, the relative contribution of forests to the economy is likely to be more obvious, and economic uses of the forest are likely to carry greater weight at the local level than at the national level. Issues like carbon sequestration are thus likely to lose priority with decentralization. To minimize these problems, the central government can set general management goals and minimum standards for forest practices, as well as auditing or supervision functions.[12]

Conversely, national-level accounting systems would enjoy greater efficiency via economies of scale in the form of centralized project accounting, project administration and monitoring, as well as common definitions and regulations for national projects. As many countries own or control large portions of available forest land at either a national or regional level, relevant government forest managers would need to design and implement REDD activities just as they have commonly done with afforestation and reforestation (A/R) activities under the CDM.[14] However, national governance capacity in many developing countries planning to host REDD activities is not currently adequate to fully perform the necessary monitoring and accounting functions, which furthermore lack adequate legal and institutional linkages with benefit-sharing decisions. Without adequate legal safeguards to ensure participation and objective selection of projects, centralized national systems may favour elite, larger projects and exclude small community initiatives, raising fairness concerns and preventing benefits from reaching local and indigenous landholders.[15] Judging from past experience, there is no guarantee that participatory processes would be included to the extent necessary to ensure that centralized national REDD regimes work.[16]

National governments eventually should be able to centrally manage accounting and crediting mechanisms for their forest carbon emissions, as national-level carbon reporting will be critical in assessing international progress towards combating climate change. Given some countries' short-term national capacity difficulties, however, an interim hybrid framework may offer a compromise between sub-national and national accounting and crediting systems. Under this option, existing national and sub-national capacity may be leveraged simultaneously in countries via nationally-aggregated project baselines and monitoring, allowing for a dual-track system of national and project-based crediting and reporting on forest carbon emissions sequestered.[17] Financial and in-kind public funding during this interim period could provide for the development of necessary laws and law enforcement capabilities, as well as legal and public financial management institutions, for equitable benefit sharing. From a legal perspective, a main goal of such work would be to develop integrated regulatory safeguards to monitor

allow. In doing so, however, public funders will need assurances from host country governments that forest governance will be improved during that interval, or such risk will end up being subsidized indefinitely and result in moral hazard.[31]During that interim time period, publicly funded cash and in-kind benefits could focus on improving legal mechanisms in relatively risky countries with inadequate rule of law, including legal provisions to ensure benefits reach their intended recipients. As forest carbon sequestration units would not be available in the early part of such an interim phase, public funding could retain its original contractual nature (rather than become pure development aid) by making payments conditional on proxy indicators for forest governance reform efforts, as under consideration in UNFCCC negotiations at the time of this chapter's writing.[32]

building and technical support for the development of new laws or regulations, and potentially for the modification and streamlining of existing laws. In addition, funding would be needed for increased government administration, monitoring and enforcement costs, the latter two of which would work in tandem with financial incentives to curb illegal deforestation activities. As the Juma Project overview in the Brazil case demonstrates, numerous other auxiliary government services could require funding in delivering on long-term REDD projects as well, such as health, education, and local capacity building.

As the main stewards of privately owned or controlled forests, private landowners are generally the most market-oriented of national actors and thus the most prone to various deforestation drivers in REDD candidate countries.[35] Depending on the national context, such drivers can include logging, agriculture, livestock, mining or biofuels interests. As such, this group will require financial incentives primarily to compensate for the opportunity costs of avoided deforestation on their lands. The third group of REDD actors, local and indigenous communities, is comprised of people living on or nearby forest lands with customary or formal legal access or ownership rights to those lands. Given the often close and enduring connection between local and indigenous communities and their forest lands, this group's receipt of fair incentives for participation in and support of REDD projects will be essential to long-term forest conservation.

Based on national experiences with A/R projects under the CDM, where sophisticated Kyoto Protocol and UNFCCC procedures and modalities required extensive reliance on international expertise, the early years of national REDD efforts will likely need similar assistance.[36] Beyond these three groups of national actors, then, a large number of private or public outside investors will be needed at the sub-national or national levels to develop projects and facilitate transactions, and thus also must be included in the distribution of benefits. This category would include investors, insurance services, project designers and developers, business and technical services, and financial intermediaries such as carbon credit brokers. Based on PES experiences, an adequate domestic supply of private intermediary institutions would not be available in the early phases of REDD development and as a result must be facilitated by government agencies or NGOs. As such processes mature, private institutions should take over such roles, allowing governments to concentrate on setting regulatory frameworks for REDD and rules for public payments, as well as overseeing participatory processes and land ownership and use rights issues.[37]

As national contexts will differ widely among countries hosting REDD projects, governments will need to assess their own unique set of national stakeholders, social and natural resource dynamics, and deforestation drivers. Lessons from past and ongoing PES projects largely support direct payments to people responsible for providing the ecosystem services, here generally the local and indigenous communities living in or around forests that protect and maintain them.[38] However, governance

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35 Johns *et al.*, *supra* note 33, p. 462.

36 Robledo, C. *et al.* (2008). *Climate Change and Governance in the Forest Sector: An overview of the issues on forests and climate change with specific consideration of sector governance, tenure, and access for local stakeholders*, p. 21. Washington DC, USA: Rights and Resources Initiative.

37 Scherr, S.J. *et al.* (2006). *Developing Future Ecosystem Service Payments in China: Lessons Learned from International Experience*, pp. 30–31. Washington DC, USA: Forest Trends.

38 Karousakis and Corfee-Morlot, *supra* note 26, p. 35.

measures will require significant funding, and without adequate incentives for private landholders or foreign investors, REDD programmes may not be feasible. Where funds are limited, countries may allocate funds horizontally according to prescribed criteria and establish benefit eligibility via competitive bidding processes, with safeguards to ensure smaller landholders and marginalized groups are not disfavoured by such practices.[39]

Key message: National legislation should partition benefits among primary REDD forest governance actors, as well as outsiders facilitating project start-up and administration. Processes for apportioning benefits must be be

- The Philippines takes a more formulaic benefit determination than Brazil or India, despite a similar centralized approach to GR control. In the Philippines, an Executive Order requires applicants to pay royalties or other compensation to the national government and indigenous or local communities concerned, and applicants are to conduct research in collaboration with national scientists and institutions.[48]
- In contrast with the centralized state GR control of others, South African law regards all biodiversity as private property, thus proclaiming that no property may be taken without a non-arbitrary use of a general law with a public purpose and requiring compensation to the owner.[49, 50] Under South African biodiversity legislation, an access permit is granted only if the applicant and a stakeholder have entered into a benefit-sharing agreement duly approved by the Environmental Ministry.[51] Benefits can be whatever the parties decide, and the national government oversees the contracts to ensure that they are reasonable. The Act also establishes a Bio-prospecting Trust Fund into which all payments are made and benefits are distributed.

Source: Roberts (2009); Secretariat of the Convention on Biological Diversity (2002), Appendix II; Carrizosa *et al.* (2004), p.14

National experiences in benefit sharing under the CBD demonstrate that nationally-based REDD regimes offer governments the chance to determine not only the types of benefits devolved to local participants, but also [illegible]

B 3.6 S a a e a PES e C a R ea a D ea R b e

Costa Rica and the Dominican Republic offer examples of government tax credits and state subsidies to pay landholders for protecting forests. In 1996, Costa Rica passed a new *F e La* (No. 7575). Article 46 of the law creates the National Forest Finance Fund (FONAFIFO). Article 22 of the law allows FONAFIFO to issue forest landowners certificates for forest conservation (CCBs) representing payment for ecosystem services. The landowners can use CCBs to pay taxes and other fees owed to the government. Similarly, in December 1999, the Dominican Republic enacted a new forest law (*Le* 118-99). Article 95, paragraph I of the law allows the national forestry agency, INAREF, to adopt regulations creating special incentives to promote the valuation of the ecosystem services of forests, including carbon fixation. The State will also issue negotiable reimbursement certificates to finance 80 percent of the expenses of capital and investments made in the establishment and handling of plantations and management and protection of forests. The expenses include payment of all applicable taxes.

S ce: Rosenbaum e a . (2004), pp. 25 and 27.

Ideally, national framework REDD regulations should specify clearly the form and amount of taxes, royalties, credits or revenues to be paid to the state, where such funds are to be directed (e.g., state climate change adaptation fund or government capacity building), as well as what amounts would be left for state programmes and local populations. The cases show a wide divergence in state tax and royalty treatment of REDD pilot projects. PNG envisions dedicating a two percent tax on REDD projects to an adaptation fund, while Cameroon[53] and Guyana will take all REDD proceeds at the national level and redistribute them among government offices and local communities. Guyana has not finalized its benefit-sharing arrangement, but it has specified that it intends to manage revenues via a newly established national Low-Carbon Finance Authority. In Brazil, funds such as the national Amazon Fund and state of Amazonas climate change fund would pay for ecosystem services including avoided deforestation, but State authorities may take a portion of the revenues from their respective local initiatives, such as the Juma Project's payments to Amazonas. The state of Amazonas has devised a system of monthly "forest grants" (*B a F e a*) to pay households for non-destructive forest activities in "sustainable development" protected areas, as outlined in Box 3.7. It is worth noting that family payments are made to wives, as the family members typically responsible for household expenses and much of the work in REDD programmes, thus reducing potential gender inequities in *B a F e a*.

53 In Cameroon, state royalties in accordance with the 1994 forestry legislation have been proposed on REDD pilot project revenues, which the state will redistribute.

B 3.7 F e a . a · S a A a a B a F a

T . a	B e a	A · (B a a R a (R$))	Pa	U

Where projects depend on significant direct financing from a single donor government or consortium of governments, and thus continuing political support behind such funding, projects should be structured to deliver credits and make payments in shorter intervals between political cycles.[58]

In order to reduce transaction costs and include smaller landholders' participation, collective contracts can be used to bundle carbon contracts with smaller landholders, as has been done with success in PES programmes in Mexico and Costa Rica.[59] Regulatory safeguards should ensure smaller landholders have both adequate awareness and the opportunity to bundle two or more nearby projects into a single REDD unit, and legal provisions should clarify the mechanics of such procedures as well as how landholder rights and responsibilities are affected.[60] Prior informed consent should be offered in this regard, in particular to local and indigenous communities.[61]

In determining prices to pay landholders (or percentages of revenues, depending on the REDD scenario), incentives must be designed to ensure both those currently deforesting are given a reason to stop deforesting, while also benefiting those parties who have never engaged in deforestation but are dependent on the forests themselves (and might have a perverse incentive to begin deforesting if not compensated).[62] Where possible, REDD payments to poor groups in particular may be pooled with further PES payments rewarding protection and enhancement of other ecosystem services such as

national payments, as well as to permanently mitigate national deforestation drivers by ensuring payments change behaviours over the long term.[67] Preferably, payments should balance the need to reward landholder activities relative to both units of carbon sequestered and opportunity costs of forest hectares preserved.[68] Furthermore, payments could be made dynamic rather than static, to reflect changing opportunity costs and international carbon prices.[69] Although complicated, such considerations might be incorporated in contracts with an updating clause, or via regulations specifying formulas for determining payments based on local and international indices, analogous to tax codes.[70] The dangers of instituting payments for ecosystem services without connecting those payments to recipients' opportunity costs (and without adequately safeguarding payments from favouritism) are shown in the example from Costa Rica in Box 3.8 below.

B 3.8 PES b e C a R ca

During the latter half of the 20th century, Costa Rica's deforestation rate was among the highest in the world due to expansion of the road system, cheap credit for cattle, and land titling laws that encouraged deforestation. Conservation policies in later years slowed deforestation rates considerably, but the country's forests remained under threat from illegal logging and

If REDD host countries can create comparable flexibility in payments according to opportunity costs and carbon units, the additionality problem of rewarding landholders in countries with a low deforestation rate (e.g., Guyana) relative to those in countries with a high deforestation rate (e.g., Brazil) could be resolved. However, as mentioned above, incorporating sophisticated legal, economic and financial considerations into national law could be overly complicated for countries with insufficiently developed legal structures and institutional capacity, and methods for determining payments may depend on national context.[71] Standardized measures should be developed and implemented where possible in order to simplify rule making, such as standardized carbon emissions reference levels, whereby a central international body could verify reference levels and a third-party verifier would only need to confirm activities performed.[72] Increased government legal and other technical capacity in such areas might be addressed during an initial public funding phase.

If REDD programmes are structured to completely restrict access to forests, then the full opportunity costs must be paid to local communities for their lost forest land or they will not participate and potentially even undermine the system given the chance, as seen in the Kilum-lijm conservation project (described in note 67 of the Cameroon case). Where entire forest communities' livelihoods are affected by REDD projects, benefits may be seen as a means of offsetting both opportunity costs and disruption to such inhabitants, providing an argument that in-kind project benefits like employment, community forest access, and local use of project infrastructure should also be considered.[73]

If benefits are distributed purely in terms of opportunity cost and designed primarily for effectiveness in halting deforestation, ignoring social equity concerns, such policies could backfire if perceived as unjust. Policy makers may also face a difficult decision between paying loggers to stop deforestation, which may result in greater short-term effectiveness, and paying local or indigenous communities customarily owning or maintaining at-risk forests that have never deforested.[74] If payments exclude law-abiding in favour of law-breaking citizens however, moral hazard could result, encouraging groups not deforesting to backlash or to begin deforesting in order to receive benefits.[75]

Key message: National legislation should ensure that payments to landholders and forest stewards are structured e ' \ or at intervals to ensure conditionality; include both units of carbon sequestered and opportunity costs of forest hectares preserved; and are flexible in order to reflect changing opportunity costs and international carbon prices. Provisions should guarantee that smaller landholders and local and indigenous communities are able, and have access to information explaining how, to bundle their projects to reduce transaction costs.

71 Rosenbaum & a ., ' a note 18, p. 35.
72 Scherr & a . (2006), ' a note 40, pp. 46.
73 Rosenbaum & a ., ' a note 18, p. 45.
74 Skutsch, M. & a . (2007). "Clearing the way for reducing emissions from tropical deforestation". E e \ a Sc e ce a d P c 10(4): 322–334, at 331.
75 Pagiola,

3.5.5 Ba a b b ca a [illegible]

National governments will need to determine the proportion of credits or payments that will be shared with outside investors and project developers (either via direct revenue-sharing regulations if a nationally controlled regime or by taxes and royalties if a sub-national or private scenario). Such investors will be needed to play a key role in financing start-up costs and providing technical guidance, and governments will compete for their atl [illegible]

4 Additionality and Permanence

Gavin Doyle*

4.1 M a a a

4.1.1 I e

Achieving additionality is a fundamental requirement for any REDD project. That is to say, a project must generate emissions reductions that are additional to what would have happened in the absence of an intervention and the carbon revenues attributed to it.[1] The achievement of additionality has been required under Article 12 of the Kyoto Protocol for all CDM projects, and it can be assumed that such a requirement will be extended to REDD contracts.

Examination of the particular context will be necessary in assessing additionality. For example, if logging concessions exist between the government and a logging company, this may indicate that a REDD project would provide the funding needed to avoid potential deforestation by incentivizing that company to avoid logging activities. A history of deforestation in the region would also legitimize a REDD project. Conversely, existing indirect government support for an avoided deforestation project, such as tax breaks, subsidies, or cheap credit, may entail that pure additionality is not being achieved, as the project's goals are already being funded to some extent.[2] Similarly, if the land is subject to national protected area (PA) legislation, this may obviate the need for international funding, as the result has already been achieved, and the forest is already *de fa* protected. This however depends on whether the legislation is adequate and systematically enforced.[3] Therefore, an examination of land title, logging concessions, PA legislation and government legislation regarding forested areas is necessary to comprehensively address additionality.

The corollary to the additionality requirement is that countries with high forest cover but historically low deforestation rates (HFLD) due to pre-existing sustainable forestry legislation may be excluded from REDD benefits by strict application of the additionality rule. In Guyana, records indicate that strong sustainable forest practices resulted in no net loss of forest cover between 1990 and 2005.[4] For example, the Kaieteur National Park was established in 1930 as a protected area, and resource

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1 The concept stems from project-based mechanisms under Art. 12 (5) (C), and Art. 6 of the Kyoto Protocol, *ee* Protocol to the Framework Convention on Climate Change (Kyoto), 37 ILM (1998J) 22, in force 16/02/05.

2 Ogonowski, M. *a .* (2009). "Utilizing Payments for Environmental Services for Reducing Emissions from Deforestation and Forest Degradation (REDD) in Developing Countries: Challenges and Policy Options". Washington DC: CCAP.

3 See Box 4.1 for further discussion.

4 Office of the President, Republic of Guyana. (2008). "Creating incentives to avoid deforestation". In Guyana, the rate of deforestation is put at 0.1–0.3 percent per year.

extraction since then has been prohibited.[5] From a strict application of the additionality rule, Kaieteur should be excluded from receiving REDD benefits, as the forest is already protected. In a similar vein, the legislation establishing the Guyanese Iwokrama reserve of 360,000 hectares of tropical forest stipulates that 50 percent of the reserve area is to be set aside for "sustainable utilization" with 50 percent designated as a wilderness reserve.[6] As Iwokrama is exempted from becoming a state forest under the National Forest Bill, and only sustainable use allowed thereon, no mining or other extractive industries can operate there.[7] Once again, a strict application of the additionality rule

B 4.1 CDM B a - a a a a a A/R a

S : Identification of alternative land uses: This refers to “realistic and credible” land-use scenarios in the absence of the CDM activity (e.g., continuation of a pre-project use or existing A/R project). Investigations into land-use records and field surveys, and whether forestation occurred as part of a legal requirement is pertinent. Credible land uses must be consistent with enforced mandatory applicable laws and regulations, and these must have legally binding status. As such, general policy statements would not qualify a land use as “credible”. If alternative land uses exist, the project moves on to step 2.

S : Investment

N e: under CDM A/R guidelines, changes in national or sectoral regulations between two crediting periods, if binding, will necessitate a review of project baselines at the start of the new crediting period, and if necessary, a review of the project baselines.

S ce: Annex 17 A/R Methodological Tool "Tool for the Demonstration and Assessment of Additionality in A/R CDM Project Activities" (Version 02).

In the Juma Reserve Protected Area in Brazil, the documentation for its establishment stated it was explicitly for the commercialization of environmental services through the sale of carbon sequestration credits. The Juma Reserve was subsequently certified as additional by an independent third party in accordance with defined criteria specified by the Climate Biodiversity and Community Alliance (CCBA), an organization providing certification for voluntary CER projects.[10] By such a proactive manner, PA legislation may intentionally avoid barriers to achieving additionality certification.

The concept of additionality is inextricably linked with the critical issue of baseline development. A baseline is the emissions reference point for a given area, which denotes the extent of GHG emissions that would have been emitted without REDD activities (i.e., "business as usual", or BAU). The baseline thus allows for the formation of a contract setting the terms of compensation to be offered for tons of carbon sequestered beyond BAU.

Key message: Due diligence regarding pre-existing domestic legislation must be conducted to ensure that additionality is ensured in any REDD contract. National protected areas legislation may not preclude additionality if it is explicitly stated in that legislation that payment is expected for this environmental service.

4.2 Ba

avoided deforestation can present difficulties.[12]

before the start of the first crediting period (threshold after 1 January 2000) were deemed eligible for CDM crediting from the start of that period. Once again however, the determination of baselines assumes importance, and definitional thresholds will need to ensure equity among participants and legal certainty in their effects. How much of a country's 'early action' activities will be eligible for carryover? At what level should the reference level be set? How does this interrelate with additionality, assuming that not all avoided deforestation activities are enacted because of the proposed REDD framework? These legal questions must all be answered if "early crediting" is pursued. Furthermore, legal conditions must be attached in order to ensure that if leakage occurs, or permanence is put at risk, liability is assumed by one of the parties for the carbon lost.[17]

Certain "equitable balancers" have been proposed, including a deforestation adjustment factor (as in PNG) and an "economically rational" deforestation baseline (as in Guyana), both of which reflect the problems facing certain countries with regard to the use of a historical baseline.[18] These proposals are outlined in Table 4.1 below.

A forward-looking baseline (i.e. a projected baseline estimating future deforestation levels) could also be used. (Indonesia has recently endorsed the adoption of either the historical trend or future development scenario.[19]) Actual emissions are compared with the projected baseline after the CP, and credits or debits are thus assigned. In the Juma Reserve in Brazil, the project simulates a BAU baseline that predicts deforestation of 75.4 percent of the reserve by 2050, based on extensive plans for increased road building and agricultural intensification.[20] Prediction, however, of the importance and impact of future factors such as energy security, progression to modern fuels, and commodity prices (relating to the opportunity cost of avoided deforestation) is difficult and based upon uncertain data.[21] Such national circumstances should be taken into account, in order to address perverse eventualities that attribute benefits to parties who have historically deforested the most. Thus, it is unclear whether past forest treatment is a robust indicator of future deforestation.

Tab 4.1 Na a · ab ba a ba a [22]

C · ,	P a	Ra a
Pa · a N G a	D : This discounts the baseline resulting in a lower or higher emission reference level.	The proposal accounts for socio-economic factors affecting the historical baseline, respective capabilities, and relevant other national circumstances. Practically, it allows HFLD countries to use a higher reference level, recognizing the need for economic growth which will result in deforestation.
G a a	E ca a a a ba : A projected baseline is used to map the path of a country if an economically rational deforestation policy were chosen. As a result, the market failure that would otherwise fail to attach value to Guyana's forest is corrected by accounting for the opportunity cost of avoiding future deforestation both in economic terms to Guyana and in the forest's economic value to the world.	As Guyana is approximately 85 percent forested, the use of a historical baseline would ensure Guyana is isolated from REDD benefits due to its historically responsible forestry practices. Furthermore, the country is at an early stage of its forest transition, implying that deforestation will rise sharply in the future and tail off after economic development.

Key message: A baseline is the emissions reference point around which REDD contracts will be constructed.

4.2.2 H a a ab

The formulation and methodology for REDD baselines take on added significance depending on the length of contract which is concluded. If for example, a historical baseline is used for a carbon project, and the project timeframe is 50 years, then deforestation can legitimately continue at a slightly lower rate than before, while the project earns credits and appears to be a GHG reduction scheme. If the baselines for a given land area prove illusory, a long-term contract would continue to assume a false projected carbon pathway while actually allowing for release of many tons of stored forest carbon over that period. Review periods, either explicitly stated in the carbon contract, or mandated by domestic law, can be used to address that concern by requiring periodic review and analysis of baselines, their efficacy and the carbon reduction actually made. Table 4.2 illustrates the timeframes envisaged by two of the countries analyzed.

22 Sources include Angelsen, A. a . (2009). *Red c E f Def e a d F e De ada- (REDD): A O A e e Re* . Prepared for The Government of Norway. *See a* OCCES (2009c), *a* note 15. *See f e* Office of the President, Republic of Guyana, *a* note 4, p. 10. In Guyana, high-level estimate of EVN indicates a value of US$4.3–24.3 billion, depending on the carbon price. EVN is calculated by taking into account the value of timber, and post harvesting activities such as mining and agriculture.

in terms of canopy cover rather than biomass content, adequately deals with degradation in REDD under the deforestation definition (forest removal in spatial terms) is debatable. It is arguable that it fails to distinguish between plantations and natural forests, with the result that natural forests that are severely degraded or converted to plantations technically remain classified as forests. Furthermore, whether deforestation should encompass temporary sequestration of carbon is another legality to be resolved by the UNFCCC.[27]

4.2.4 W a a a a · a · ● ' b

Box 4.2 presents the standards applied to the Juma Reserve project. While not representative of a global standard, it illustrates a good reference point for assessing the parameters used to appraise a project's benefit. At present, in the absence of a global framework on REDD, guidance on standards and methodology must be sought from voluntary standards, such as the Voluntary Carbon Standard (VCS) and the CCBA standard, which underpinned the Juma Reserve carbon sequestration certification.

B 4.2 S a a · a a J· a

4.2.5 D a b a a, b- a a a - a

In the event of national or regional baselines being developed, there will be implications for accounting purposes and environmental effectiveness. In particular, there is considerable debate on the merits of national, regional or project baselines, and the inter-relationship between state and sub-sector levels.

A national approach to baselines would reward developing countries upon proof of deforestation reduction below a certain baseline. Theoretically, a national baseline makes practical sense, due to lower transaction costs, easier international market access, and clearer national comparability.[29] If integrated into a regional approach, whereby countries agree to cooperate and work jointly under a regionally-united baseline framework, or a globally negotiated baseline with one target divided into sectors, national baselines would have the benefit of being *a fac e* well placed to tackle carbon leakage.[30]

However, whether including additional and non-additional projects in one national baseline affords adequate transparency and environmental effectiveness for each individual project is debatable, as available accurate data may prove a significant constraint.[31] Furthermore, the use of national baselines raises the issue of benefit sharing, and whether sub-national activities that actually reduce

weUa

and national emissions reference level. [38] Currently, it does not appear clear from the Indonesian legislation how the relationship between the sub-national baseline and the guiding national baseline will manifest itself, especially if several projects are bundled as envisaged by the legislation.[39] Furthermore, there is no guidance on how a country allocates credits to sub-national projects, and no mention of state liability regarding compensation of project participants should Indonesia fail to meet its national baseline target.[40] This is further clouded by the potential use of different baseline methodology (historical and future) at various sub-sector levels. The extent of autonomy given to regional governments may necessitate a detailed examination of forest management, royalty, tax, timber concessions and any other laws that could jeopardize the national/sub-national legal consistency. In sum, consistent baseline reference methodologies across various implementation levels will be fundamental in ensuring accurate national accounting and avoiding carbon credit accounting complications.

Nonetheless, the trade-off in using standardized baselines for all sub-national projects, especially for federal systems like Brazil or Indonesia, is that sub-national projects may have particular circumstances that require consideration (such as a good forest conservation history). If the use of historical baselines were to be mandated on a national scale, it could effectively result in a certain regions being excluded from that REDD regime. Harmony and consistency in legal approaches at national, regional, and local level will facilitate the coordinated and efficient deployment of REDD projects and thus be of commercial importance. If REDD follows a market-based scheme under the UNFCCC, investors will reward countries able to align their regulatory structures to facilitate accurate, transparent and timely transfer of CERs to market.

Key message: If national baselines are [illegible]

driving deforestation to areas outside the regime.[42] Therefore, for a carbon contract to have long-term security (assuming temptation-

4.3.2 A … a … a …

The nature of REDD credits under a future framework is still unclear, and in particular whether REDD credits are envisaged as permanent or if periodic expiry and renewal will be required. Some guidance may be gained from previous treatment of this issue under the CDM for A/R projects in the first CP (2008–2012), as presented in Box 4.3.

B … 4.3 A/R … CDM … CP[53]

CDM A/R projects in the first commitment period (CP) of the Kyoto Protocol (including agro-forestry, mixed industrial plantations and forest landscape restoration projects) generate tCERs and long-term CERs (lCERs). TCERs are used with an expiry date (the end of the first Kyoto CP), but with the potential for renewal upon verification that the underlying biomass is still in existence. As such, the liability for emissions compensated in the first CP will manifest itself once more in the second and all subsequent CPs. LCERs can be valid for up to 60 years, but must be re-verified every five years, and ensure that the CER remains with the buyer for the entire term of the project. Both have to be discounted (as opposed to full-value CERs from GHG mitigation projects) to take stock of permanence issues, liability for lost carbon, and the cost associated with re-verification. As such, they both reflect the fact that A/R projects under the CDM only temporarily store carbon. A/R CERs cannot be carried over for compliance in subsequent CPs, and they may only contribute toward a maximum of one percent of Annex 1 countries' emissions. While the EU Emission Trading System (ETS) excluded A/R projects in the first trading period (2008–2012), Directive 2009/29 EC supports the development of a financing mechanism stimulating investment in A/R and REDD for future CPs.

Depending on the form of the carbon credit, permanence of carbon sequestered may be in jeopardy in REDD contracts. An lCER project requires the seller to ensure that the carbon will be effectively stored for the lifetime of the contract. The inherent risk of investing in long-term contracts from a buyer's perspective is accompanied by an understandable reluctance on the part of sellers to guarantee effective sequestration for a long period, especially if liability for lost/leaked carbon is assumed. While it does ensure an element of continuity and certainty is instilled in the contract, and may encourage the buyer to become directly associated with the projects' sustained permanence, a tCER has the benefit of flexibility, and the permanence fears of long-term projects are less acute. In sum, tCERs present less risk to carbon permanence.[54]

For sellers of carbon credits, one option is a forward contract, whereby a specified number of credits are delivered to the buyer at a specified point in the future. Otherwise, recourse to the carbon spot market is possible if CER prices are expected to gain value in future trading, or if multiple buyers are sought. However, concern has been raised about the use of lCERs traded on spot markets, due to

53 Manguiat … *a.*, supra note 13. *See f … e* Streck and O'Sullivan, supra note 47, at p. 12; and Emmer, I.M. and Kägi, W. (2007). "The Encofor Checklist for CDM A/R Project Developers", at p. 15.

54 Streck and O'Sullivan, … *a* note 47.

the specified contract period. This could manifest itself in the form of a penalty on landowners for non-compliance with the REDD contract terms,[59] or even a periodic expulsion from CDM REDD funding opportunities. LCERs carry a greater risk for buyers, as they will necessitate a greater investment and the risk of losing such an investment will cover a longer period. This greater burden may translate into certain obligations (in the form of guarantees) on the part of the domestic landowner or an

and ground-based monitoring to measure actual deforestation leakage, raising doubt as to the reliability of the figures. Given the theoretical nature of the methodologies used and incomplete data, it is difficult to assess whether emission reductions were real, measurable, quantifiable and variable. Deforestation and forest degradation in areas outside the NKCAP in Bolivia or across the border into nearby Brazil appears to have neither been monitored nor accounted for by the project, raising doubt as to whether leakage was accurately quantified. Moreover, while the project generated offsets based on sub-national deforestation reductions, the national deforestation rate actually increased in percentage terms, raising further leakage doubts. This example demonstrates how more comprehensive monitoring, including both national and transboundary-level impacts, may better assess leakage from REDD projects. [illegible]

specifically envisaged under the new legislation.[66] The potential for inequities due to perceived bad risk projects could be offset by subsidizing such projects and enabling them to attain insurance.

The use of a project-level discount factor on CERs (10 percent in the case of the Juma Reserve) could account for leakage by incorporating a certain degree of uncertainty into every REDD carbon contract which entails sale of CERs. However the transaction costs to this method could be considerable and may result in substantial delays or disputes between regions over the factor applied to their project. Furthermore, whether this will address leakage at a national level remains debatable.[67] Box 4.5 below presents further options available at the international level to counteract the causes of leakage.[68]

B 4.5 T a a ca ca

4.3.5 L ab , a ea b

There appears to be consensus that emissions offsets from A/R projects are not permanent offsets for the purposes of the CDM, an uncertainty mirrored in REDD discussions. In the event then that the carbon contained is released, either through anthropogenic interference, leakage (on-site and

B 4.6[72] L ab ea b e · A/R

The commercial uptake of A/R projects has been slow, due to a lack of willingness to provide up-front payments to sellers of carbon credits in the absence of any collateral, as well as buyer concerns that a seller may renege on an afforestation project, or simply not implement it in the first place. In this regard the following two projects represent liability apportionment that assisted project deployment:

- The Mexican Scolel Te "Activities Implemented Jointly" (AIJ) pilot project for A/R projects holds the participating farmers liable for any carbon loss during the contract's 25-year duration.
- The Costa Rican AIJ implemented project buffers for 20 years, with the government assuming liability for lost carbon.

4.4 C

By carefully identifying and considering legal issues regarding the formulation of REDD baselines, the pursuit of project permanence, and the achievement of additionality, it is hoped that governments will be able to build strong national legal frameworks for REDD. The overarching aim of a REDD framework must be to ensure close correlation between emissions reductions and earned carbon credits, and in this regard, ensure that:

- The project is not merely subsidizing a pre-existing avoided deforestation activity;
- Baselines are set taking into account relevant national circumstances that will underpin overall environmental effectiveness;
- Permanence is assured through appropriate benefit sharing, national-level safeguards, and prior assigned apportionment of liability.

The underlying aim of any REDD regime is to ensure reduction of GHG emissions, and this must be the guiding criteria behind any REDD regime. In this regard, analysis of the national case studies has revealed inefficient legal frameworks with laws that directly contradict the aims of a REDD project, while a lack of harmony between national and sub-national legislation may prove to be a significant barrier to sub-national implementation if benefits are not apportioned. In order to achieve a stable,

and these difficulties are likely to increase under a future REDD regime. Clarity and predictability in REDD regulatory frameworks would attract outside investment or purchases, as transaction costs could be reduced and investor confidence increased. Whether developing new national REDD laws or merely modifying existing environmental or forest law frameworks, then, law and policy makers should endeavour to avoid contradictions and clarify relevant laws and legal mechanisms.

Streamlining REDD legal procedures, via mechanisms such as standardized indices and universal project methodologies, could reduce administrative difficulties for governments and transaction costs for investors.[3] Given the variety of complicated new legal and technical concepts and methodologies that will be required in developing countries hosting REDD programmes, administrative procedures and workloads could be reduced by employing universal definitions and standards, ideally tied to internationally-agreed definitions and indices. Similarly, countries should reconsider antiquated laws and legal concepts existing in their legislation that could pose conflicts for parties in their national REDD system. For example, given the advantages of a separate proprietary ownership interest in carbon, as established in Chapter 1, it may be more efficient for countries to adopt a generally accepted definition of such an ownership interest in order to facilitate carbon investments, rather than persisting in using unworkable definitions of carbon rights in terms of land or forest ownership. To ensure harmony across national legal systems, however, carbon ownership interests then should be recognized under other sectors of law according to the same definition.

Judging from the case studies and review of other national experiences to date, it does not seem necessarily advisable that all REDD host countries enact brand new legal instruments in order to provide for successful REDD projects. At a minimum, at least in the short term, countries should ensure that the existing legal framework can address the needs of REDD activities and their participants. This may entail re-interpretation of existing laws, and capacity building (in administrative and judicial branches of government especially) in order to apply old laws to new REDD projects and procedures. Additional room for working within existing law may be created by better land-use planning, in particular choosing project sites that avoid areas subject to conflicting legal claims such as areas characterized by unclear rights in land. However, in countries like Indonesia, such sites may be difficult to find, given the controversy over indigenous rights described in Chapter 1. Alternatively, this approach may entail amendments to existing legal instruments, when interpretation may not be sufficient to effectively support REDD activities, as well as to provide more legal certainty.

1.2 C a a a a a

(if necessary, according to a national administrative law framework); indigenous affairs agencies or other social programmes responsible for local and indigenous communities; land-use planning and agricultural bureaus; foreign investment-related agencies; and judicial bodies. Whether via a new

discussion for a future agreement under the UNFCCC. Developing countries revising existing laws or creating new legislation should consider such a possibility and ensure national laws and institutions may be easily adapted to NAMAs, which would provide a common systematic basis for coordinating funding for and MRV of all national mitigation activities.

If A/R projects under the CDM and voluntary markets are any indication of REDD markets, the private sector may be more interested in simply buying forest carbon credits instead of investing in long-term forestry projects.[6] This is likely in large part due to concerns regarding additionality and permanence, relative inefficiency of carbon sequestration compared to other types of offset projects and high costs of such projects (especially when forest governance costs are added to the equation).[7] If that is the case (and should a REDD regime allow direct carbon deals between buyers and sellers), then law and policy makers might work to develop substantive criteria for contract clauses to guarantee fair treatment of local participants. Such standard clauses could be developed similarly to work on mutually agreed terms for access and benefit sharing under the

2.1 La , a ea b

The successful establishment of REDD projects will require that rights to land and forest resources be clarified and assigned to stewards capable of controlling and managing forests for carbon sequestration. In many cases, this will entail strengthening local communities' involvement in protecting forests, and building on links with local actors to control the exploitation of forest resources and enforce regulations.[9]

Regulatory frameworks on REDD should clearly determine who owns the right to the carbon sequestered in forests. Carbon ownership may either be treated as separate proprietary interest, or a proprietary interest linked to forest or land ownership. The creation of carbon credits separated from land ownership could facilitate their circulation on the market. If rights over sequestered carbon are transferable, some fraud prevention issues may arise, similar to the ones posed by other rights associated with property. The decision on who will bear the risk for variations in the sequestered carbon depends on the nature of the property right and of the transaction.

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It is important to recall that different countries will have different ranges of actors potentially selling carbon sequestration services, including corporate groups and medium to large-sized landowners at one end, and low-income, smallholders and local and indigenous communities at another. Depending on their respective national or regional circumstances, then, policy makers will need to design legal mechanisms that incorporate both sophisticated contractual and financial regulatory elements for business entities, and safeguards protecting local and indigenous rights, information, participation and benefits.[10]

2.4 A a , a e a ba

In order to ensure climate benefits from REDD programmes, national laws should require independent verification to ensure that projects subsidizing a pre-existing activity resulting in avoided deforestation or forest degradation lack eligibility for REDD funding. National laws setting baselines should take account of past deforestation rates as well as future predictions under BAU scenarios, and be set based on national circumstances (while expressly barring 'hot air' targets) in order to provide for overall environmental effectiveness. Ultimately, legal frameworks and institutions must aim to ensure a strong correlation between carbon credits and actual emissions reductions. Legislative and regulatory criteria ensuring permanence should be established through strong benefit sharing, national emissions-level safeguards guarding against leakage, and assigned apportionment of liability.

One of the most critical decisions facing legislators is whether to adopt a nation-based or project-based approach to REDD.[11] A nation-based approach could provide flexibility to manage collective forest resources and help tackle the problem of in-country leakage. However, nation-based REDD policies would require strong governance and effective administrative checks. In many potential host countries, insufficient institutional capacity may seriously obstruct the implementation of a nation-based approach. In this connection, a project-based approach to REDD could be implemented more quickly and better accommodate in-country heterogeneity. However, this option presents challenges relating to leakage and liability. Hybrid arrangements could solve the impasse over nation vs. project-based REDD approaches. In any case, it will be important for governments to consider the comparative benefits of these options, as they may significantly influence the decisions of prospective forest carbon credit suppliers and buyers (or funders).

may act as a powerful incentive to address long-standing disputes and pending questions. In this connection, it is crucial to bear in mind the complexities of the drivers of deforestation and build upon lessons learnt through existing efforts to tackle such problems.

3. Legal analysis: What laws are relevant to forest?

a) [illegible]
b) [illegible]
c) [illegible]
d) [illegible]
e) [illegible]
f) [illegible]
[illegible])

4. Do any claims exist over the forest, for example:

   a) c a \ \\ e, e, cc /a

5. Are there any conflicts over the land, such as:

   a) c /a • c a f a a e e • \ , c /a • c a \ e / e, b da d - /\ e

❑ **D e a e**

1. Who has the right to make decisions regarding the REDD scheme?
   a) \a e, a d e , a c.
2. What legal mechanisms exist for participation in decision making?
3. Does the decision maker need to obtain Prior Informed Consent (PIC) from others?
   a) PIC e•a e ed, a d f f
   b) a \ e/ ce f a • PIC
4. Do decision makers need to consult stakeholders?
   a) a \ e/ ce f de • \a e de ?
   b) a e•a ec a e \ f c \a ?
5. Is an Environmental or Social Impact Assessment legally required?

❑ **Ace a**

1. Is there an obligation (e.g., for government, project managers or investors) to provide information, particularly information held by government?
2. Who will receive information?
3. How is information made available to people accurately and in a timely manner?

❑ **D**

1. Is there a system for identifying, preventing and resolving conflict between stakeholders (e.g., administrative review, mediation, alternative dispute resolution, arbitration, litigation)?
2. Are stakeholders aware of the existence of that system?
3. Is the system affordable and accessible?
4. Does the system provide a result within a reasonable period of time?

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❑ **Pa**

1. What is the source of funding for REDD?
   a) *b c f d*
   b) ca b c ed
2. What legal mechanisms exist for making the REDD payments?
3. To whom will the payments be made?
   a) d e a e a e
   b) d e a e e / e f f e
   c) d e a e a a e ed a
4. What are the modalities of payment, for example:
   a) e e d, a e ad a ce, a e f e f a ce
5. How is the amount of payment calculated – price of carbon?
6. How will the scheme deal with fluctuations in the price of carbon?
7. What legal mechanisms exist for deciding who gets what revenue?
8. Will there be non-monetary benefits?
   a) f , a e a a e, ba a d a
9. What legal mechanisms exist for taxes, subsidies or state payments?

❑ **I a a a REDD**

1. How will the REDD Scheme be implemented?
2. Which are the implementing institutions?
   a) e e a e c
   b) ad a/c a a e e
3. What is the legal framework for REDD, for example:
   a) REDD ec c e a , a e d e e a e e a
4. Should REDD build on national initiatives, for example:
   a) e e c e f a ed a ea e f e a , e a e a - e e f e e d e ce c a ed ca a d ea , f e a e f ce e a d e a ce a e

❑ **M . , . a ea (MRV): a .**

1. What system is to be used for monitoring the participation by forest dwellers and users in the REDD Scheme?
2. What system is to be used to monitor individual projects within the REDD scheme?
3. What are the reporting requirements: who reports and to whom?
4. What system is to be used for verification?
   a) ed a ea
   b) e e
   c) a e e
   d) a e

b) T e ca ac f e f e e e e ca b e be f a e a e, a e ab e e ,
c a a f p e d e, e ed de e a c ce a d e .
T e e ca e e c e a d e . I c e , a
be e ed:

1. T e e e ca b a e affe e e f e f e e e e
f e ca b c , e a ce ;

2. T e e e ca b a e e affe e f e ed. H e e, e
a d e a e a e a a c a , a c e a e
e a ec a e a d a d b d a e e .

c) A ( ) ab e, b e e ed de e e a c a a .

2. The carbon sequestered in the forest is a publicly-owned asset:

a). T e e e d e f e ca b c a ee f e be e f f e e f
e b c, e e e a a . I c e , d ffe e a be
e ed:

1. T e e e a a c a e e e a d e e e a ce e e -
;

2. T e e e a e e e e e f a d e e a ce ca b
e e .

b) T e e e a e e e e e f e ca b c a a . I c e ,
a a be c ed:

1. T e ac f ca b c a be e a b d ;

2. O a ed be f e e a be e be ca b c , c a e e e -
ca b a d de ff ; ba c a e ed dea c ed ; NGO e -
e ed e e a e ; d e e e e ff e e a d .

C e C a 2: Pa e a , Ba a e . R a l , a P l C

Ob e :

La a 0

3. Access to justice:

a)

C e C a 3: B S a .

Ob e :
La . e a e a e · . b - b·
a a . REDD- a ae , · a a . · a a
a , ea a . · e · , a a e a , a ea . a b
. . a a · .

C e C a 4: A a P a e

Ob e :
R . a , a e ae a . a a a REDD e ae
a a ea b . a a . b ae ab e ;
e e a ba ; a a . a . .

❑ **P a ,**

1. Do national laws establishing REDD project eligibility criteria require that the project's proposed activity or land use result in a greater reduction in forest carbon emissions than its current use?
2. Do existing laws already provide adequately for the funding of deforestation initiatives or for the protection against deforestation in proposed REDD sites?
3. How are national baselines established currently, and how do they incorporate sub-national and/or project baselines?
4. Do national laws require proposed REDD projects to be designed in order to guarantee permanence of carbon emissions sequestered?

❑ **O ab . a a , ba , a a e REDD e**

1. Meeting the additionality prerequisite
   a) Na a a e e f • f e • b (a a a a b- a a e e):
   b) T e e a e d e d f def e a a d e a d def e a ;
   c) T e e a e e • • e e ea e ace a ade a e f d de f e e ec f e ed e a' a f ed c • def e a .
2. Baseline development
   a) Na a a de e f e ca b e efe e ce e e b e f be ba e e :
      1) H ca def e a : c ed a e a f def e a be e e e fa a e d (e.•., a a•• e•a e f e a decade a fa ed a ea);
      2) F e def e a : c ed a e ba ed e ed a a a e f e a ed f e def e a e e a fe e c e e d.
   b) Na a a e ea ce a ef a ef REDD a e c a , c d • a e dc e e .
   c) Na a a c a a e e a da d UNFCCC ca ca , c ea d de f f e .
   d) Na a a e a e e c a a a a da d ea e e a e' be e .
   e) If a a a e a•e e b d • f a a e , e e a a ba ee e b- a a ba e ea d e • d • a ba e e de ed.

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3. Ensuring permanence: avoiding leakage, possible safeguards, liability

a) La d e, ca b e , a d c a e e ed, a d c e e b ee

Part II

Annex III: Country Studies

Case Study: Brazil

Émilie Champagne* and Josh Roberts**

1. Overview of the REDD Background

have a successful REDD programme in Brazil, these issues will need to be addressed in subsequent legislation.

2. E . . a a e a

In Brazil, there is currently no national federal climate change law or legal framework for REDD. The REDD process is instead governed by various federal and state policies, regulations, and laws (as well as a number of state carbon laws), which lay the legal foundation for initiating REDD projects in Brazil.

2.1 P e a

Initiatives to combat climate change and deforestation in Brazil are guided by two overarching policies: the *Na a P a C ba Def e a a d P a C ba Def e a a S a e Le e f e Pe d 2008 2011* ("Deforestation Plan"),[3] and the *Na a P a C a e C a e* ("National Plan").[4]

Launched in 2008, the National Plan reveals Brazil's climate change strategy, which includes deforestation targets and cites REDD as a way to create an economic dynamic favourable to forests. It sets Brazil's first ever deforestation reduction target by aiming to slash deforestation by 70 percent by 2018. Following Brazil's direct funding approach, the National Plan does not create any rights to carbon emissionfte evmissionfteCg BresNaDie3Ds appvNDpbon emis

and preserve the environment for present and future generations.[6] Forests are considered to be national wealth and a common asset for all inhabitants.[7] This includes the Amazon Forest, among other biomes, which is declared part of the national heritage. Furthermore, it states that unoccupied lands or lands seized by the states through discriminatory actions which are necessary to protect the natural ecosystems are inalienable.[8]

The shared responsibility of all levels of government regarding environmental protection is explicitly stated under the common powers provision of Article 23, which articulates that it is commonly incumbent upon the Union, the states, the Federal District and the municipalities to protect the environment and fight pollution in any of its forms, and to preserve the forests, fauna and flora.

With respect to indigenous peoples, Article 231 recognizes the Indians' right to land that they traditionally occupy, that these lands are intended for their permanent possession, and that they have exclusive rights over the "riches of the soil, the rivers and the lakes existing therein". It adds that these lands are inalienable and indisposable, and that the removal of indigenous groups from their lands is forbidden, with certain exceptions.[9]

2.3 La a a

There is extensive legislation regulating forests and land tenure in Brazil. Private land ownership is permitted by the Constitution guaranteeing the right to property.[10] The existing legal framework in Brazil enables land users to obtain legal title (*ca*) over land that they have developed through their own work, and have made productive for five uninterrupted years.[11] Brazil lacks a central land register, and it is believed that only four percent of private land in Amazonia is covered by secure title deeds; much of the rest is being grabbed in the hope of eventually establishing *de fa* ownership.[12] Furthermore, the occupancy of public lands in the Amazon has also been marked with widespread irregularity.

The Brazilian *F e C de*[13] echoes the Constitution declaration that forests on national territory are goods of common interest to all inhabitants of the country.[14] The Code governs forest management and outlines the procedures for forest conservation as well as the conservation of natural resources in national forested areas, including both private and public lands.

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6 Federal Constitution of Brazil of 2006, Article 225.
7 *Ib d.*
8 *Ib d.*, Article 225, para. 5.
9 *Ib d.,* Article 231.
10 *Ib d.*, Articles 5 and 170.
11 "The person not being the landowner of rural or urban property, having possessed it as his for five uninterrupted years, without opposition (if rural property with an area less than 50 hectares), making it productive through his own or his family's work, having it as his home, will acquire its formal ownership". Translation of Art. 1239 of the Law n 10406/2002: from Ogonowski, M. *a .* (2009). "Utilizing Payments for Environmental Services for Reducing Emissions from Deforestation and Forest Degradation (REDD) in Developing Countries: Challenges and Policy Options". Washington DC, USA: Center for Clean Air Policy.
12 The Economist. (2009a). "The Brazilian Amazon: Preventing Pillage in the Rainforest". (26 February 2009).
13 Lei n. 4.771, de 15/09/1965. *N C d F e a .*
14 *Ib d.*, Article 1.

The use of natural forest resources on private land is permitted by the landowner, making him the provider of ecosystem services on the property, subject to certain limitations imposed by the Code. All rural properties are required to have two types of protected or conserved areas. First, Permanent Preservation Areas are areas within public and private properties that have important environmental functions. Secondly, landowners must keep 80 percent of their forest land as a *Re e a Le•a* (legal reserve).[15] This land can only be exploited with an authorized sustainable management plan (MP).

Public lands are administered by the Union, states or municipalities in the interest of the common good. On public land, concessions may be allocated under the *La ↘ e Ma a•e e↘ f P b c F e↘* .[16] This law manages publicly owned forests and guarantees the allocation of areas to be managed by local communities. The law establishes a forest concession system that governs the allocation of timber concessions by conceding rights to manage public forests sustainably for the exploration of products and services which are allocated through an open bidding process.

Under the Constitution, indigenous land is the property of the federal government.[17] Although the land and the natural resources deriving from these lands are the inalienable property of the Union, indigenous communities have exclusive rights to the use of the land and resources.[18] The Statute also grants permanent tenure of lands traditionally occupied by Indians.

Under Federal law, if the forest people are not included in the REDD scheme they do not lose their rights to access natural resources on the land. Under the Indian Statute, indigenous communities have a right to the use of the resource without being the owner. Furthermore, the law allows indigenous communities the right to derive income from the resource without being the owner of the land. Article 43 of the Statute states that indigenous income is the result of the application of the goods and utilities (services) of the indigenous patrimony. The revenue is, of preference, used to benefit the community.

2.4 T e a a ,

In Brazil, PAs are regulated by the National System of Conservation Units (NSCU),[19] a unified system encompassing all federal, state and municipal protected areas. Primarily destined for conservation, Conservation Units are another type of land in Brazil, which can include both public and private land, and serve as another tool to combat deforestation.

The system includes 12 management categories divided into two groups of PAs: those under full protection and those allowing sustainable use of the land's resources. Protected areas under full protection are areas in which only indirect use of natural resources is allowed. These include:

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15 The percentage of forested area is "established according to the percentage of rural property areas in which forests shall be preserved for the purpose of sustainable forest management. This percentage varies between 20 percent and 80 percent of the rural properties" (with 80 percent in the Amazon Forest). Art. 16, Law 4771/1965, *F e↘ C de.*

16 Lei no.11.284/2006 de Gestão de Florestas Públicas (Law for sustainable management and production of forests).

17 Federal Constitution, *a* note 8, Article 20(10).

18 *Ib d.*, Article 231, para. 2. ". . . exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein".

19 Lei no. 9.985, de 18/07/2000. *S↘ e a Nac a de U dade de C e a(de Na e a.*

ecological stations; biological reserves; national, state or municipal parks; natural monuments; and wildlife refuges.

Protected areas under sustainable use are intended to allow nature conservation and the sustainable use of natural resources. They include extractive reserves; sustainable development reserves; national, state or municipal forests; fauna reserves; environmental protection areas; areas of relevant ecological interest; and natural heritage private reserves.[20]

Extractive Reserves and Sustainable Development Reserves allow income-generating activities. However, for such activities to be legally allowed there must be an approved MP elaborated with the participation of the local inhabitants. The Juma Project, a sustainable development reserve, is an

A National Policy for Ecosystem Services and a Payment for Ecosystem Services Programme are currently under discussion. If approved, six substitute bills[26] would establish the concept of PES in Brazil, and would institute a National Policy on Environmental Services to institutionalize PES amongst small-scale farmers, to be financed by international donations. The definition of environmental services in this bill was taken from the *P a b e ı e* Programme and includes REDD as well as carbon sequestration.

A third bill[27] to be introduced would attempt to secure permanent funding from the national budget and other domestic and international sources. These bills would together provide a legal and financial basis for expanding Proambiente into a national programme.

3.2 O a · a · ●

Protected areas are considered part of the public domain, and are therefore owned by the State. This means that forest peoples do not own the land, although some may have been living there for several generations. However, the State grants them the right to use the land, and they are responsible for the sustainable use of the land under the PA's MP.

By regulating access to public forests through the Brazilian Forestry Service, and providing financial support through the new National Fund for Forestry Development, the 2006 *La ı e Ma a•e e ı f P b c F e ı* improves incentives to encourage sustainable productive activities. The law expressly prohibits the inclusion of terms in a forest concession which grant rights to commercialize credits from forestry concessions derived from avoided deforestation.[28] However, it leaves the right for states to commercialize credits from reforestation projects. As such, the right to sell carbon lies with the State.

While private ownership is permitted in Brazil, in practice, experience has created a complicated system of ownership, leading to insecure tenure and disputes over land ownership. Insecure tenure makes people vulnerable to being dispossessed, giving them less leverage in relations with government and the private sector.[29] As REDD initiatives may increase land values, this could accentuate the problem of dispossession.

Insecurity in land and forest ownership has undermined sound forest management as, without sound secure rights, forest users have few incentives to invest in protecting forest resources, leading to deforestation.[30]

new norms to define property rights, and it aims to establish regulation of titles to 80 percent of the private landholdings in Amazonia over the next three years.

Until now, concessions on public lands to private individuals for rural use were limited to 500-hectare

The State of Mato Grosso has also recently enacted a law *E ab e E ec e D e f e F df F e De e e S a e f Ma G* .[33] Dealing with forestry management, this law regulates both title registration through a property registration system, and a land registry that records the physical characteristics of the land.[34] The law also requires the landholder or occupant to obtain a single environmental permit or licence which specifies the landowner's conservation rights and obligations. However, the law does not determine whether a landowner is entitled to the carbon sequestration rights by engaging in forest conservation activities on his land.[35] This ambiguity should be removed to provide clear incentives to landowners considering whether to engage in forest conservation as opposed to some other more unsustainable practice.

4. REDD b a

Many countries support an international market-based initiative to generate funds for avoided deforestation. Brazil, however, advocates a voluntary fund-based approach as a forest protection tool. Under this approach, REDD projects would receive direct financing under the UNFCCC, based on national policy drawing upon international funds donated by industrialized nations. Contributors would not be eligible for carbon credits that could be used to meet emission reduction obligations. Unlike the direct-financing approach taken at the federal level, the State of Amazonas aims to finance its deforestation reduction initiatives through the international marketing of carbon sequestration credits.

On indigenous lands, the Constitution recognizes f rights[36] of indigenous communities over the natural resources of their lands. Therefore, even though forest lands are owned by the State, these groups have permanent usage rights.[37] These rights are classified, as the real right to explore the utilities, uses and fruits of the resource or property which includes the legal right to use and derive profit generated from the resource. Additionally, the Brazilian Civil Code recognizes that "the person who possesses the rights to the usufruct of a thing also possesses the right to the possession, use, administration and receipt of the fruits".[38]

Given Brazil's policy on a voluntary, fund-based national approach to REDD, it is doubtful that indigenous peoples would be allowed to enter into REDD agreements or contracts with private entities. However, indigenous communities would be entitled to the income generated by payments for REDD activities, and can enter into REDD agreements/contracts with the State. This becomes vital for REDD projects.

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33 Lei Nº 8.723, de 23 de outubro de 2007 - D.O. 23.10.07. "Establishing the Executive Directors of the Fund for Forestry Development of the State of Mato Grosso". August 18, 2008.

34 Baker & Mackenzie, *a* note 7, p. 54.

35 *Ib d*.

36 Law n. 6.001/73, Statute of the Indian, 1973. Article 24 defines f rights as the right to the ownership, utilization and perception of the natural resources and all the uses and utilities existing on the lands they occupy, as well as the product of the economic exploration of such resources and utilities.

37 Ogonowski *a* ., *a* note 13.

38 Law No. 3071, *C C de f B a* of 1916, Article 718.

5. Framework for benefit sharing

At the time of publication, there was no national level framework for benefit sharing. While Brazil's

The *B a F e* benefit-sharing mechanism has four components. First, a Family Forest Grant pays a monthly allowance of R$50[43] to the wife of each family living inside the PA that is willing to participate in the programme. Each family receives a direct cash payment through an electronic Visa card, which can be obtained from and used in banks and post offices, and aims to complement family expenses. Each family's details are registered, thus generating an important database for social environmental monitoring.[44] The payment is designed to involve the local population in activities to combat deforestation.

Second, a Forest Grant for Associations is granted to associations of people living in the PA. Payments for this allowance correspond to 10 percent of the total of Family Forest Allowances. The purpose of the Allowance is to strengthen organizational and b[illegible]

	R$	P e a a
(A) Monitoring and law enforcement	1,414,560	29.75%
(B) Bolsa Floresta social investment	693,000	14.58%
(C) Community development, scientific research and education	2,322,500*	47.90%
(D) PES – Bolsa Floresta**	324,280	6.82%
G a a	**4,754,340**	
**Section (D) Bolsa Floresta breakdown:		
Infrastructure/equipment	24,000	7.40%
Payment to the families	170,000	52.42%
Payment to the association	17,000	5.24%
Community Investment Plans	113,280	34.93%

S ce: Fundação Amazonas Sustentável (2008), pp. 73–74.

**N e* – in the document, there was a discrepancy of 45,000 in the total for Maintenance Costs.

Tab e 1. T e J a Re e e REDD P e I e e P a f 2008 2011

6. I a , a e a a a

The Constitution states that "all persons have the right to receive, from the public agencies, information of private interest to such persons or of collective or general interest…".[48] In 2003, Brazil passed its law on access to environmental information (Law No. 10.650 of April 16, 2003). The law applies to public agencies that have authority to implement the Brazilian National Environmental Policy Act. It requires these agencies to make public when asked to do so, or when necessary, all relevant information relating to environmental protection.

Brazil's Constitution imposes a duty on the government and the community to defend and conserve the environment for present and future generations. This imposes an implied duty to participate in preserving the environment, and could be extended to participation in the development of REDD projects.

It will be important to incorporate participation from indigenous groups or local communities, because they have a very important role to play in forest conservation. For instaptictMet National Fmu5pation

The Juma Project may be a good indicator of how future REDD projects will incorporate participation. The PA was created using participatory workshops and public consultations conducted by the FAS and SDS in order to guarantee the involvement and commitment of all local stakeholders, and to ensure their access to information. Furthermore, the Project will set up a Reserve Management Council,[49] which will be formed by community representatives, local stakeholders and governmental and non-governmental institutions. Its role will be to decide on the reserve's programmes and activities, to approve the annual operational investment plan, and together with the State Secretariat of Planning and Economic Development (SEPLAN), it develops the reserve's MP.

Families who want to benefit from the FAS can participate in a Community Association, therefore allowing them to exert colle[illegible]

Another risk is that people might move outside a PA in order to engage in unsustainable forest practices. Recent studies on deforestation dynamics indicate that the single measure of creating a PA promotes a reduction of deforestation in the surrounding areas, due to the improvement of monitoring and governmental inspection activities, and to the increased orientation of local communities regarding the legal use of the forest. This effect was observed in the great majority of PAs created in the Brazilian Amazon, and the offsite "reduction of deforestation" that was generated varied from one to three percent of the size of the PA (Amazon Environmental Research Institute (IPAM), 2008)).

Inside the Juma Reserve, the entire surrounding area is monitored by the State and Federal Government as part of the project's monitoring plan. This includes monitoring migration from the communities inside the Juma Reserve to other forest areas, as well as immigration. Furthermore, the 10 km "buffer zone" surrounding the Reserve's perimeter[51]

building capacity to exercise sustainable management strategies for exploitation.[67] Otherwise,

whose rights have not been clearly defined. Most forested areas in Cameroon are still considered to be national land despite centuries-old claims by local or indigenous people, albeit without formal title. Under this legal framework, most carbon credits realized from REDD will probably go to the State.

Under the R-PIN for Cameroon prepared by MINEP, forest inhabitants constitute one of the major groups of actors in the REDD process, given that they are direct custodians of forest upon which they live, depend and exploit. As a Party to the CBD, Cameroon has a duty under Articles 8 (j) and 10 (c) to protect invaluable indigenous traditional knowledge, and cultural use of forest and forest resources. Therefore, Cameroon has recognized that success of REDD depends largely on forest dwellers. However, strict implementation of existing land-tenure law will invariably prevent forest peoples from participating in REDD.

Forest peoples must be included in the process if they are to better appreciate the objectives and importance of REDD. Furthermore, land-tenure law needs to be redefined to provide incentives for local peoples to engage in forest conservation. Otherwise, excluding forest people will be detrimental to REDD objectives, given that local or indigenous peoples in Cameroon have always perceived conservation projects as interfering with their ownership rights. The Kilum-Ijum Mountain Biodiversity Conservation project is an example.

3.2 Ob a . e e ea b - a e , e

The process for obtaining concessions for carbon-related ecosystem services will depend on the type of ecosystem service concerned, whether it is for mining, forestry or hunting game. As mentioned above, there is no specific legal framework for REDD projects in Cameroon. However, there is specific natural resource legislation regulating concessions over those resources. The law regulating forest concessions is one example.

The procedure and requirements for allotting forest concessions is spelled out in Decree No: 95/531-PM (the 1995 Decree).[70] Forest concessions are only granted to natural persons residing in Cameroon, or to companies whose registered offices are in Cameroon and whose shareholders are known to the forestry service. Granting a concession is preceded by a public call for tenders. An inter-ministerial committee pre-selects and classifies bidders using the following criteria, and considering the minimum limits previously set by the Minister of Forestry in the call for tenders (the limits here are fixed by the minister and is not explained in this law): investments envisaged; financial potential, including the guarantee of good performance (criteria of good performance are determined by the committee); technical and professional capacities; and how well the term of previous contracts in the same domain were respected.

The Minister then signs a provisional exploitation contract with the successful bidder upon proof of having paid the requisite fee into the Public Treasury. The provisional exploitation contract l eJ veJ tr

of conformity with the specifications of the provisional exploitation contract. The owner can then apply for a permanent or final exploitation contract. The final exploitation contract takes the form of a forest concession granted by decree of the Prime Minister. The final exploitation contract is valid for 15 years, and is renewable.

These requirements do not prevent forest people from participating in the REDD process, as forest concessions do not in any way confer a right of ownership over the corresponding land, even though the area over which the concession is granted is reserved for the licensee. In addition, the requirement for an EIA for such a project can promote the participation of the forest people in the concession process, because the EIA legal process makes public hearings and consultations with

strategies. Thus, capacity building for forest communities will be fundamental for the success of REDD projects in Cameroon. It must also be kept in mind that transplanting western ideas of forest management may be not suitable and appropriate to the culture and lifestyle of forest dwellers.

5. F a b a .

There is no developed framework for benefit sharing under REDD. However, through provisions of the 1994

community and are not liable for tax. Such projects are supervised by the local government official in charge of forestry.

While the 10 percent share of revenues was originally meant to be paid directly to the village level, a joint arrêté (administrative decision) of the Ministry of Economy and Finance and of the Ministry of Territorial Administration (29 April 1998) provided for management by local governments at the regional level – thereby effectively recentralizing forest revenue allocation.[76] Furthermore, a widespread lack of implementation of these tax allocations to bordering villages has been reported.[77]

The 10 percent redistribution of profits due to local communities is often received by recognized government auxiliaries – chiefs, on behalf of their communities. This leaves many, particularly customary holders, out of the benefit-sharing process as they have little or no say in how funds are spent, and therefore benefit little from them. Equally, communities living inside or within three kilometres of national parks are unlikely to qualify for such direct payments as timber exploitation will never occur within their customary territories.[78]

In collaboration with the Ministry of Finance, the Ministry of Forestry negotiates the terms of benefit sharing. The percentage paid to the local community living around the State forest for development purposes is fixed by the *F a ce La* .[79] As such, there is no consultation process with the local community before fixing the amount. Before exploitation activities can begin, the community must be notified. The local administrative authority is required to hold a briefing meeting attended by the traditional authorities, the local technical officials concerned and the project participant. At the meeting, the community is notified of the amount it will be paid.

The 10 percent allocated to forest people is insignificant compared to what exploitation or logging companies (carbon investors) extract from the forest, and what they pay into the Public Treasury. Furthermore, despite State-imposed obligations to carry out developmental projects and provide social amenities, these obligations are not enforced. This leaves communities in a worse situation than before, because in addition to the irreversible environmental damage caused by the exploitation, they do not receive benefits to mitigate the damage. In addition, some companies exploit more than what is specified in their contract, both in terms of quantity and in species harvested. The situation is compounded by the fact that some State officials either connive with exploitation companies for corrupt reasons, or are shareholders in those companies.

No legal disputes have arisen under REDD, because most projects are still at the feasibility study phase. However, an administrative procedure (forum), a judicial forum (the courts), traditional authorities, and arbitration are all available for settling disputes stemming from natural resource exploitation. These avenues are provided for through environmental laws, forestry law and other natural resource

76 Cotula, L. and Mayers, J. (2009). *Te*

laws.[80] There are also several sanctions available in case of failure to pay compensation under the benefit-sharing agreement.

Aside from alternative dispute resolution, the judicial process is neither independent nor efficient. As a result, an exploitation company may get away with non-payment. Effective dispute-resolution mechanisms should be addressed by REDD policies, especially with regard to payment of royalties by conservation projects and logging companies. Otherwise, REDD projects will attract resistance from local people for fear of being taken advantage of by carbon investors.

The strengths of the benefit-sharing process in Cameroon lie in the fact that the State plays a major role in negotiating with exploitation companies, and has all the means to ensure payment of agreed amounts. But in practice, the materialization of such initiatives has been weak.

However, weaknesses of the process include uneven distribution of benefits, and exclusion of the local population from negotiations. Local communities are usually dissatisfied with the amount awarded to them. Moreover, due to corruption, benefits scarcely ever reach the community. In developing benefit-sharing legislation for REDD, communities should be given the opportunity to outline their needs in terms of development and social amenities, especially with regards to REDD. Benefits should include training to provide forest dwellers with alternative means of making a living.

administration monitor forest exploitation using remote sensing and GIS, and intends to develop a cartographic and statistical database destined for forest resource users and managers.

7. A a

Under the REDD scheme in Cameroon, additionality requires activities claiming REDD credits to show that reduced deforestation rates would not have occurred in the absence of carbon finance. These activities include reduction of illegal logging, creation of more protected forest, elimination of “slash-and-burn” methods of farming (especially in forested zones), using alternative sources of fuel rather than fuel wood, and reducing incidences of forest fires.

Almost all the different types of forest have the potential for initiating a REDD scheme, particularly the Permanent Forest Domain, which is comprised of State and Council Forests. However, REDD schemes may also occur on Non-permanent Forest Domain, which is made up of communal forest,

The national government currently monitors and controls REDD projects through its Ministry of Forestry in conjunction with the World Resources Institute and Global Forest Watch. However, monitoring is

Case Study: Guyana

road running from Lethem to Georgetown into a highway. This would increase problems of illegal immigration from Brazil, risks associated with illegal mining and uncontrolled timber exploitation, and would result in increased emissions from growing levels of transportation. Any such upgrade would be subject to an EIA in which these potentially negative effects would need to be addressed. A recent study, "Climate Change and Biodiversity Mainstreaming through Avoided Deforestation – Guyana Case Study", funded by the Inter-American Development Bank, highlights the threats to forest from inadequate management.[89]

There are currently no REDD projects in Guyana. However, Guyana intends to enter the carbon market, and it plans to have two million hectares funded through a REDD mechanism by 2020. In the meantime, the Guyana Forestry Commission (GFC) is taking steps to reduce emissions by working with Amerindian Communities under a Community Forestry Programme (CFP). The CFP's objectives are to reduce emissions from slash-and-burn agriculture, and to improve timber harvesting by introducing techniques for improved governance and better harvesting methods. Some success under the CFP has been reported, with three communities adopting techniques for reduced-impact logging, harvest planning and forest inventories.[90]

2. E . L . a a P e F a

Guyana is currently developing a policy framework for REDD. To prepare for participation in the World Bank's Forest Carbon Partnership Facility's (FCPF) Readiness Mechanism, Guyana has developed an R-PIN and an R-PLAN. Both documents contain general statements of Government policies aimed at improving readiness for participation in REDD, some of which include using FCPF funding to continue the GFC's efforts to reduce emissions. The underlying aim of these documents is to improve governance, monitoring and enforcement, reporting and verification, and to develop a strategy to reduce deforestation and conserve forests through the GFC. The R-PLAN should also produce a reliable estimate of carbon stock that will form the basis of sustainable forestry and improved monitoring. Both the R-PIN and R-PLAN are in their early stages, and funding is expected to be provided shortly. The R-PLAN was revised as of 1 June 2009 and approved by the World Bank.[91]

The Low Carbon Development Strategy (LCDS) is Guyana's most important policy document on climate change and REDD.[92] The basis of the LCDS is that forest conservation which meets international standards should not come at the expense of Guyana's sovereignty, or of the rights of the Guyanese people. As such, conservation should be promoted through acceptable and agreed economic incentives. The LCDS sets out how Guyana "can work within the emerging international partnership to provide the world with a model for how immediate action can stimulate the creation of a low-deforestation, low-carbon, climate-resilient economy".[93] Guyana maintains the position that

the forestry sector should be included in the global carbon trading system or a series of linked regional trading systems in order to generate funds for avoided deforestation. Each rainforest country, including Guyana, would be granted Assigned Amount Units (AAU), which would be equivalent to tradable sovereign allowances to emit carbon dioxide. Furthermore, the AAUs would need to be assigned in phases in order to avoid flooding the market. Under the LCDS, the Government aims to obtain transitional payments until Guyana can participate fully in a REDD scheme.

Guyana does not have any specific legislation for REDD. Therefore, until such legislation is passed REDD must fit within the existing constitutional and statutory framework.

2.1 T C

Guyana's Constitution contains two provisions of particular relevance to REDD. Article 36 states that: "The well-being of the nation depends upon preserving clean air, fertile soils, pure water and the rich diversity of plants, animals and ecosystems". While this principle might not be legally enforceable, it does place some obligation on the Government to preserve Guyana's natural heritage, including its forests. Any REDD scheme should therefore be compatible with this principle, and should as REDD+ include the role of conservation, sustainable management of forests, and enhancement of forest carbon stocks, as elaborated under the Bali Action Plan.[94]

Part 2 of the Constitution sets out the fundamental rights and freedoms of the individual. Article 149J(2) articulates the duty of the State as follows:

The State shall protect the environment, for the benefit of present and future generations through reasonable legislative and other measures designed to –

a) Prevent pollution and environmental degradation;

b) Promote conservation;

c) Secure sustainable development and use of natural resources while promoting justifiable economic and social development.

Although this section is intended to protect fundamental rights and freedoms of citizens, it imposes a duty on the State to balance economic activity with the duty to protect the environment. As such, a REDD scheme should promote sustainable development in harmony with forest conservation objectives. Sustainable development has also been recognized as a principle of international law in various treaties[95] and by the International Court of Justice.[96] A necessary part of sustainable development is the concept of inter-generational equity and the responsibility to future generations. Therefore, international law would be a useful guide for the courts of Guyana in interpreting sustainable development under Article 149(J).

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94 UNFCCC. "Bali Action Plan". Decision UN Doc. FCCC/CP/2007/6/Add.1./CP

Furthermore, Article 142 of the Constitution protects interests in or rights over property. Under Article 142, *f* c rights held by Amerindian communities are treated as rights in the nature of property, and are also protected against a taking by the State. Therefore, any REDD scheme must not be set up in a way that diminishes these rights.

2.2 T 1953 F Ac a 2007 F B

forests over their conservation. Therefore, this provision should be repealed or it could undermine national policy to conserve the forests.

2.3 The Mining Act 1989

With the exception of the coastal plain, Guyana is divided into six mining districts. As a consequence, State forests are located within mining districts. The Guyana Geology and Mines Commission (GGMC) has jurisdiction over all minerals in Guyana[99] and is authorized to issue mining permits in any mining district of Guyana.

The GFC has no jurisdiction over minerals in these forests, and the *Forests Act* does not exempt State forests from mining activities. Section 12 of the *Forests Act* provides that a lease, licence or concession in State forests granted under the *Mining Act* shall be subject to the provisions of the *Forests Act* except where such lease, licence or concession contains any provision to the contrary. However, this section has very little effect since activities authorized under the *Mining Act* must by definition require the clearing of forest, without the permission of the GFC. The only restriction appears to be contained in Section 14 of the *Forests Act*, which states that sales of timber are subject to payment of a royalty. However, this provision does not even address the question of conservation of forests.

Although Clause 5(1) of the Forests Bill imposes a general prohibition on using, occupying or damaging State forests, it does not adequately address the problem of mining in State forests. Clause 5(2)(c) specifically a [illegible]

P d s) A 1986. Again, the GGMC merely has to consult the GFC, but the GFC has no power to regulate or control petroleum operations in State forests. As far as can be ascertained, there are currently no licences for petroleum operations in State forests. However, should any such licences ever be granted they would be inconsistent with the current proposals for REDD. Any proposed REDD scheme would probably require an amendment to the law to exclude mining and forestry from State forests.

2.4 F S a a

Not all of the forests located on State lands have been declared to be State forests. Those forests located on State lands which have not been declared to be State forests fall under the jurisdiction of the Guyana Lands and Surveys Commission (GLSC), which is responsible for all public lands.

The definition does not extend to minerals found within the forest. This perpetuates the conflicts with mining, as discussed above. Neither this definition nor the rest of the Forests Bill draws any distinction between carbon and the tree as the physical entity in which the carbon is stored.

Both the existing *F e Ac* and the Forests Bill define "forest products", although neither definition includes carbon. The Forests Bill defines forest products more broadly to include a much wider variety of other forest products such as derivatives from timber and plants, but it does not mention carbon specifically.[114] However, the Forests Bill allows the GFC to declare any other thing to be forest produce through public notice. Therefore, it is theoretically possible that carbon could be declared to be forest produce as it is a material asset. In any case all forest produce belongs to the State.[115] If carbon was declared to be a forest product, the concession holder would have to pay a royalty which should take into account the market value of the carbon.

It is doubtful whether the scope of the GFC's power extends to declaring an intangible financial interest such as carbon credits to be forest produce. Even so, the State would own all carbon credits in relation to State forests. Amerindians occupying or using State lands would not own any carbon credits as their rights are limited to traditional rights as defined in the *A e d a Ac* .

The State could transfer to another person (a corporation, an NGO, etc.) the right to sell the carbon. Such an arrangement would depend on whether the government considers this to be the best commercial arrangement and the one that is likely to raise the most revenue.

Guyana does not currently have any legislation which regulates the ownership of ecosystem services.[116] Applying general legal principles, the owner of the forests would probably be the owner of the ecosystem services.

3.1 A a

The situation is similar for Amerindian forest in that the ownership of carbon and carbon credits would follow the ownership of the land. Although the Forests Bill excludes Amerindian lands from the definition of private land, this is legally incorrect as the land is privately owned even though it is owned collectively. As owners of forests, Amerindian communities would probably also be the owners of the ecosystem services and be entitled to trade in carbon credits in their own right. In theory, the Village Council could transfer the right to sell carbon, provided that this was in the best interests of the community.

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114 The Forests Bill 2007 defines forest produce as: (a) timber, firewood, charcoal, heart of palm, bark, and extracts of bark; (b) latex, gums, resins, flowers, fruits, seeds, nuts, leaves, fibres, turpentine, spices, dye-stuffs, moulds, fungi, drugs, fodder and thatching material derived from trees or plants; (c) trees, plants (including bamboo and other grasses) and all parts and produce of trees and plants, regardless whether the trees or plants are dead or living; and (d) any other thing, after public consultation, that the Commission, by public notice, declares to be forest produce.

115 *Ib d.*, Clause 73.

116 It is worth noting that Guyana's territorial sea which functions as a carbon sink is owned by the State and Amerindian communities do not have any recognized rights over the sea other than their traditional collective rights to fishing and passage.

4. REDD b . a

In relation to State forests and the Kaieteur National Park, the State would be the seller of the carbon credits. In relation to Iwokrama, the Board of Trustees should have the power to deal with carbon because they already possess a mandate to demonstrate that tropical forests can maintain biological diversity while supporting economic activity. Furthermore, they have already entered into an agreement for ecosystem services with Canopy Capital.

The LCDS does not contain provision for involving community organizations or NGOs in the carbon markets. These organizations do not own any forests and cannot represent the State or private owners of forests. Local NGOs could be involved in providing on-the-ground monitoring services.[124] Although the traditional rights of Amerindian communities are protected in both the Kaieteur National Park and Iwokrama, this does not extend to the right to participate in a REDD scheme in either protected area. However, under the Iwokrama legislation, the Centre must ensure adequate consultation with and the involvement of the Amerindian community in the Centre's activities. Although somewhat vague, this provision could be the basis for some form of Amerindian involvement in REDD in Iwokrama.

As stated above, Amerindian communities who own land would, under normal operation of the law, own the carbon credits for the forests on their lands. As currently envisaged in the LCDS there would be no barriers to Amerindian communities taking part in REDD. However, Amerindian communities depend on their land for their physical and cultural survival, not merely as individuals but also as peoples. Therefore, the *A e d a* Act 2006 prohibits the Village Council and community from disposing of their lands since any disposal would undermine that survival.[125] As such, REDD could not involve any transfer of title or any property right. According to the IIED, Amerindian titles may be revoked in the public interest if Amerindians transfer rights to their titled lands or parts thereof.[126] This is incorrect – under the *A e d a A* 2006 the attempted disposition is void and the title is unaffected.

Although Amerindian communities are entitled to lease their lands, a lease would not be feasible since it is limited to ten per cent of the community's territory which would not be sufficient for REDD. Even if ten percent was considered sufficient as a pilot project, the lease has to be for productive use.[127] It is doubtful whether avoided deforestation would be considered to be productive use since productive use is generally regarded as using the land to produce something or harvesting material resources from the land, rather than conservation.

To be effective a REDD scheme would need to be developed in such a way that it did not amount legally to a disposal of any interest, right or title in the Amerindian lands. Amerindians are entitled to sell resources on their lands provided it does not affect their ownership of the land. A REDD scheme

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124 For example, the South Rupununi Conservation Society has been appointed by the Environmental Protection Agency as the lead organization to monitor the Red siskin, a very rare species of bird. Such work could easily be extended to monitoring the bird's forest habitat for REDD.

125 Amerindians who wish to have an individual rather than a collective title are free to apply for individual titles on the same basis as other Guyanese. Amerindian title protects the special situation and collective rights of the communities.

126 Cotula and Mayers, *a* note 25.

127 *A e d a A* , *a* note 27, Section 46.

could be implemented by having a commercial agreement between the Amerindian Village Council on the one hand, as the legal representative of the community trading the carbon credit, and on the other hand, the buyer who would be selected through normal commercial channels.

5. F a b a .

As REDD does not yet exist there is no benefit-sharing regime in place. Benefit sharing is to be addressed under the R-PLAN. Under the LCDS the revenue will accrue to the Government. The Government intends to create the Guyana Low-Carbon Finance Authority to collect, manage, and monitor forest payments.[128] A Low Carbon Strategy Project Management Office will also be established to drive key projects in cooperation with the Guyana Office for Investment, which is responsible for attracting investments to Guyana. The Government also proposes that in the long term the Guyana Low Carbon Finance Authority should interface with a new tropical forest funding agency to ensure appropriate fiduciary oversight of funds. The intention is to have full transparency on disbursements and use of funds within Guyana, with strict controls and external audits.

During the first phase in 2009, Guyana expects to raise funds to launch the LCDS and pay for a monitoring, reporting, and verification (MRV) system. Under Phase 2 (2010–2012), the Government hopes to obtain transitional funding starting at US$60million and increasing to US$230–350 million. This revenue is to be treated as part of the Government budget, and spent on projects such as infrastructure, hydro-power, agriculture and aquaculture. Norway is the only country listed as a funder, and the LCDS notes that this phase will require the participation of other global partners. On 25 September 2009, Guyana and the Inter-American Development Bank signed two agreements for funding of US$1.45 million to support the LCDS. The funding will be used to strengthen national institutional capacities for dealing with climate change as well as improving disaster risk and flood management.[129]

Under Phase 3 (2013–2020), the Government is depending on the expansion of the carbon compliance markets and the increased supply of REDD credits to generate payments of up to US$580 million. The LCDS notes that: “These payments will supplement, and hopefully ultimately replace, transitional payments”.[130] In this phase there are no provisions for benefit sharing but only for all revenues to be spent by the Government on infrastructure and economic development projects.

Phase 4 is intended to start in 2020 with a full-scale REDD mechanism funding all the costs of avoided deforestation. The Government will remain in control of all funds and the LCDS notes that there will need to be a balance between using the forest payments to enhance opportunities for those who live in forests and recognizing the rights of other Guyanese citizens including the urban poor.[131] Benefit sharing is therefore seen as nothing more than general benefits from projects which will be selected and developed by the Government. This is an unsatisfactory approach as the forests do not belong to the government but to the State which comprises the citizens of the country. In 2000 Guyana completed a highly participatory and successful national exercise, with broad-based political and

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civil involvement, to produce a National Development Strategy. In view of the significance of REDD, it would be appropriate to have a similar national process to reach a national consensus on how the revenue from REDD should be shared by the citizens of the country. There should also be national rather than international mechanisms by which Government is held accountable for expenditure.

Under the LCDS, the Government proposes that Amerindian communities who take part in REDD will receive their share of forest compensation payments. Some funds will be paid directly to the Amerindian communities, while the rest will be paid into an Amerindian Development Fund to be used for development programmes in Amerindian communities. This is intended to be similar to the Brazilian Amazon Fund. There would seem to be no good reason for Amerindian communities to agree that payments in respect of their forests should be paid to the Government. The situation in Brazil is very different as Amerindians in Brazil are not allowed to own land – the land is owned by the federal state and set aside as Indian reserves. As the landowners, Guyanese Amerindians should be entitled to have the payments for their forests made directly to them. It would be up to the Amerindian communities to retain professional experts to assist them in designing and implementing an acceptable REDD scheme.

6. I a , a e a a a

Guyana does not yet have legislation that requires the government to share information with its citizens. All proceedings of the National Assembly are public, but in practice it is difficult to obtain copies of parliamentary debates or other official documents.

In relation to REDD, however, the *E e a P e A* 1996 is one useful avenue for obtaining information and ensuring greater public participation. Section 17(2) provides that "Where any public authority adopts or alters any policy, programme or plan and such policy, programme, plan or alteration may significantly affect the environment the [Environmental Protection] Agency shall require the public authority to carry out an environmental impact assessment of such policy, programme, plan or alteration". Section 11 automatically requires an EIA for any project listed in the fourth schedule to the act, which includes: installations for hydro-electric power, roads, and construction of dams and other installations to hold or store liquid on a long-term basis. If the Environmental Protection Agency (EPA) decides for any reason that an EIA is not necessary, the EPA must publish its decision and any person who may be affected by the project is entitled to appeal against the decision to the Environmental Assessment Board.

Section 11 of the *E e a P e A* also provides for reasonable public access to information and public participation in the EIA. The developer is required to submit to the EPA a project summary with the site, design and size of the project, possible effects on the environment, duration of the project and a non-technical explanation of the project. The EPA in turn must publish a notice of the project in at least one daily newspaper and must make the project summary available to members of the public. This ensures that the public will be aware of any proposed project to be carried out with REDD funding. Members of the public have 28 days to write to the EPA setting out the matters which they want to be considered in the EIA. The EPA must take these submissions into

During the EIA, the developer must consult members of the public, interested bodies and organizations, and must provide copies of information at a reasonable cost. The Environmental Protection Act also specifies in detail the information that must be covered in the EIA including: the geographical area, land-use requirements, the impact on human beings, flora, fauna, habitats, soil, water, air, climatic factors, cultural heritage, landscape, ecological balance and ecosystems, pollution, and the duration of the project. The developer must publish a notice in a national newspaper informing the public when the EIA and the environmental impact statement were submitted to the EPA, and the EPA must make these documents publicly available at a reasonable cost.

The public therefore has access to all relevant information. There is a 60-day period during which the public can make further submissions to the EPA, and the EPA must take these submissions into account when deciding whether to approve the project. The EPA must then publish its decision and the grounds for its decision. Under Section 28, any person who is not satisfied with the EPA's decision can appeal to the Environmental Appeals Tribunal and from there to the High Court. The EIA process therefore offers members of the public some opportunity to review the LCDS and changes in policy as well as to influence the scope of projects to be funded under REDD.

Many projects proposed by a REDD scheme will likely be subject to an EIA. First, the LCDS, once finally adopted, will certainly have a significant impact on the environment and could be subject to public scrutiny and comment. Moreover, the government proposes to use revenue from avoided deforestation to fund hydropower, drainage and irrigation, roads, aquaculture, and agricultural expansion in non-forested areas. Under Section 11, these projects may be subject to an EIA, because they are all listed in the fourth schedule, even if the development is being carried out by the State or one of its agencies. Agriculture and aquaculture projects would also be caught by this provision since they are likely to be large-scale if initiated by the government using REDD funding. Lastly, any change to the GLSC's land-use plans for Guyana as a result of REDD could be subject to an EIA if the change may significantly affect the environment.[132]

There has been consultation on the R-PIN and R-PLAN with a variety of stakeholders, including Amerindian communities and the forestry sector. Furthermore, there are currently national consultations on the LCDS. The draft LCDS is publicly available, and everyone has the right to provide feedback. In addition, meetings have been held with the National Toshaos Council and Amerindian Communities. There is a national steering committee for consultations, which consists of the Minister of Amerindian Affairs, the Minister of Agriculture and representatives of Conservation International (Guyana), trade unions, women's affairs organizations, Amerindian NGOs, the GFC, and the GGMC. The external review for the R-PIN recommends that the National Toshaos Council and the Amerindian Peoples Association should be approached to ensure proper consultation with Amerindian communities. The National Toshaos Council, comprising all elected Amerindian leaders is in a good position to advise the government on how best to consult Amerindian communities. The recommendation to involve an NGO is however an unfortunate step backwards and undermines the authority of the Amerindian communities. The Amerindian communities have made it very clear that consultation must take place directly with them as historically there have been conflicts between the community position and the NGO stance. It is very difficult to consult each Amerindian community

132 *La d a d S e C* *A* , *a* note 17, Section 4.

from avoided deforestation as a part of conservation consistent with the Bali Action Plan.[138] The LCDS also takes the basic position that REDD must include avoided deforestation. The LCDS notes that there is a problem with leakage, and suggests that any REDD scheme should require permanent commitments to avoid rainforest nations from reversing their policies on protection.

The additionality requirement is problematic. Countries already engaging in forest conservation before REDD commences may be ineligible for funding because emissions reductions are already part of the BAU scenario. Furthermore, the additionality requirement can have the unintended consequence of reducing the protection of the forests in the short term. In Guyana, the requirement for additionality is almost certainly linked to the Government's delay in moving ahead with the creation of a national PA system. Under a REDD agreement, a national PA system would be a good mechanism for monitoring and verifying compliance with Guyana's obligations to conserve its forests.

8. C

Guyana is taking a lead in the debate on forest conservation and has demonstrated its willingness to conserve its forests, provided that the international community is willing to compensate Guyana

Case Study: Papua New Guinea

Marguerite Pettit*

1. Overview of REDD Papua New Guinea

Papua New Guinea (PNG) has been one of the more vocal countries in favour of including REDD in a post-Kyoto agreement. With help from the UN-REDD Programme and the International Forest Carbon Initiative, it is preparing for REDD domestically. REDD pilot projects have also received funding from Norway, Australia, and the EU.

The Office of Climate Change and Environmental Sustainability (OCCES), the entity in charge of administering REDD in PNG, has been involved in two pilot REDD projects – the April Salome, and the Kamula Doso. The April Salome project, located in East Sepik Province, comprises 521,000 hectares of virgin forest, and is home to 20,000 indigenous peoples.[142] The land is owned by approximately 160 families. The Kamula Doso project is located in Western province, and covers 800,000 hectares of virgin rainforest. Both projects have come under scrut

Nevertheless, there is an existing legal framework for forest and environment in PNG. The forestry sector is regulated under the *F e\ A&* 1991. It provides for the management, development, and protection of PNG's forest resources and environment. The Act is administered by the Forest Authority. The Forest Authority has power to prepare National Forest Plans (NFPs), negotiate Forest Management Agreements (FMAs) and timber permits, and enforce regulations over forest produce.

The Policy Framework refers to carbon ownership, stating that it will remain with the owner of the land, whereas “the development and sale of carbon stock will be the responsibility of the State”.[154]

If REDD legislation for issuing carbon concessions does end up looking similar to that for timber, it should deal with these negotiating deficiencies when it comes to carbon. As custodians of the forest, customary landowners should be consulted throughout the process, not just at the beginning when project proposals lack specific detail. Furthermore, they should have more say when it comes to negotiating royalties. Ultimately, REDD legislation should give strength to constitutional provisions which provide for customary land rights, rather than just provide another avenue for the government to make money by leasing its forests.

3.2 D

The current mechanism for settling disputes over customary land ownership is the *La d D e Se e e Ac* 1975. Dispute resolution facilitated by this Act is based on Melanesian culture and the "principle that a resolution by consensus is more permanent than one imposed by authority".[161] The Land Titles Commission, National Land Commission and Land Courts all facilitate dispute resolution.

Typically, a land dispute is first taken to a local mediator, normally a male (according to custom), who is greatly respected and who has the requisite customary knowledge of the rules and principles that apply to the dispute. If this fails, the disputing parties go to the Local Land Court, which can impose a settlement. The parties may then appeal the Local Land Court's decision to the Provincial Land Court; however, grounds for appeal are limited to "errors of jurisdiction, decisions made contrary to natural justice (procedural fairness),[162] and cases of manifest injustice".[163]

Section 4 allows the Head of State to settle the dispute if it has been determined irreconcilable, if it has resulted in a breach of the peace, if there is no possibility of the disputing parties reaching an agreement, or if it is in the national interest that the agreement be settled in some other manner.[164]

The current system for dispute resolution over existing title to land and associated remuneration suffers from a number of weaknesses. First, insufficient resources for staff and organizations facilitating dispute resolution prevent speedy resolution. This is compounded by local magisterial services giving preferences to criminal and civil cases over land disputes.[165] Furthermore, confusion between which institution should handle a particular dispute, and slow turnover rates, cause community groups to seek mediation from more than one institution. Costs associated with seeking formal resolution also prohibit poorer groups and women from seeking and resolving disputes.[166] Lastly, the large number of varying customs creates confusion in the courts, and results in some cases being thrown out because they are not recognized.

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161 *Ib d.*, p. 235.

162 New South Wales Department of Education and Training. (2008). "Procedural Fairness". ("Procedural fairness refers to a process that provides fairness to all parties. It includes the right to be heard, the right to be treated without bias, the right to be informed of allegations being made and to be provided with an opportunity to respond to them and the right to information regarding the status of the complaint.")

163 Australian Agency for International Development (AusAID). (2008b). *Ma La d W . V e : Ca e de c a a d a d de e e e Pac c*, p. 229. Canberra, Australia: AusAID.

164 *Ib d.*, p. 231. Section 4 allows the Head of State to settle the dispute if it has previously been irreconcilable, if it has resulted in a breach of the peace, if there is no possibility of the disputing parties reaching an agreement or it is in the national interest that the agreement be settle in some other manner.

165 *Ib d.*

166 Australian Agency for International Development (2008a), *a* note 12, p. 59.

5. F a b a .

PNG does not have a legal framework for benefit sharing under REDD. However, somewhat analogous benefit-sharing provisions exist under the *F e A* 1991 (hereafter called 'Forest Act '). Under Section 58, the FMA negotiated between customary landowners and the Forest Authority must specify monetary and other benefits they will receive as consideration for giving away rights. The Provincial Forest Management Committee oversees the distribution of benefits to communities from logging on customary land.[168] Neither the *F e A* nor its subsequent Regulations specify benefits to be received. However, both the *F e A* and *F e Re a* 1998 require project proposals to be developed by project proponents to include "analysis of projected cash flows and the anticipated net benefit to the resource owners and to the State", which is assessed by the Provincial Forest Management Committee.[169]

Due to the fact that no benefit-sharing arrangements have been mandated in PNG, a range of informal options have been circulating. So far, benefits from carbon sequestration agreements have been split by distributiJ07J0(peceiv7c5pl8pliiv7knaJ5f6cpa9l8pliiv)34]5enefits
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remainder.[182] Of these drivers, logging has gained the most attention, largely due to the poorly regulated nature of the industry and widespread claims of government corruption.[183]

The Government of PNG has not addressed additionality in the Framework Policy. Nevertheless, the *E e ı a C ı a a ı A* (ECA) 1978 makes it an offence for a person, his or her employee or agent to pollute water, the atmosphere or the land.[184] This law could be used to address leakage and enforce liability for leakage in the project area. The ECA does not include carbon as an atmospheric contaminant; however it does establish that pollution to the atmosphere will be considered to have occurred if a substance is detrimental to persons, flora, fauna, or property.[185]

Although carbon is not included as a detrimental substance in the ECA, its effect on climate change and the subsequent likely impacts on flora, fauna, and contagious diseases (impact on human health) provide room for statutory interpretation to include carbon as an atmospheric pollutant. It is likely that the introduction of REDD legislation and the necessary listing of carbon as a pollutant will see a liability mechanism, similar to the one in the ECA, introduced into REDD legislation.

Theoretically, because of the extent of commercial and illegal logging, demonstrating additionality under REDD should not be difficult. However breaches of the *F e ı A* are common. *T e F e ı A* and the *F e ı Re a* provide for enforcement action against violators. However, these laws are often not implemented. Therefore, timber companies often log additional areas outside their allotted permit and the FMA without scrutiny. This reduces the additionality potential, and if extensive enough will actually result in more carbon emissions. Logging restrictions must be enforced if REDD is going to have a significant effect on reducing emissions from reducing deforestation and degradation.

Furthermore, permit holders for REDD projects must not be allowed to get away with not paying sufficient royalties to customary owners. Otherwise, leakage is likely to occur.[186] If a permit holder can withhold distributing benefits to landowners, they may move outside the protected area to access the resources they need.

OCCES engagement with the issue of additionality is limited. A memo by its former Director refers to additionality to the extent that it must be addressed prior to certification under the Voluntary Carbon Standards.[187] A letter by the OCCES in support of the April Salome REDD project notes that the

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funding to build capacity, and to have certifiable credits recognized at an international level, it will need to address the issue of additionality directly.

8. C

The present state of forest governance in PNG suggests that REDD legislation must include measures to address its largest driver of deforestation, illegal logging. The government needs to expand on additionality, and develop some sort of liability mechanism with teeth to discourage violations.

Furthermore, PNG should address uncertainties in customary land tenure. The law should be changed to decrease the participation disparity between customary landowners, the government, and private entities when it comes to forest resource use. This will better ensure success of REDD, because it will foster more participation among the people who are in the best position to act as custodians over the conservation of forests. PNG's current mechanism for dispute resolution also lacks capacity to deal with issues that will arise with disputes over land and benefit-sharing agreements. Furthermore, increasing access to information on REDD projects will increase awareness among local communities about the importance of REDD, and the important role it has to play.

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