

Legal options for an international agreement on Reducing Emissions from Deforestation and Degradation (REDD)

Introduction

REDD may have severe implications for indigenous peoples and local communities whose livelihoods depend on forests. It is crucial that REDD funds are not purely focused on reducing emissions but also contribute to the improvement of forest governance and the achievement of the Millennium Development Goals.

This briefing note highlights some findings from recent analysis by FIELD:

Barriers to implementation

Basic laws on forest conservation, land use and granting of concessions exist in all major rainforest nations, but quality, harmonisation and relevance vary significantly. In federal systems the situation is complicated by different, sometimes conflicting layers of law. Whilst there are still large gaps in the law of the Democratic Republic of Congo (DRC), there is already a relatively comprehensive set of nature conservation and forestry legislation in Brazil that could provide an entry point for REDD.

Uncertainties about land ownership and tenure rights remain a common problem, and the relationship between customary titles to land and modern state law is problematic in most jurisdictions. Legal safeguards to protect the interests of indigenous peoples are emerging in for example Brazil, but they are much weaker in Indonesia, and there is virtually no protection in the DRC. Some countries face mainly an enforcement problem, in others awareness and compliance with the law is weak amongst the general public and amongst government officials. In others that have suffered from years of conflict there is hardly an operational framework of law and institutions.

Rights of forest dependent communities

Legal protection of the human and customary rights of forest dependent people is poorly developed. In most jurisdictions their titles to land are either ignored, insufficiently recognised or subject to violations. REDD activities risk increasing the problems. Indigenous peoples' organisations have repeatedly expressed their concerns:

*"...the current framework for REDD is not supported by most indigenous peoples.....According to the right to self-determination and the principle of free, prior and informed consent, indigenous peoples must not be excluded, and should be centrally involved and benefit from forest policies and programs at all levels."*¹

Institutional structures for fair allocation of financial benefits derived from REDD to local communities is not in place in any rainforest nation. Top-down government interventions in local systems of land tenure and resources management tend to marginalise forest dependent

¹ Statement by Victoria Tauli-Corpuz, Chair UNPFII, 23 May 2008, Ninth Conference of the Parties to the Convention on Biological Diversity, Bonn, Germany.

communities and have a detrimental effect on their livelihoods. The capacity of the judiciary and civil society to monitor implementation of rights is still weak.

A badly designed REDD mechanism could reinforce the perception of forests as valuable only or mainly in terms of the carbon that they contain, rather than taking into account other ecosystem services, livelihood values, biodiversity and spiritual values. A well designed REDD mechanism could strengthen the rights of forest dependent communities, including indigenous peoples, for example if it provided incentives for strengthening land tenure.

National implementation

The transformation of international agreements into domestic legal frameworks takes place through a variety of normative approaches. Depending on a country's readiness and willingness, its existing legal frameworks and traditions, this usually includes law reform, institution building, state enforcement and engagement of private actors. Regulatory efforts may involve many stakeholders, including state authorities, political parties, commercial interests and civil society organisations, and may focus simultaneously on different subject areas of the law, such as penal, tax, environment and land law. A REDD mechanism must be capable of interacting with a variety of domestic legal orders. A robust framework is essential to ensure investor confidence, credible certification and fair remuneration for ecosystem services. A system perceived as channelling funds to national elites and 'back pockets' will not be able to maintain credibility.

Especially in jurisdictions where ownership of the land is vested in the state the rights of forest dependent communities need to be strengthened. A REDD mechanism could contribute through for example codifying rights of forest dependent communities. An appropriate balance of financial incentives and regulatory approaches will differ between countries and regions. There is no 'one size fits all' solution.

Public engagement in consultation and implementation

An international agreement on REDD needs to be supported by a participatory national processes. Free, prior and informed consent and the UN Declaration on the Rights of Indigenous Peoples are important components. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters can serve as a reference for implementation.²

Good natural resources management depends on participatory, transparent, open and accountable governance. Legal frameworks become more sensitive to poor and marginalised communities if the government ensures their meaningful involvement in decision making. Where legal systems and enforcement mechanisms are weak public support and participation in the law-making process are particularly important. Law developed and implemented without the participation of those primarily affected are likely to be ineffective and possibly harmful.

A participatory national process for developing REDD will require time and substantive financial and technical support. Rather than 'establishing' a new mechanism, an international agreement on REDD should reflect the need for a gradual development in collaboration with all stakeholders concerned.

An international REDD agreement

An international REDD agreement will need to allow 'learning by doing' over time and it will need to make provision for review and adjustment. It will need to encourage participation from as many developing countries as possible to minimise the risk of international leakage and take into account widely differing national circumstances. The biggest challenge for the financial

² For more information see <http://www.unece.org/env/pp/> .

mechanism of a REDD agreement will be the allocation of financial benefits at national and sub-national levels.

The institutional structure of a REDD agreement should be as simple as possible. It is likely to make sense to use existing UNFCCC bodies where possible. An agreement will need a governing body, such as a Meeting of the Parties. It may need an executive body of some kind, although the institutional arrangements for the financial mechanism – one of the main building blocks of an agreement - may make an additional body superfluous.

Protecting rights

One approach to ensuring that the rights of forest dependent communities are respected could be a **set of principles** to guide REDD activities. These could be incorporated in an article or articles of a REDD agreement or could be set out in an annex, perhaps in the form of a '**charter**'. The principles could be accompanied by a **complaints mechanism**. Such a mechanism could form part of the REDD agreement's compliance system or be a separate arrangement. The REDD compliance system is likely to be concerned mainly with emission reductions, even if social and environmental impacts were built into the monitoring and verification system. A complaint mechanism linked to a set of principles or 'charter' would be concerned with issues of a different nature, although there might be a link with the compliance system, for example through penalties that involved the reduction or discounting of REDD credits.

A REDD agreement could also refer explicitly to the Convention on Biological Diversity and the UN Declaration on the Rights of Indigenous Peoples.

Examples of possible elements and text options for an international REDD agreement

A REDD agreement could take several forms. For example, amendments to the Kyoto Protocol to incorporate reduction targets for the second commitment period could be combined with an agreement (e.g. a protocol) or decisions under the UNFCCC incorporating REDD elements. An agreement could include provisions such as the examples below. One additional element that may be worth exploring is an **international forum**, composed of representatives of national fora, which could have an advisory role.

National implementation

Provisions on national implementation in a REDD agreement could include:

- *Each Party shall establish transparent, effective and accountable national systems for the compensation of eligible activities. This shall include the designation of an independent financial body, which will supervise transactions under the national system.*
- *Each Party shall determine criteria for eligible activities and for designation of recipients of compensation.*
- *Each Party shall seek to clarify and strengthen legal and other systems for land ownership, land tenure and access to land in connection with eligible activities.*
- *Each Party shall provide for a clear and effective legal and administrative framework governing the contractual arrangements relating to eligible activities.*
- *Each Party shall establish or strengthen effective grievance and redress mechanisms for the mitigation of conflicts resulting from eligible activities.*
- *Each Party shall take into account extra sectoral drivers of deforestation and forest degradation and shall seek to address such drivers.*

Dissemination of information

Awareness and access to information are a critical part of an agreement, as is participation:

- *Parties shall ensure that the provisions of this agreement and related measures already in place are brought to the attention of persons concerned by all appropriate means within their territory.*

Participation

- *Parties shall, in accordance with their national traditions and practice, take adequate measures to ensure the involvement of relevant stakeholders in the implementation of the mechanism at the national and local levels, taking into account the need for free, prior and informed consent.*

National fora

- *Parties shall facilitate the establishment or designation of a national forum for indigenous and local communities concerned with eligible activities for the purpose of advising the Party on national implementation. Parties shall ensure that:*
 - a) the national forum is informed and consulted on all national implementation in good time;*
 - b) recommendations made by the national forum are taken into account by the national legislative and executive organs;*

Funding mechanism

If Parties decide to establish a REDD funding mechanism, provisions could include the following:

- *There is hereby established a funding mechanism dedicated to reducing emissions from deforestation and forest degradation and facilitating the sustainable development of eligible Parties and indigenous and local communities in those Parties.*
- *The funding mechanism shall function under the authority and guidance of the Conference of the Parties acting as the Meeting of the Parties.*
- *The funding mechanism shall assist eligible Parties in the development of a national implementation infrastructure and implementation of nationally appropriate mitigation actions.*

Reporting

Reporting and effective monitoring and verification will be one of the critical building blocks of a REDD agreement. National reporting will need to address changes in deforestation rates and provide an accurate picture of the success or failure of REDD activities. In addition Parties should be required to demonstrate how they have met their implementation obligations (above) and for example engaged civil society and indigenous and local communities, strengthened local rights and raised awareness.

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