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# Comparative study of carbon rights in the context of jurisdictional REDD+

Case studies from Africa, Asia and the Pacific,  
and Latin America and the Caribbean



# **Comparative study of carbon rights in the context of jurisdictional REDD+**

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and Latin America and the Caribbean**

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# Abbreviations

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<b>ART</b>	Architecture for REDD+ Transactions
<b>COP</b>	Conference of the Parties
<b>ER</b>	emission reduction
<b>ERPA</b>	Emission Reductions Payment Agreement
<b>FCPF</b>	Forest Carbon Partnership Facility
<b>FAO</b>	Food and Agriculture Organization of the United Nations
<b>FPIC</b>	free, prior and informed consent
<b>GCF</b>	Green Climate Fund
<b>GCF REDD+ RBP</b>	Green Climate Fund's pilot programme for REDD+ results-based payment
<b>GHG</b>	greenhouse gas
<b>JNR</b>	VCS Jurisdictional and Nested REDD+
<b>MRV</b>	measurement, reporting and verification
<b>NDCs</b>	nationally determined contributions
<b>PA</b>	Paris Agreement
<b>PES</b>	payment for ecosystem services
<b>REDD+</b>	Reducing Emissions from Deforestation and Forest Degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries
<b>RBP</b>	results-based payment
<b>TREES</b>	The REDD+ Environmental Excellence Standard
<b>UNFCCC</b>	United Nations Framework Convention on Climate Change
<b>VCM</b>	voluntary carbon market
<b>VCS</b>	Verified Carbon Standard
<b>VGGT</b>	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
<b>WFR</b>	Warsaw Framework for REDD+

# Glossary

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- ART-TREES** Architecture for REDD+ Transactions - The REDD+ Environmental Excellence Standard, or ART-TREES, is one of the four main carbon standards presented in this document. This voluntary standard was created by Winrock International to standardize, safeguard and verify REDD+ emission reductions.
- Benefit-sharing** Benefit-sharing refers to the distribution of both monetary and non-monetary benefits (e.g. capacity building, infrastructure, ecosystem services) generated through the implementation of REDD+. It implies establishing a process to channel such benefits to eligible stakeholders. Entitlements to REDD+ benefits are to be considered separately from emission reduction titles.
- Carbon credit** A carbon credit is a certified greenhouse gas unit in a national or international carbon registry that can be traded or used for offsetting emissions. It is identifiable through a serial number, and usually corresponds to one tonne of carbon dioxide equivalent.
- Emission reduction** An intangible asset that has been fully measured, reported, verified and registered in the context of national or jurisdictional REDD+ programmes.
- Emission Reductions Payment Agreement (ERPA)** The Emission Reductions Payment Agreement between the trustee and the program entity providing for the sale and payment for emission reductions in accordance with the general conditions, and all schedules and agreements supplemental to the ERPA.
- Emission Reductions Program Document (ERPD)** The Emissions Reduction Program Document describes the relevant REDD+ components that need to be in place at the national/jurisdictional level, and how they will operate when accessing the Forest Carbon Partnership Facility Carbon Fund's results-based payments.
- Forest Carbon Partnership Facility (FCPF)** The Forest Carbon Partnership Facility is a global partnership of governments, businesses, civil society organizations, and Indigenous Peoples focused on reducing emissions from deforestation and forest degradation, forest carbon stock conservation, the sustainable management of forests, and the enhancement of forest carbon stocks. See <https://www.forestcarbonpartnership.org/>
- Free, prior and informed consent (FPIC)** Free, prior and informed consent is a specific right granted to Indigenous Peoples recognized in the UN Declaration on the Rights of Indigenous Peoples, which aligns with their universal right to self-determination.
- GCF REDD+ RBPs** The Green Climate Fund (GCF) offers a pilot programme for REDD+ results-based payments (RBPs), providing an opportunity to claim historic emission reductions achieved against the forest reference level. Countries that have generated REDD+ results from the end of 2013 until the end of 2018 are eligible to apply.
- Gender equality** A state in which women and men enjoy equal rights, opportunities and entitlements in civil and political life. "Equality" does not mean that women and men are the same; rather, it refers to how the rights, responsibilities and opportunities for women and men do not depend on whether they are born female or male.

<b>Methodological Framework of the FCPF</b>	Published by the Forest Carbon Partnership Facility (FCPF) and used as its set of standards, these guidelines are a set of 37 criteria and related indicators (C&I), associated with five major aspects of emission reductions programmes: level of ambition; carbon accounting; safeguards; sustainable programme design and implementation; and emission reduction programme transactions. See <a href="https://www.forestcarbonpartnership.org/carbon-fund-methodological-framework">https://www.forestcarbonpartnership.org/carbon-fund-methodological-framework</a>
<b>Nationally determined contributions (NDCs)</b>	Nationally determined contributions are non-binding commitments of each nation to reduce greenhouse gas emissions under the Paris Agreement.
<b>Nesting</b>	Refers to a set of provisions aimed to ensure that project-level accounting is aligned with jurisdictional (e.g. national) strategies and methods. It includes criteria and requirements to ensure the alignment of baselines, monitored data, emission reduction and/or emission removal estimates, and carbon accounting across levels (i.e. projects, subnational programs and national programs).
<b>Paris Agreement</b>	The Paris Agreement is a multilateral environmental agreement on climate change. It was adopted in 2015 by 196 parties at the UN Climate Change Conference (COP21) in Paris, and entered into force on 4 November 2016. REDD+ is recognized in Article 5 of the Paris Agreement, where parties reiterated the encouragement to implement REDD+ activities.
<b>REDD+</b>	REDD+ is a framework created by the UNFCCC Conference of the Parties to guide activities in the forest sector, specifically Reducing Emissions from Deforestation and Forest Degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries. See <a href="https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd#:~:text=REDD%2B%20is%20a%20framework%20created,carbon%20stocks%20in%20developing%20countries">https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd#:~:text=REDD%2B%20is%20a%20framework%20created,carbon%20stocks%20in%20developing%20countries</a> .
<b>Results-based payments (RBPs)</b>	Results-based payments generated by the implementation of REDD+ (Phase 3). Results-based payments are the final phase in REDD+ that provides financial incentives to developing countries that have proved through rigorous UN-backed technical evaluation they have halted deforestation during a period of time.
<b>Rights to carbon benefits</b>	The right to benefit from sequestered carbon and/or reduced greenhouse gas emissions.
<b>Title to emission reductions</b>	The full legal and beneficial title and exclusive right to emission reductions (FCPF).
<b>Voluntary carbon market (VCM)</b>	It was formed with the aim of driving finance to activities that reduce greenhouse gas emissions. Over time, the VCM has evolved and matured into a robust and effective means to tackle climate change by driving resources to projects which deliver independently verified and additional emission reductions on a global scale.
<b>Warsaw Framework for REDD+ (WFR)</b>	Adopted in 2013 at the UNFCCC COP19 in Warsaw, it provides methodological and financing guidance for the implementation of REDD+ activities.
<b>VGGT</b>	Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security
<b>WFR</b>	Warsaw Framework for REDD+

# Executive summary

Recognizing the invaluable role of forests in the fight against climate change, countries and the international community have established a framework known as Reducing Emissions from Deforestation and Forest Degradation, and the role of conservation, sustainable forest management, and the enhancement of forest carbon stocks in developing countries (REDD+). This framework aims to encourage countries to reduce deforestation and degradation by offering financial rewards or results-based payments (RBPs) for verified emission reductions, all at the same time promoting sustainable development.

While the existence of various international RBPs and carbon market schemes valuing emission reductions (ERs) presents multiple opportunities for countries participating in REDD+, there is a critical need to clarify ERs rights and determine who benefits from REDD+ results.

This study offers a comprehensive comparative analysis that focuses on the nature and allocation of ER rights, as well as the legal entitlements associated with REDD+ outcomes. To conduct this study, legislation from more than twenty countries across Africa, Asia and the Pacific, and Latin America was reviewed between November 2021 and June 2023.

In practical terms, ER rights may imply “the right to benefit from the revenues generated by sequestered carbon and/or reduced greenhouse gas emissions resulting from forest activities.” Typically, these rights are interconnected with forest tenure rights, which encompass ownership or user rights, control over the land and trees, or involvement in activities generating ERs.

In the context of national or jurisdictional REDD+ initiatives, ER rights have also been addressed through REDD+ benefit-sharing agreements, aimed at ensuring the cooperation of affected and relevant stakeholders contributing to REDD+ implementation. This involves the crucial step of securing free, prior, and informed consent (FPIC) and establishing contractual arrangements with tenure right holders and/or community forestry groups as essential components of ERs transactions. However, these processes tend to be complex and costly when implemented on a large scale.

Governments facing the challenge of meeting national forest and climate goals, within the framework of their nationally determined contributions (NDCs), must also recognize the rights of communities, private landowners, and others managing or using forests. In general, the rights associated with ERs require clearer definition, better understanding, and equitable distribution. However, many countries’ legal systems have yet to specifically address these rights.

In some countries, the implementation of legislation has been postponed as they awaited further developments related to Article 6 of the Paris Agreement. In contrast, other nations have adopted secondary legislation, such as decrees, to oversee initiatives focused on jurisdictional emission reductions (ERs), including in the context of the World Bank Forest Carbon Partnership Facility (FCPF) negotiations. Concurrently, several countries have recently established regulatory frameworks to govern the transfer of ERs units through a national registry. This legislation often requires prior government authorization to maintain transparency and prevent instances of double counting.

In a broader context, owning intangible resources like ERs poses both conceptual and practical challenges for traditional property law systems in many countries. Identifying land ownership, is often insufficient to establish ownership over ERs within a specific forest, particularly if land rights are not secured. For instance, in the context of local REDD+ projects developed with individual landowners or communities, this link might be more straightforward. However, with REDD+ programmes implemented on national or subnational scales, ERs can encompass broad areas, typically involving multiple landowners, possessors, users, and other stakeholders.

To prevent situations where potential ambiguities could be exploited at the expense of local benefits, it is essential to clearly define ERs rights and benefit structures for distributing benefits in the implementation of REDD+. Achieving this clarity should be facilitated through participatory processes and the establishment of appropriate legal and operational frameworks.

The study delves into the progress made by various countries as they pursue legal solutions and identifies critical issues from these country cases, shedding light on the associated challenges and current considerations regarding the topic.

Depending on the specific context of each country and in alignment with international ER legal requirements, a differentiation in legal conceptualization is becoming evident among nations. Country legislation may encompass:

- the right to claim or receive payments derived from REDD+ RBPs;
- the legal capacity to administer these payments;
- the rights to transfer benefits resulting from such RBPs or originating from forest carbon trading;
- ER rights or property rights over certified ERs.

These legal provisions are crucial for enhancing

clarity regarding the legal implications of ERs and for streamlining access to forest climate finance under various modalities.

To ensure clarity and compliance, the legal framework should clearly define the following aspects:

- the individuals or entities entitled to claim ownership of ERs;
- the conditions governing the transfer of ER rights;
- strategies for addressing the risks associated with double counting and promoting environmental integrity, two guiding principles established in the modalities, procedures, and guidelines for the transparency framework of the Paris Agreement (Article 13).

In cases where tenure rights are uncertain or when customary land rights allocation lacks formal legal recognition, criteria for assigning ERs rights should not be solely linked to land ownership. Instead, it would be effective to allocate rights to those who have contributed to generating ERs through benefit-sharing arrangements.

This approach may encompass women, youth, or concessionaires, offering more practical solutions for transferring ERs rights to the programme proponent (jurisdiction/state). However, their consent remains fundamental to ensure their fair engagement in carbon trading arrangements.

In situations where the state primarily owns forest resources but allocates them to organizations, individuals, and communities for long-term forest management purposes, collaborative decision-making becomes essential to ensure that the rights of all relevant stakeholders, including women and marginalized groups, are respected.

Moreover, it's essential to maintain consistency between the legal requirements at the REDD+ project level and those at the jurisdictional level. This should take into account the challenges associated with different geographical scales



and the varying levels of capacity within the country, often constrained at the local level. To effectively implement these actions, building both institutional and human capacities is a prerequisite.

Simultaneously, it is vital to conduct participatory and inclusive processes involving key actors to make well-informed decisions regarding ER rights and the equitable allocation of benefits.







# Introduction

More than ten years ago, when carbon sequestration and storage in forests started to be considered an asset in the context of REDD+, the following question started to be asked: Who owns forest carbon?

Developments under the United Nations Framework Convention on Climate Change (UNFCCC) challenged decision-makers and legislators to establish how climate change mitigation initiatives should address forest tenure issues in order to foresee, plan, and distribute risks and benefits derived from carbon sequestration activities.

Literature and academia have considered the subject at length in order to define and conceptualize this new form of property rights – the first publications and meetings among lawyers to try to settle the issue date back to the late-1990s and early-2000s (Streck, 2020). Despite the various studies and efforts to conceptualize carbon rights, there is still a gap in the “stocktaking” of how countries are progressing in this domain. As such, carbon/ERs rights have been defined in different ways, assuming various shapes and forms.

Yet, in many forest countries, customary or traditional legal systems remain relevant for the interpretation of land and ERs titles. In fact, few countries have adopted specific legislation clarifying ownership rights over carbon rights/ERs, with Australia and New Zealand being the originators in the context of common law countries (Felicani-Robles, 2012). On the other hand, contractual arrangements have been considered an alternative at project-level for communities, private landowners and companies in order to define carbon-related rights and responsibilities.

More recently, as tropical forest countries

are advancing in implementing REDD+ on a national scale, accessing REDD+ RBPs and trading jurisdictional carbon credits require national designated entities to comply with legal requirements in order to avoid double counting and potential claims by third parties on the amount of ERs internationally transacted. It is also essential to allocate benefits derived from REDD+ to all relevant stakeholders that have contributed to ERs – beyond their land titles – emphasizing forest-dependent communities and vulnerable groups.

The latest developments under Article 6 of the Paris Agreement (PA), and NDC commitments requiring corresponding adjustments for authorized carbon credits, might have an impact on the implementation of national, jurisdictional and project-level carbon projects under the Paris Agreement and voluntary carbon market (VCM). Additionally, the context of the national law, with all its particularities, must be recognized and forest countries should be encouraged to improve it when necessary.

The report has three main objectives:

- I. to describe the requirements related to ERs rights under different international standards;
- II. to present the state of REDD+ countries' legislation and existing arrangements related to carbon/ERs rights centred on forest tenure rights, payment for ecosystem services (PES) legislation, and other national laws relevant to clarifying and allocating forest carbon rights; and
- III. to identify and report on challenges and opportunities as countries continue to progress in finding legal solutions to clarifying ERs rights and the allocation of benefits.

The study is based on experience gained through the Food and Agriculture Organization of the United Nations (FAO) UN-REDD technical assistance provided to countries interested in unlocking climate finance through public or private sources and the VCM, as well as through broader FAO work in supporting countries accessing REDD+ RBPs and results-based finance under the Green Climate Fund (GCF) or the FCPF Carbon Fund. It also capitalizes on collaborative work developed over the years by the UN-REDD Programme, the FAO Development Law Service and other partners, such as the law firm, White & Case LLP, and Climate Focus.

While this study aims to describe the status quo of REDD+ countries' legislation related to ERs rights in light of relevant international schemes and standards, it also provides insights as countries progress in finding legal solutions in this area (Sections 3 and 4). Key issues emerging from country cases are also identified at the beginning with the aim of highlighting associated challenges and ongoing thoughts on the subject (Section 2).

Overall, the legislation of more than twenty countries from Africa, Asia and the Pacific, and Latin America and the Caribbean has been assessed. The review took into consideration: forest tenure aspects; key national laws related to forests and PES; and regulations and institutions relevant to clarify and allocate carbon/ERs rights. Key points summarizing relevant messages are included at the end of each section.

In order to facilitate the comparison between country legislation and key findings, the study is organized into three subsections presenting country cases from three regions: Africa, Asia and the Pacific, Latin America and the Caribbean.

Finally, the study's conclusion identifies potential legal/institutional arrangements that could facilitate tackling constraints associated with ERs rights, and proposes legal options based on country experiences (5. Conclusion).

# International context

## Relevant legally-binding and soft law instruments

The 16th session of the Conference of the Parties (COP16) to the **United Nations Framework Convention on Climate Change (UNFCCC)**<sup>1</sup> in Cancun:

*encouraged developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party, and in accordance with their respective capabilities and national circumstances: (a) Reducing emissions from deforestation; (b) Reducing emissions from forest degradation; (c) Conservation of forest carbon stocks; (d) Sustainable management of forests; and (e) Enhancement of forest carbon stocks (UNFCCC, 2011, p. 12).*

These activities together stand for REDD+,<sup>2</sup> which is intended to incentivize forest countries to reduce human pressure on forests that result in greenhouse gas (GHG) emissions and to increase carbon stocks in forests.

In the context of the UNFCCC, further progress has been made at COP16, COP17, COP18 and COP20, among others, through the adoption of decisions that address additional relevant issues related

to REDD+. These include safeguard measures to ensure environmental and social protection to key stakeholders, which are the building blocks and processes for countries to develop a REDD+ programme and scope of REDD+ activities. COP19 combined the key operational elements of REDD+ in the Warsaw Framework for REDD+ (WFR) by adopting five decisions on operational issues and two on finance and coordination.

Overall, the REDD+ WFR enables the operationalization of REDD+ RBPs, which implies the development of the “four elements”: forest reference emissions levels (FRELs), a safeguards information system, a national forest monitoring system (NFMS), and a REDD+ national strategy or action.

The **Paris Agreement** (2015) reiterates and emphasizes the relevance of forests in combating climate change.<sup>3</sup> In particular, Article 5 invites countries to take action to conserve and enhance sinks and reservoirs of GHGs, including forests. The article also encourages actions to implement and support these processes, including through RBPs, the existing WFR adopted in COP19, and alternative policy approaches such as sustainable management of forests.

Six years after the Paris Agreement, the rulebook for implementing Article 6 has been adopted in Glasgow (COP26). Article 6 is central to the agreement as it guides how countries will participate under cooperative approaches and under the mechanism to contribute to the mitigation of greenhouse gas emissions and

<sup>1</sup> More information about the 16th session of the Conference of the Parties (COP16) to the UNFCCC can be found here: <https://unfccc.int/process-and-meetings/the-convention/what-is-the-united-nations-framework-convention-on-climate-change>

<sup>2</sup> More information about REDD+ can be found here: <https://unfccc.int/topics/land-use/workstreams/redd/what-is-redd#:~:text=REDD%2B%20is%20a%20framework%20created,carbon%20stocks%20in%20developing%20countries>

<sup>3</sup> More information about the Paris Agreement can be found here: <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>



## BOX 1 Work programme on results-based finance from the Warsaw Framework for REDD+

A work programme on results-based finance was launched in 2013 (UNFCCC, COP 19) and concluded as part of the Warsaw Framework for REDD+ (WFR).

Among its recommendations, the work programme encouraged financing entities, including the Green Climate Fund (GCF), to channel adequate and predictable results-based finance in a fair and balanced manner. It also recognized the importance of incentivizing non-carbon benefits and established an information hub on the REDD+ Web Platform (<https://redd.unfccc.int/>), to publish information on results and corresponding results-based payments (RBPs).

Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Indonesia and Paraguay accessed REDD+ RBPs in the context of the GCF pilot programme, with the Food and Agriculture Organization of the United Nations (FAO), United Nations Development Programme (UNDP), and United Nations Environment Programme (UNEP) as Accredited Entities (AEs) – depending on the country.

**Note:** More information about GCF-funded REDD+ activities can be found at <https://www.greenclimate.fund/redd#projects>

**Source:** Author's own elaboration.

support sustainable development leading to more ambitious NDCs.

Overall, nearly 100 countries referenced reducing emissions from the land sector in their NDCs,<sup>4</sup> with a considerable number of these specifically committing to either financing or implementing REDD+.<sup>5</sup>

Countries receiving REDD+ RBPs are requested to develop fair and equitable benefit-sharing plans in order to distribute monetary and non-monetary benefits derived from REDD+ implementation. All relevant stakeholders having contributed to such efforts, as well as the full and effective participation of Indigenous Peoples, local communities and vulnerable groups including women, should be considered in the development and implementation of such plans.

The guidance for countries to implement fair and equitable benefit-sharing can be inferred from the Cancun Safeguards, which require developing countries to ensure “the full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities”. REDD+ actions should “enhance other social and environmental benefits [taking into account the need for sustainable livelihoods of indigenous peoples and local communities

and their interdependence on forests in most countries ...]”.<sup>6</sup> The importance of ensuring the rights of women was not specifically articulated in the Cancun Safeguards; however, since then, more attention has been brought to gender issues and the need to take deliberate actions to guarantee the role and benefits of women in the framework of REDD+.<sup>7</sup>

However, the existence of different international initiatives that value ERs poses some challenges for countries participating in REDD+, as well as for communities and private actors involved in VCM initiatives. Specifically, it has become increasingly important to define carbon rights or ERs titles, and clarify who benefits from REDD+ results, in line with other conditions for accessing RBPs.

In this regard, the governance of tenure is considered to be a crucial element in determining if and how people, communities and others are able to acquire rights, as well as associated duties to use and control land and forests. Adopted by FAO in 2012, the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)* serve as a reference and present principles and internationally accepted standards to promote the realization of the

<sup>4</sup> More information about NDCs can be found here: <https://unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs>

<sup>5</sup> At the time of writing this paper, there were 54 REDD+ countries.

<sup>6</sup> Specifically, Paragraph 70 and Appendix 1 of UNFCCC Decision No. 1/CP.16.

<sup>7</sup> More information can be found at: <https://unfccc.int/topics/gender/workstreams/the-enhanced-lima-work-programme-on-gender>

In addition to mitigating climate change, REDD+, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+) can support livelihoods, maintain vital ecosystem services and preserve globally significant biodiversity. If REDD+ is well designed and implemented, it would have unprecedented benefits for forest biodiversity.

The 9th session of the Conference of the Parties to the United Nations Framework Convention on Climate Change (COP9) to the Convention on Biological Diversity (CBD) called on parties, other governments, and international organizations to ensure that REDD+ efforts:

1. do not counter the objectives of the CBD and the implementation of the programme of work on forest biodiversity;
2. provide benefits for forest biodiversity, as well as Indigenous Peoples and local communities (when possible);
3. involve biodiversity experts, including holders of traditional forest-related knowledge; and
4. respect the rights of Indigenous Peoples and local communities, in accordance with national laws and applicable international obligations (Decision No. IX/5).

Those indications are very relevant in order to build the linkages between REDD+ implementation and the correct identification of results-based payment (RBP) beneficiaries, valuing the role of Indigenous Peoples and local communities, and of the traditional knowledge in generating REDD+ biodiversity benefits.

**Note:** More information concerning CBD-REDD+ links can be found at <https://www.cbd.int/forest/redd-plus>

**Source:** Author's own elaboration.

responsible governance of tenure.<sup>8</sup> They provide a framework that states can use when developing their own strategies, policies, legislation, programmes and activities. As they relate to forestry, the VGGT also focus on the need to recognize and secure tenure rights of forest-dependent people, including Indigenous Peoples, which is key for securing their livelihoods and ensuring that other interests or assets linked to the land, such as carbon, are clearly defined. The VGGT also emphasize the importance of promoting gender equality in relation to tenure systems by providing guiding principles and effective tools.

### International schemes and legal requirements linked to emission reductions rights

As emerging opportunities to access REDD+ climate finance open up, forest countries aiming to access certain RBPs and carbon market opportunities to trade forest carbon credits have to comply with requirements aiming to guarantee transparency, accountability and environmental integrity, while also addressing and respecting REDD+ safeguards, including the rights of communities and Indigenous Peoples. Clarity on ERs rights is also required, in order to avoid double counting or double payments for the same ERs, as well as to identify who should be rewarded for their REDD+ actions and who should be involved when ERs are transacted at the national or international level.

Certain standards or RBP schemes have adopted their own definition of ERs, including criteria on how to meet ERs rights (e.g. FCPF),<sup>9</sup> while others establish requirements to be met by the country in order to clarify them. Results-based payment schemes and carbon market standards considered for country analysis include:

<sup>8</sup> The VGGT were officially endorsed by the Committee on World Food Security on 11 May 2012. Since then, implementation has been encouraged by the Group of Twenty (G20), United Nations Conference on Sustainable Development (Rio+20), United Nations General Assembly, Francophone Assembly of Parliamentarians, and others. See: <https://www.fao.org/tenure/voluntary-guidelines/en>

<sup>9</sup> See guidance note on the ability of program entity to transfer title to ERs.

- the REDD+ RBP Pilot Programme under the GCF;
- the FCPF;
- the REDD+ Environmental Excellence Standard (TREES) under the Architecture for REDD+ Transactions (ART); and
- the VCS Jurisdictional and Nested REDD+ Framework (JNR).

## The REDD+ Pilot Programme under the Green Climate Fund

In 2017, the GCF started to pilot REDD+ RBPs, consistent with the WFR and other REDD+ decisions under the UNFCCC. Countries that have completed the first two phases of REDD+ for results generated from the end of 2013 to the end of 2018 are eligible to apply for Phase 3 funding through this pilot programme (this request for proposals ran from the end of 2017 until the last GCF board meeting in 2022).<sup>10</sup>

According to the terms of reference, ownership of ERs paid for by the GCF will not be transferred to the GCF, as they are not used as offsets. Payments should be recorded in the UNFCCC web portal; the same ERs results will no longer be eligible for RBPs under the GCF or in any other arrangement (GCF, 2017).

While no transfer of rights is foreseen, section F of the GCF pilot programme for REDD+ RBPs “Legal title to REDD+ results”, requires developing countries to provide an analysis with respect to legal title to REDD+ results in the country. This should include an analysis of entitlement to claim for the results to be paid for by the GCF and covenant that no other party has a competing claim to the results proposed to the GCF in accordance with national policy, legal frameworks or regulatory frameworks.

<sup>10</sup> The funding for this pilot phase was exhausted by the end of 2020. At its 25th meeting in 2020, the GCF Board requested the GCF Secretariat to undertake a further analysis of alternatives for the continuation of the implementation of REDD-plus results-based payments during 2020, taking into account the lessons learned.

## The World Bank Carbon Fund Programme

The Carbon Fund of the FCPF requires a “Program Entity” to demonstrate its ability to transfer title to ERs (FCPF Carbon Fund, 2020, p. 22).<sup>11</sup> In addition, the term “title to ERs” has been defined in the FCPF Methodological Framework as referring to the “full legal and beneficial title and exclusive right to ERs contracted for under the Emission Reductions Payment Agreement (ERPA)” (FCPF Carbon Fund, 2018, p. 1).<sup>12</sup>

Specifically, Indicator 36.2 of the Methodological Framework requires that the “Program Entity” “demonstrates its ability to transfer to the Carbon Fund title to ERs, while respecting the land and resource tenure rights of the potential rights-holders, including Indigenous Peoples (i.e., those holding legal and customary rights), in the accounting area” (FCPF Carbon Fund, 2020, p. 28).

Further, Section 15.01(a) of the General Conditions Applicable to ERPAs for FCPF Emission Reductions Programs provides that “the Program Entity shall ensure throughout the term of the ERPA and in accordance with the Methodological Framework that the Program Entity has the ability to transfer Title to ERs to the Trustee, free of any interest, encumbrance or claims of a third party other than in accordance with the ERPA” (FCPF Carbon Fund, 2018, p. 1).

The ability to transfer title to ERs may be demonstrated through various means, including reference to existing legal and regulatory frameworks, sub-arrangements with potential land and resource tenure rights holders (including those holding legal and customary rights), and benefit-sharing arrangements under the benefit-sharing plan.

Overall, the status of rights to carbon and

<sup>11</sup> See Criterion 28, Indicator 28.3 of the Methodological Framework: [https://www.forestcarbonpartnership.org/system/files/documents/fcpf\\_carbon\\_fund\\_methodological\\_framework\\_revised\\_2020\\_final\\_posted.pdf](https://www.forestcarbonpartnership.org/system/files/documents/fcpf_carbon_fund_methodological_framework_revised_2020_final_posted.pdf)

<sup>12</sup> More information about the FCPF Guidance Note on the Ability of Program Entity to Transfer Title to Emission Reductions can be found here: [https://www.forestcarbonpartnership.org/sites/fcp/files/2019/July/FCPF%20Guidance%20Note%20on%20the%20Ability%20of%20Program%20Entity%20to%20Transfer%20Title%20to%20Emission%20Reductions\\_2018.pdf](https://www.forestcarbonpartnership.org/sites/fcp/files/2019/July/FCPF%20Guidance%20Note%20on%20the%20Ability%20of%20Program%20Entity%20to%20Transfer%20Title%20to%20Emission%20Reductions_2018.pdf)

relevant lands should be assessed to establish a basis for successful implementation of the ERs programme. If the ability to transfer title to ERs is still unclear or contested at the time of transfer of ERs, an amount of ERs proportional to the accounting area where title is unclear or contested shall not be sold or transferred (Indicator 36.3).

As a note, most of ERs transferred under the FCPF are not used as offsets, and do not demand transfer of title (Tranche B participants).

### The REDD+ Environmental Excellence Standard under the Architecture for REDD+ Transactions

REDD+ project or programme proponents might choose to generate carbon credits to sell on the VCM to companies, individuals or organizations that wish to offset some or all of their GHG emissions.

In accordance with TREES and in consistency with UNFCCC decisions, ART provides such a platform.<sup>13</sup> In 2020, ART was approved to supply ART-issued jurisdictional forest carbon ERs credits to airlines for their compliance under the Carbon Offsetting and Reduction Scheme for International Aviation (CORSA).<sup>14</sup>

Section 6 of the concept note issued by ART, "Ownership rights to emissions reductions (ERs)", requires the participant<sup>15</sup> to provide a brief summary of the participant's rights to the ERs generated from the accounting area or a description of how rights will be obtained in accordance with domestic law. This includes a description of any agreement in place or that will be in place for the transfer of ERs rights or benefit allocation arrangements with landowners or resource rights holders that exist between the participant and project owners and/or landowners (ART Secretariat, n.d.).

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<sup>13</sup> Including the WFR and Cancun Safeguards.

<sup>14</sup> Decision approved at a meeting of the governing Council of the International Civil Aviation Organization (ICAO) in November 2020. See <https://www.artredd.org/wp-content/uploads/2020/11/ART-Approved-to-Supply-Units-to-CORSA-FINAL.pdf>

<sup>15</sup> Forestry developing country or jurisdiction (as an intermediary step) aiming to issue forest carbon credits under ART.

No credits will be issued unless the participating jurisdiction demonstrates ownership of the credits or the right to receive payments for credits or other negotiated benefits. For example, in the case where rights to the ERs are granted to private landowners within the accounting area, the government would need to have an agreement with the landowners either to receive the payment for the ERs or to have rights to the credits that would allow for the transfer of title.

The entity to which credits are being issued must demonstrate ownership of the asset regardless of the nature of the transaction.<sup>16</sup>

### The Jurisdictional and Nested REDD+ Framework - Verified Carbon Standard

Similarly to the ART-TREES standard, the JNR-VCS framework serves as a comprehensive carbon accounting and crediting platform for governments to guide development of their REDD+ programmes. It also helps nest REDD+ projects and subnational jurisdictions within these programmes.

The requirements incorporated into the JNR Program under VCS Version 4 establish that jurisdictional proponents, such as national or subnational governmental entities that have the legal authority to adopt REDD+ policies and measures at the jurisdictional level, can register jurisdictional programs. Furthermore, in the "Authority and Rights to Emission Reductions" section, it is established that jurisdictional proponents must demonstrate how jurisdictional rights relate to the rights of non-state stakeholders, including Indigenous Peoples, local communities, private entities and individuals, and how the rights of existing and any future nested projects or programmes will be respected.<sup>17</sup>

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<sup>16</sup> Nesting Under ART 2021. See <https://www.artredd.org/wp-content/uploads/2021/12/Nesting-under-ART-final-July-2021.pdf>

<sup>17</sup> More information is available here: [https://verra.org/wp-content/uploads/2021/04/JNR\\_Version\\_4\\_Summary\\_Updates\\_and\\_Effective\\_Dates.pdf](https://verra.org/wp-content/uploads/2021/04/JNR_Version_4_Summary_Updates_and_Effective_Dates.pdf)



According to VCS Version 1,<sup>18</sup> project and jurisdictional proponents shall demonstrate that they have the legal right to control and operate project or programme activities, including: (i) project ownership arising by virtue of a statutory, property or contractual right to the land, vegetation or conservational or management process that generates GHG ERs and/or emission removals;<sup>19</sup> and (ii) an enforceable and irrevocable

agreement with the holder of the statutory, property or contractual right in the land, vegetation or conservational or management process that generates GHG ERs or emission removals which vests project ownership in the project proponent.



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<sup>18</sup> Once projects have been certified against the VCS programme's set of rules and requirements, project developers can be issued tradable GHG credits, called Verified Carbon Units (VCUs), which can then be sold on the open market and withdrawn by individuals and companies in order to offset their own emissions. More information can be found here <https://verra.org/project/vcs-program>

<sup>19</sup> Where the project proponent has not been divested of such project ownership. More information is available here: [JNR\\_Version\\_4\\_Summary\\_Updates\\_and\\_Effective\\_Dates.pdf](https://verra.org/JNR_Version_4_Summary_Updates_and_Effective_Dates.pdf) (verra.org)



TABLE 1

## Legal requirements linked to carbon rights/emission reductions rights under REDD+ programmes and standards

	Legal implications for the forest country	Programme/standards			
		GCF REDD+ Pilot Programme	World Bank Carbon Fund*	ART-TREES	JNR-VCS
Demonstration of the ability to transfer ERs rights	Existing legal and regulatory frameworks clarifying ERs rights.	Not required	Not required Option 1	Not required.	Not required
	Arrangements for the ownership, registration, and transfer of forest carbon rights (ERs) in place.	Not required	Yes	Yes	Yes
	Sub-arrangements with land tenure or resource rights holders, identified as primary owners of ERs rights.	Not required	Option 2	Yes	Yes
	Agreements/ arrangements clarifying the allocation of benefits.	Yes	Option 3	Yes	Yes
Avoiding competing claims on REDD+ results	Benefit-sharing plan and/ or designation of eligible REDD+ beneficiaries.	Yes	Yes	Yes	Yes
	Clarity on the designation of the entity entitled to claim for the volume of ERs generating RBPs.	Yes	Yes	Yes	Yes
	Clarity on the designation of the entity able to receive REDD+ payments.	Yes	Yes	Yes	Yes
	A national registry tracking REDD+ project results or carbon credits.	Internationally established. Inscription of REDD+ results in the UNFCCC portal.	Internationally established. Countries encouraged to also establish a national registry.	Internationally established. Countries encouraged to also establish a national registry.	Internationally established. Countries encouraged to also establish a national registry.
Considers a rights-based approach	Respect and application of social and environmental safeguards, considering a human rights approach in protecting people's forestry rights.	Yes	Yes	Yes	Yes

**Note:** \* The ability to transfer title to ERs may be demonstrated through the reference to existing legal and regulatory frameworks (Option 1), sub-arrangements with potential land and resource tenure rights holders (Option 2), and benefit-sharing arrangements under the benefit-sharing plan (Option 3).

**Source:** Author's own elaboration.

### BOX 3 Key points, international context

Since the four pillars of REDD+ were set in the context of the United Nations Framework Convention on Climate Change (UNFCCC) (2010), forest countries have progressed consistently towards its implementation. A growing number of countries have actually reached Phase Three, accessing results-based payments (RBPs) under different international sources.

By the time of writing this report, Argentina, Brazil, Colombia, Chile, Costa Rica, Ecuador, Indonesia and Paraguay had accessed REDD+ RBPs in the context of the Green Climate Fund (GCF), supported by Food and Agriculture Organization of the United Nations (FAO), United Nations Development Programme (UNDP) and United Nations Environment Programme (UNEP) as Accredited Entities (AEs). In addition, fifteen countries have signed an Emission Reductions Payment Agreement (ERPA) under the Forest Carbon Partnership Facility (FCPF) Carbon Fund.\* Costa Rica and Mozambique were the first countries to receive payments related to the FCPF Carbon Fund.

The existence of different international RBPs and carbon market schemes that value emission reductions (ERs) poses some challenges for countries participating in REDD+, particularly as it relates to the need to clarify “carbon/ERs rights” or “ER title”, as well as to identify who benefits from REDD+ results.

International RBP schemes and carbon market standards considered in this study include: The REDD+ RBPs Pilot Programme under the GCF, the FCPF, the REDD+ Environmental Excellence Standard (TREES) under the Architecture for REDD+ Transactions (ART), and the Verified Carbon Standard (VCS) Jurisdictional and Nested REDD+ Framework (JNR).

With the exception of the GCF, the transfer of ERs rights from primary owners to jurisdictional/national entities is required (if they don't coincide) in order to secure transactions.

While a definition of ERs rights is not considered to be a precondition to accessing RBPs, it will avoid inconsistencies related to the allocation of rights.

**Note:** An ERPA is an agreement signed between country participants and the World Bank (acting as trustee of the FCPF Carbon Fund) for the sale, transfer of, and payment for ERs generated from the ERs programme. The total ERs contract value of the 15 countries who have signed an ERPA is USD 721 300 000. So far, the countries that have signed an ERPA include: Chile, the Congo, Costa Rica, Côte d'Ivoire, the Democratic Republic of the Congo, the Dominican Republic, Fiji, Ghana, Guatemala, Indonesia, the Lao People's Democratic Republic, Madagascar, Mozambique, Nepal, and Viet Nam

**Source:** Author's own elaboration.





# Key issues emerging from forest countries related to emission reductions rights

REDD+ countries need to comply with legal requirements related to ERs rights established under different schemes to access carbon markets and RBP payments. In general terms, a more stable and clear enabling environment that guarantees minimum and appropriate forms of legal protection to contracting parties would stimulate investments in REDD+. However, owning an intangible resource such as ERs poses conceptual and practical challenges for traditional property law systems in most countries. The identification of landownership is not always sufficient to ensure ownership over the ERs in that forest.<sup>20</sup> It is increasingly important that ERs rights and benefit arrangements to implement REDD+ are clearly established through the necessary legal/operational arrangements, as they affect the acceptance, incentives and fairness of the REDD+ mechanism.

Depending on country contexts and in light of international ERs legal requirements, a differentiation in legal conceptualization is needed between the right to claim or receive payments derived from REDD+, the legal capacity to administer and transact REDD+ RBPs, and the right to benefits arising from such RBPs, as well as ERs or carbon rights.

## Emission reductions rights and country perspectives

The legal framework should clearly identify: who has the right to claim ownership over ERs from various REDD+ activities; the conditions under

which carbon/ERs rights or ERs titles can be transferred; and how to deal with the associated risks of reversal or non-permanency/displacement – clarifying who is responsible.

Emission reductions rights may generally be defined as including “the right to benefit from sequestered carbon and/or reduced greenhouse gas emissions derived from forests” (Streck, 2020, p. 6),<sup>21</sup> going hand in hand with forest tenure rights (ownership or user rights), some kind of control over the land and trees, or linked to the activity that generates ERs.

Overall, the following distinction can be made: (i) ownership rights related to forest goods (carbon considered as a forest product, stored in the tree, wood, biomass) or to ecosystem services (e.g. carbon sequestration belongs to the forest landowners or service provider); (ii) the entitlement for REDD+ results, in terms of beneficiary rights aiming to identify who will be rewarded for their efforts in generating ERs; and (iii) rights to sell, trade, and purchase carbon credits.

Other existing definitions of “title to ERs” are that of full legal and beneficial title and exclusive rights to ERs (FCPF), or are defined in terms of which parties have the right to sell, trade, and purchase carbon credits derived from REDD+ verified actions.

In the context of national or jurisdictional REDD+ programmes, ERs are the result of the implementation of REDD+ policies and measures, in line with decisions of UNFCCC COPs; they are also linked to the participation in REDD+ benefit-

<sup>20</sup> A differentiation is to be made between the ownership rights over the carbon stock (the carbon in the trees) and the rights over ERs, which could be generated from a variety of activities such as avoided deforestation assessed through a counterfactual reference level, or through carbon removals from the atmosphere through forest/tree growth.

<sup>21</sup> Carbon rights can flow from either ownership of the asset or control of the activity that lead to a reduction in deforestation or an enhancement in forest carbon stocks. The control of the asset refers to the carbon sink (the actual biomass) or the land that is undergoing conservation or restoration activities. The control of the activity refers to the environmental service that the stewards of the forest or individual trees provide and that leads to a reduction of deforestation or additional tree planting.

## BOX 4 Concepts and definitions

A **carbon credit** is a certified greenhouse gas (GHG) unit in a carbon registry that can be traded or used for offsetting emissions. It usually corresponds to one metric tonne of carbon dioxide equivalent.

To be recognized, carbon credits generated by forests must be traceable back to a specific forest area within a given location or country. Because of this spatial dimension, questions of ownership, control, and use of the land, trees, and carbon associated with those forests are fundamental to the function and transparency of carbon-based payment mechanisms.

In order to guarantee legal security, the rights and obligations of buyers and sellers must be defined in relevant laws, contracts and project documents.

**Emission reductions (ERs) and carbon rights (CRs)** are intangible assets created by legislative and contractual arrangements that arise from the storage of carbon in forests. They can be linked to tenure ownership rights or some kind of control of the land and trees, or it can be considered as a separate interest. While carbon rights might refer to the bundle of rights associated with the carbon stored or sequestered by forests, which may have tenure implications (the landowner or rights holder owns the carbon), ERs titles might be linked to the credits derived from activities related to REDD+. In the context of jurisdictional REDD+ programmes, ERs and emission removals are also the result of the implementation of REDD+ policies and measures, in line with the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).

**Forest tenure** may be defined as the right – statutory or customary – that determines who can use, manage, control or transfer forest lands and resources, such as wood or the multitude of non-wood forest products (NWFPs). Forest tenure defines how long and under what conditions these rights are held. The Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT) of the Food and Agriculture Organization of the United Nations (FAO) specify that tenure systems may be based on written policies and laws, as well as on unwritten customs and practices.\*

**REDD+ benefit-sharing** refers to the distribution of both monetary and non-monetary benefits, such as capacity development, infrastructure and ecosystem services generated through the implementation of REDD+. It implies establishing a process to channel such benefits to eligible stakeholders. Entitlements to REDD+ benefits can help offset the costs and benefits of REDD+ actions accrued by various stakeholders and thus are to be considered separately from ERs titles.

**Note:** \*See <https://www.fao.org/forestry/tenure/en>

**Source:** Author's own elaboration.

sharing in order to ensure cooperation of affected and relevant stakeholders contributing to REDD+ implementation.

More recently, the implementation of Article 6 of the Paris Agreement referring to mitigation outcomes transferable internationally, is leading certain countries like Suriname to issue REDD+ sovereign carbon credits as ITMOs under Article 6.2.<sup>22</sup> National arrangements aiming to operationalize this mechanism are therefore expected to be developed

<sup>22</sup> Article 6.2 of the Paris Agreement outlines the possibility of cooperative approaches and the transfer of Internationally Transferrable Mitigation Outcomes (ITMOs) between different actors, including countries and private sector companies, through bilateral agreements. Article 6.4 provides a structure for a carbon credit market on which greenhouse gas ("GHG") emission reductions or removals may be transferred internationally.

by countries in the next future.

### Forest tenure and ERs/carbon rights: linkages and implications

One major consideration relates to whether the property law system in a particular country treats land and natural resources such as forests, including ecosystem services, as fundamentally belonging to the state (in the public domain) or other actors, such as private owners, local communities, or Indigenous Peoples.

Another aspect that may affect the implementation of REDD+ activities concerns the formal recognition of customary land tenure rights, which is a reality in many developing countries. From this perspective, it is relevant

**TABLE 2** Rights related to emission reductions and country examples

Rights related to emission reductions	Country examples
Ownership rights on the asset, such as: <ul style="list-style-type: none"> <li>• rights to physically stored carbon (e.g. timber rights);</li> <li>• rights to the forest land (including user rights); and</li> <li>• rights to the fruits of forests (carbon defined as a forest product).</li> </ul>	Congo Costa Rica Democratic Republic of the Congo Papua New Guinea (including customary owners) Zambia
Ownership rights linked to those providing services or activities leading to emission reductions (ERs) (environmental service generated through activities).	Indonesia (e.g. rights conferred to forest management activities) Mexico Peru Viet Nam
Rights to the benefits generated by REDD+ projects or programmes.	Ghana Papua New Guinea Viet Nam
Rights to certified ERs/carbon units/carbon credits.	Australia Congo Democratic Republic of the Congo Fiji Gabon Indonesia New Zealand (e.g. forest ownership rights determine who owns carbon credits too)
Rights to claim or receive payments from REDD+ payments.	Argentina Chile Colombia Paraguay

Source: Author's own elaboration.

to understand how benefits can be extended to “communities” (rather than individuals in the traditional property rights paradigm), which should be included in the group of beneficiaries.

To date, legislation rarely regulates ERs rights or entitlement to REDD+ benefits directly. In these cases, as stated, ownership of forest resources or allocation of forest tenure rights often provides a basis to understanding who owns carbon stored in forests and who can claim REDD+ benefits. However, full clarity in the matter is hindered by the fact that forest tenure is not always

secured and may depend on layers of rights that are sometimes conflicting or overlapping. Gender inequalities may also come into play in the subsequent allocation of benefits, since customary land tenure systems tend to be male dominated, such as in traditional chiefdoms. Moreover, entitlement to REDD+ benefits at the jurisdictional level as a legal right might depend on how a beneficiary is identified (eligibility criteria) independently from strict tenure rights implications.

Based on these assumptions, this study hereby presents a simplified assessment showing how certain countries progressed in legislating on the subject matter.

### Forest resources and emission reductions/ carbon rights belong to the state

In the **Democratic Republic of the Congo**, Article 3 of Ministerial Decree No. 047/2018, which sets the homologation procedure for REDD+ investments, clearly states that carbon stocked in forests is owned by the state. This approach is in line with the provisions contained in the Constitution (2006) and in particular with the provisions contained in the Forest Code (2002), as its Article 7 stipulates that forests constitute the original property of the state.

Similarly, primary ownership in ERs rests with the government in **Zambia**. According to the Forest Act (2015), the government owns all trees in forests and all forest products, including carbon, until transferred to others. The act also describes community forest management groups that can own forest user rights, potentially including carbon, through community forestry agreements. In the same direction, Article 4 and Article 6 of **Mozambique**'s REDD+ decree, adopted in 2018, clearly establishes state ownership of all ERs generated in the country.

### The state exercises an original domain on forest resources, but recognizes the contribution of other actors in REDD+ actions and their rights to the benefits

In **Peru**, according to the Law for Forestry and Wildlife (MINAGRI, 2015), depending on the location, the right to use forest resources is granted through enabling titles such as concessions, permits, and authorizations. To access REDD+ schemes, specific regulations related to climate change and REDD+ also have to be fulfilled. Peru's legal framework for climate change and REDD+ establishes two requirements for an actor to be eligible for establishing REDD+ schemes: (1) to hold rights over forest resources; and (2) to fulfil all legal requirements established by the national legal framework for REDD+,

including respecting safeguards, measurement, reporting and verification (MRV), and nesting, as well as complying with the requisites for inclusion in the National Registry for Mitigation Measures (RENAMI).

The rights over forest resources that could allow the implementation of REDD+ actions can be accessed through three modalities.<sup>23</sup> According to the Framework Law on Climate Change (2018) and its regulation (2019), the Ministry of Environment (MINAM) is the national technical and regulatory authority on climate, responsible for the design, implementation, and guidance over the process of receiving, managing and distributing RBPs. It is also responsible for the management of the National Registry of Mitigation Measures (RENAMI), which is a mechanism through which the ministry will authorize the transfer of ERs and emission removals, following specific procedures and requirements. The ministry is currently working on further provisions to regulate the functioning of the registry in Peru.

Article 7 of **Viet Nam**'s Forestry Law (2017) institutionalized the concept of forest ownership in accordance with the provisions in the 2013 Constitution. Accordingly, two categories of forest ownership are defined: (1) forests under the ownership of the entire people for which the state is the owner's representative; and (2) forests under the ownership of organizations, households, individuals, or local communities. Forestry ownership rights imply the right to the benefits and profits generated from natural forest; according to Article 65 and Article 73: "forest owners have rights to be provided with forest environment services and benefit from such services", which include carbon sequestration.

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<sup>23</sup> (a) enabling titles over forest resources (Law No. 29763); (b) a usufruct contract ("contratos de cesión en uso"), in the case of forests within the territory of a native community (the collectively titled territories for Indigenous Peoples in the Peruvian Amazon), as per the Law of Native Communities and Agricultural Development of the Selva and Ceja de Selva (Law No. 22175) and its bylaws; and (c) administration contracts for the co-management of natural protected areas ("ANP" [the acronym in Spanish]), as per the Law for Natural Protected Areas and its bylaws. See TREES – Final Concept Note: Peru, <https://www.artredd.org/art-registry>



## Forest tenure rights, including customary rights, contribute to determining who owns emissions reductions and who can benefit from REDD+, if secured

In **the Congo**, if forests are owned by the state, local authorities, or other legal persons under public law, the carbon credits generated belong to the state, local authority, or other legal person under public law concerned, respectively, as stated in Article 180 of the Forest Code (2020).

In addition, Article 9 of Order 113-2019, which determines the principles of the REDD+ process, states that:

if the REDD+ project or programme includes forests belonging to a third party and/or private forest plantations, the project or programme proponent's application must be accompanied by a note regulating the transfer of rights linked to the Congolese Emission Reduction Units (URC). The approval of the REDD+ project or programme implies the recognition of the proponent's exclusive right to claim the URCs (Congo, 2019, p. 4).

**Ghana** is an example of a legally pluralistic environment where land rights and tenure are governed by customary laws and norms operating alongside statutory ones. Customary landowners or allodial title holders in the country (including stools, clans, families, *tindanas* and *tendamba*) own about 78 percent of the total land area in the country. Of the remainder, the state owns 20 percent, and 2 percent is held in dual ownership by the government and the beneficiary interest of the community. Because of the complexity of the land and timber tenure system, the domestic distribution and ownership of ERs might be complex if strictly associated with tenure rights. In such a scenario, it becomes relevant to ensure that beneficiaries' rights are duly recognized to all the categories of relevant local stakeholders, as indicated in the benefit-sharing plan.

In **Papua New Guinea**, customary law is recognized by the Constitution of 1975, and under customary law, forest resources are owned by the customary owners of the relevant land. Section 46 of the Forestry Act (1991) states that "the rights

of customary owners of forest resources are to be fully recognized and respected in all transactions affecting the resource". In particular, customary landowners legally own approximately 97 percent of land in Papua New Guinea. According to Section 90 of the CCM amended Act (2021), it is also well-accepted that landowners have rights to the benefits derived from agreements related to climate change projects.

## The allocation of emissions reductions/ carbon rights and benefits takes into consideration jurisdictional and project-level scenarios

The Sustainable Development Forestry Law of **Mexico**, amended in 2022, establishes that forest resources belong to the owners of the land; therefore, it is possible to infer that carbon rights related to forest conservation or REDD+ projects would correspond as well to the *ejidos*, communities or private parties who have property rights over such land. In that direction, Article 138-bis states that "the owners and legitimate possessors of forest lands may carry out the compensation or transfer of emissions at national or international level in voluntary markets, subject to the general provisions established by the Secretariat".

In the same way, according to Article 138bis, the Federal Ministry of Environment and Natural Resources (SEMARNAT) is "empowered to enter into international agreements on cooperative mechanisms to reduce emissions in the forestry sector, including avoided emissions ... and is empowered to agree with the governments of the federal entities on the forms of their participation in such mechanisms, as far as the territory under their jurisdiction is concerned". On the other hand, "The resources obtained from the payment for results derived from the reduction of emissions will be granted in accordance with the benefit distribution programme that, in a participatory and inclusive manner, is drawn up in accordance with the objectives, safeguards and criteria of the forestry policy provided for in this Law".

According to Section e 78B of the Climate Change Management (amended) Bill (2021) of **Papua New Guinea**, if the Government engages in any transaction under international REDD+ programs,

## BOX 5 Primary ownership of emission reductions before transfers occur

Before transfers occur, the primary ownership of emission reductions (ERs) can rest with:

- the government
- owners of lands and forests
- non-state actors contributing in generating ERs
- others

Source: Author's own elaboration.

including the Green Climate Fund RBPs program, the *Board* responsible for climate change matters is deemed to have the authority of the landholder. This authority extends to the sale and transfer of all carbon sequestered by the forest, including in the form of ERs, Papua New Guinea Mitigation Outcome Units, or carbon sequestration resulting from that program. Additionally, the Government may compensate customary landowners as Payment for Ecosystem Services (PES) and any landowner with forest carbon included in the transaction under an approved benefit-sharing plan, among other conditions. Proposed amendments in the 2023 Bill introduce a new Article (78C) specifically addressing the establishment of carbon markets.

### Primary ownership, devolvement, and transfer of emission reductions/ carbon rights

A relevant element for the understanding of ownership rights on ERs/carbon is identifying the primary ownership of ERs before transfers occur. As seen in the previous country examples, parties entitled to primary ownership might include: the state/government, such as state forest lands, if designated to administer ERs volumes; forest landowners, including private actors and local communities; and non-state actors contributing in generating ERs, when recognized as beneficiaries.

The **Democratic Republic of the Congo**, **Mozambique** and **Zambia** have showcased examples where carbon stocked in forests is originally owned by the state until transferred to others. On the other hand, in countries like **the Congo** and **Costa Rica**, carbon rights are linked to forest tenure rights, owned by the state, as well

as private actors and collective entities, such as Indigenous Peoples or local communities, depending on the tenure system (Costa Rica, 2022). In **Indonesia**, Regulation P.20/Menhut-II/2012/ on the management of forest carbon, as well as Regulation No. P.30/Menhut II/200930/2009 and 36/2009, do not expressly create a right to carbon. However, “forest carbon managers” and license holders under these regulations are conferred rights to trade carbon. This trading right can be understood as a way to implicitly confer the right to carbon to those organizations that carry out forest carbon management.

**Ownership of ERs may be transferred to other actors** if foreseen by law or by contractual arrangements. This case is especially relevant when considering accessing carbon markets or if carbon credits are to be sold to the FCPF Carbon Fund.

Where the government is the primary owner of ERs, it may devolve ownership to other actors, e.g. to the private sector, or to donor entities. For example, ERs/carbon rights can be devolved to the private sector through concession contracts, or to the project developer when carbon projects receive approvals.

Regarding the Democratic Republic of the Congo, Article 3 of the REDD+ Homologation Decree No. 05/2018, provides that the state recognizes REDD+ investment holders' exclusive property to ERs units generated in the country (UREC) upon approval. The steps to complete this approval process are further defined by the decree and consist of two parts: registration in the National REDD+ Register (to be operationalized) and approval of the REDD+ investment.

When carbon rights are primarily owned by private landowners, local communities and



Indigenous Peoples, a devolution of rights to the government/jurisdictional authority competent to transact internationally is required, as is the case in the Congo, Costa Rica, and Papua New Guinea. However, achieving this at the national level can be intricate without the provision of adequate capacities to manage such contracts.

Article 7 of **Viet Nam's** Forestry Law (2017) has institutionalized the concept of forest ownership. Regarding "natural forests" (and

other categories stated in Article 7), the state has rights over environmental services (including carbon sequestration, Article 73). As such, it is assumed that the government is allowed to transfer title of ERs to a third party for trading purposes. Organizations, households, individuals and residential communities may own planted production forests. In the second case, it is assumed that previous arrangements with them are needed before transacting REDD+ carbon credits

**TABLE 3**

**Summary of implications of forest tenure and emission reductions rights for national or subnational jurisdictional entities**

Basic setup of forest tenure	Linkages with ERs titling	Linkages with benefit-sharing of national or jurisdictional REDD+ programmes
<p>Ownership rights on the asset, such as:</p> <ul style="list-style-type: none"> <li>• rights to physically stored carbon (e.g. timber rights);</li> <li>• rights to the forest land (including user rights); and</li> <li>• rights to the fruits of forests (carbon defined as a forest product).</li> </ul>	<p>Are definitions aimed at clarifying NFMS-related concepts included in the legal instrument?</p>	
<p>State/communities/social tenure right holders/private entities own forest resources (including ecosystem services such as carbon).</p>	<p>ER rights primarily recognized to forest landowners/social tenure right holders (state, private entity, communities, Indigenous Peoples).</p> <p>Forest landowners/social tenure right holders can devolve ERs rights/titles to the state to facilitate transactions with third parties.</p> <p>Although a rights-based approach is necessary, certain countries that have enacted such devolution of carbon rights to the programme entity at the national scale by signing individual contracts with landowners face challenges due to the lack of human/financial capacities/high transaction costs, and have expressed concerns in this regard (e.g. Costa Rica).</p> <p>Forest resource owners can transfer and sell ERs to third parties, potentially requiring approval from the state.</p> <p>According to the Climate Change Regulation (13/2019), the national climate change authority of Peru administers the National Registry of Mitigation Measures and authorizes the transfer of GHG ERs units. According to Article 56.5, it also prepares and approves the guidelines for the operation of the National Registry of Mitigation Measures.</p>	<p>The benefit-sharing plan will often allocate a share of benefits to forest resource owners, but other beneficiaries are also considered.</p> <p>Benefits generated by ERs performances are allocated to those that contributed to ERs and forest landowners (state/communities/social legitimate tenure right holders).</p> <p>State allocates benefits to relevant parties (communities/Indigenous Peoples/private entities) involved in ERs activities in state-owned forest lands, but not only vulnerable groups may be included as beneficiaries too.</p> <p>Benefit-sharing modalities are to be decided between the parties (communities/private entity/government) if a project developer implements an ERs project.</p>

Source: Author's own elaboration.

generated in those intervention areas in the context of a jurisdictional programme. Other solutions have been enacted in order to rather focus on the groups of beneficiaries.

In **Ghana**, considering that no legislation has yet been passed that directly references ERs rights, the current allocation of those rights is to be based on the framework agreements to be signed between the Forestry Commission and the local collective bodies located in the accounting area (CSC Consortium, Governance Board). This includes arrangements with local groups of actors (sub-Hotspot Intervention Areas) representing the interests of the beneficiaries of the Ghana Cocoa Forest REDD+ Program (Option 2 and Option 3, FCPF Carbon Fund). In the context of such framework agreements, to eliminate any ambiguity, the parties authorize the Forestry Commission to transfer any ERs generated from such subproject to the FCPF Carbon Fund, free of any third party interest or encumbrance. Legal capacities to the Community Resource Management Area (CREMA) might however need to be formalized as a prerequisite step, which is foreseen in the context of the draft Wildlife Act.

With regard to carbon markets, in **Australia** and **New Zealand**, as well as under **Fiji's** Climate Change Bill (2020), carbon offset units are created by legislation to represent ERs generated by offset projects pursuant to approved methodologies, which includes the land sector. These regimes clearly identify who is entitled to such carbon offset units upon first issuance. The issuance and subsequent transfer and/or cancellation of such carbon offset units must be tracked in national registries, which identifies and guarantees title to the ERs (Baker & McKenzie, 2020).

In the **Democratic Republic of the Congo**, Ministerial Decree No. 05/2018 establishes that the state recognizes REDD+ investment holders' exclusive property to ERs units generated in the country (UREC) upon completion of the homologation procedure, which implies the registration of the REDD+ initiative in the National REDD+ Register (to be operationalized) and approval of the REDD+ investment.

## The right to claim or receive payments derived from REDD+

It is also relevant to define or set out a process for allocating the legal entitlement to the results of REDD+ activities (the ERs achieved in tonnes of carbon dioxide). These results may or may not be represented by carbon offset units. Ownership of REDD+ results may be defined in a number of ways, including through regulatory or policy frameworks establishing forestry concessions, PES schemes or community forestry programmes, or contractual arrangements (Baker & McKenzie, 2020).

In the context of the GCF's pilot programme for REDD+ RBPs (GCF REDD+ RBPs), countries accessing REDD+ RBPs should provide an analysis with respect to legal title to REDD+ results in order to demonstrate their entitlement to claim for the results to be paid. This has led countries to analyse the legislation providing the basis for such entitlement.

In **Colombia**, no explicit legal norms regulate the legal nature or ownership of GHG emissions. However, Article 175 of Law No. 1753/2015 provides that the Ministry of Environment and Sustainable Development (MADS) is the government entity in charge of accrediting the reduction of GHG emissions in the framework of national or subnational programmes. This legal provision is the only one that establishes a legal attribution in relation to reduced emissions from REDD+ activities. This commitment is operationalized and made public through the registration of the corresponding national or subnational programme in the National Greenhouse Gas Emissions Reduction Registry (RENARE).<sup>24</sup>

Likewise, **Paraguay's** legal framework does not define the ownership of carbon. However, the country has several laws and precedents that provide the Ministry of Environment and Sustainable Development (MESD) with the mandate to receive, manage and administer payments for environmental services, including those resulting from forest protection, as well as to manage resources and funding for climate change

<sup>24</sup> More information can be found here: Extract of legal certificate on legal capacity and commitment of reduced emissions under Colombia REDD+ Results-based Payments for Results Programme 2015–2016 between the GCF, the Government of Colombia, and FAO.

The National Forest Corporation (CONAF) of Chile has prepared collaborative agreements involving small and medium landowners regarding the non-monetary benefits derived from the implementation of the National Strategy on Climate Change and Natural Resources (ENCCRV).

The rights and obligations related to Green Climate Fund (GCF) results-based payments (RBPs) are regulated at the territorial level through those bilateral agreements. Each agreement will vary according to the modality chosen and the nature of the counterpart, and will contain elements identified by the benefit-sharing plan to clarify how benefits will be distributed among the beneficiaries having contributed to generating these payments.

The agreement states that emission reductions (ERs) and emission removals generated from the implementation of the activities reported will be exclusively accounted towards the country's nationally determined contribution (NDC) targets, in accordance with the methodologies and reports submitted to the United Nations Framework Convention on Climate Change (UNFCCC), in line with the ENCCRV. In order to avoid the risk of double counting and/or double payment, the owner shall not enter into any other contract, act, or agreement involving ERs transactions generated by activities financed through +Bosques (GCF's pilot programme for REDD+ RBP) during the validity of this agreement.

Source: Author's own elaboration.

mitigation and actions related to environmental conservation.<sup>25</sup>

The legal framework in **Argentina** provides the foundation for the mandate of the Ministry of Environment and Sustainable Development (MAyDS) to receive, manage and administer payments for forest environmental services, including GHG emission fixation. In particular, according to Argentine legislation, the ministry is in charge of protecting the value of forest environmental services throughout the territory, in collaboration with the provinces within their jurisdictions, as established in Article 12 of Law 26.331/2007.

Similar to the other countries, the Framework Law on Climate Change No. 30754/2018 of **Peru** and its regulations recognize the Ministry of Environment (MINAM) as the national climate change authority with the mandate to design the process of receiving, administering and distributing benefits from payments for REDD+ results, as well as to authorize transfers of GHG ERs units, among others.

In **Chile**, the official designation of the National Forestry Corporation (CONAF) – responsible for implementing the National Strategy on Climate Change and Natural Resources (ENCCRV) – as the national entity in charge of managing REDD+ RBPs, coupled with the legal and institutional arrangements established at the regional and local

level with relevant counterparts through bilateral agreements to implement the benefit-sharing plan, might be considered as positive measures to mitigate the risk of competing ERs titles among different actors.

According to the new Climate Change Law No. 21455/22, the Ministry of Environment shall establish, manage and maintain a public register containing the approved ERs, as well as removal projects and certificates attesting verified ERs or emission removals, which shall have a unique electronic identifier and may be transferred.

### Legal implications of nesting forest carbon projects into national or jurisdictional REDD+ programmes

REDD+ was formed as a way to incentivize jurisdictional scale actions at both national and subnational levels; however, in practice, there has also been growth in specific project-level interventions funded by a variety of private sector actors, some of which are actively involved in VCMs. As a result, concerns over the risk of double counting or double claiming ERs over a given area under both projects and jurisdictional REDD+ areas have been raised. In addition, the potential for collaborative approaches and eventual market transactions that imply transfer of rights across

<sup>25</sup> See Section F, Legal title to REDD-plus results, REDD+ RBP Pilot Programme, Green Climate Fund.

countries has also raised questions over the implications of such transactions over the ability to meet their NDCs.

From a legal perspective, it will be relevant to assess whether a project-based solution for allocating rights to land, vegetation, or processes that generate ERs to the project proponent will set a precedent for defining carbon rights, affecting national REDD+ results accounting and benefit-sharing mechanisms. In addition to land tenure rights, it is important to recognize carbon rights, which encompass the entitlements of forest-dependent and Indigenous Peoples or individuals to benefit from REDD+ initiatives. Safeguarding these rights involves community participation, recognition of land and resource rights, and inclusion in benefit-sharing arrangements, possibly through nesting. This will also depend on whether carbon rights legislation exists and makes this differentiation. If not, a different approach has sometimes been adopted at the national level in order to give value to REDD+ activities carried out by various actors, such as the government, local communities or the private sector. It would also be important to assess how to combine the two systems, if they coexist. Overall, the legal and governance frameworks of a country influence its nesting architecture and can help to clarify carbon/ERs rights in that context (Streck *et al.*, 2021).

The above questions are becoming increasingly relevant, especially considering initiatives at the jurisdictional level that potentially imply a transfer of title over ERs, such as the Lowering Emissions by Accelerating Forest finance (LEAF) Coalition.<sup>26</sup> In the case of this coalition, there are four transaction pathways available to parties engaged in relevant transactions, which are coordinated by Emergent Forest Finance Accelerator (Emergent). All four pathways are intended to be compatible with host country accounting guidance included in the Article 6 negotiation outcomes from COP26.<sup>27</sup> Some of them explicitly require the transfer of rights and corresponding adjustments to national accounting.

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<sup>26</sup> More information about LEAF can be found here: <https://www.emergentclimate.com/leaf-coalition>

<sup>27</sup> For a complete description of each pathway, refer to Appendix 1, which contains pathway descriptions set forth in the April 2021 call for proposals, as well as the final legal agreements that will govern the sale and purchase of ERs for the Lowering Emissions by Accelerating Forest finance (LEAF) Coalition.

In the context of the FCPF's Carbon Fund, a number of forest countries have signed ERPAs, regulating the transfer of verified ERs.<sup>28</sup>

The combination of the three options foreseen to demonstrate the programme entity's ability to transfer title to ERs to the Carbon Fund "free of any interest, encumbrance or claims of a Third Party", constitutes a precedent establishing a basis to interpret carbon rights in the context of a jurisdictional scheme. Importantly, Indicator 28.3<sup>29</sup> and Indicator 36.2<sup>30</sup> of the Carbon Fund Methodological Framework address the ability to transfer ERs titles with land and resource tenure rights.

Regarding the VCS-JNR standards, it might be relevant for countries to foresee any issues regarding the integration between non-state stakeholders' rights and jurisdictional rights, if local representative bodies could enter into agreements with the jurisdictional proponent, and/or if the rights of non-state stakeholders refer to land rights only.

Linking ERs/carbon rights to land and forest tenure rights is therefore a requirement both under REDD+ jurisdictional programmes and projects. The relevance of establishing benefit-sharing arrangements is a complementary or alternative option under jurisdictional schemes, due to the greater challenges associated with the geographical scale of such programmes.

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<sup>28</sup> As per September 2021, 15 forest countries have signed FCPF ERPAs (Chile, Costa Rica, Côte d'Ivoire, the Dominican Republic, the Democratic Republic of the Congo, Fiji, Ghana, Guatemala, Indonesia, the Lao People's Democratic Republic, Madagascar, Mozambique, Nepal, the Congo, and Vietnam). See <https://forestcarbonpartnership.org/carbon-fund-dashboard>

<sup>29</sup> Indicator 28.3: The ERs programme provides a description of the implications of the land and resource regime assessment for the ERs programme entity's ability to transfer title to ERs to the Carbon Fund.

<sup>30</sup> Indicator 36.2: The ERs program entity demonstrates its ability to transfer title to ERs, while respecting the land and resource tenure rights of the potential rights holders, including Indigenous Peoples (i.e. those holding legal and customary rights, as identified by the assessment conducted under Criterion 28), in the accounting area. The ability to transfer title to ers may be demonstrated through various means, including reference to existing legal and regulatory frameworks, sub-arrangements with potential land and resource tenure rights holders (including those holding legal and customary rights, as identified by the assessments conducted under Criterion 28), and benefit-sharing arrangements under the benefit-sharing plan.



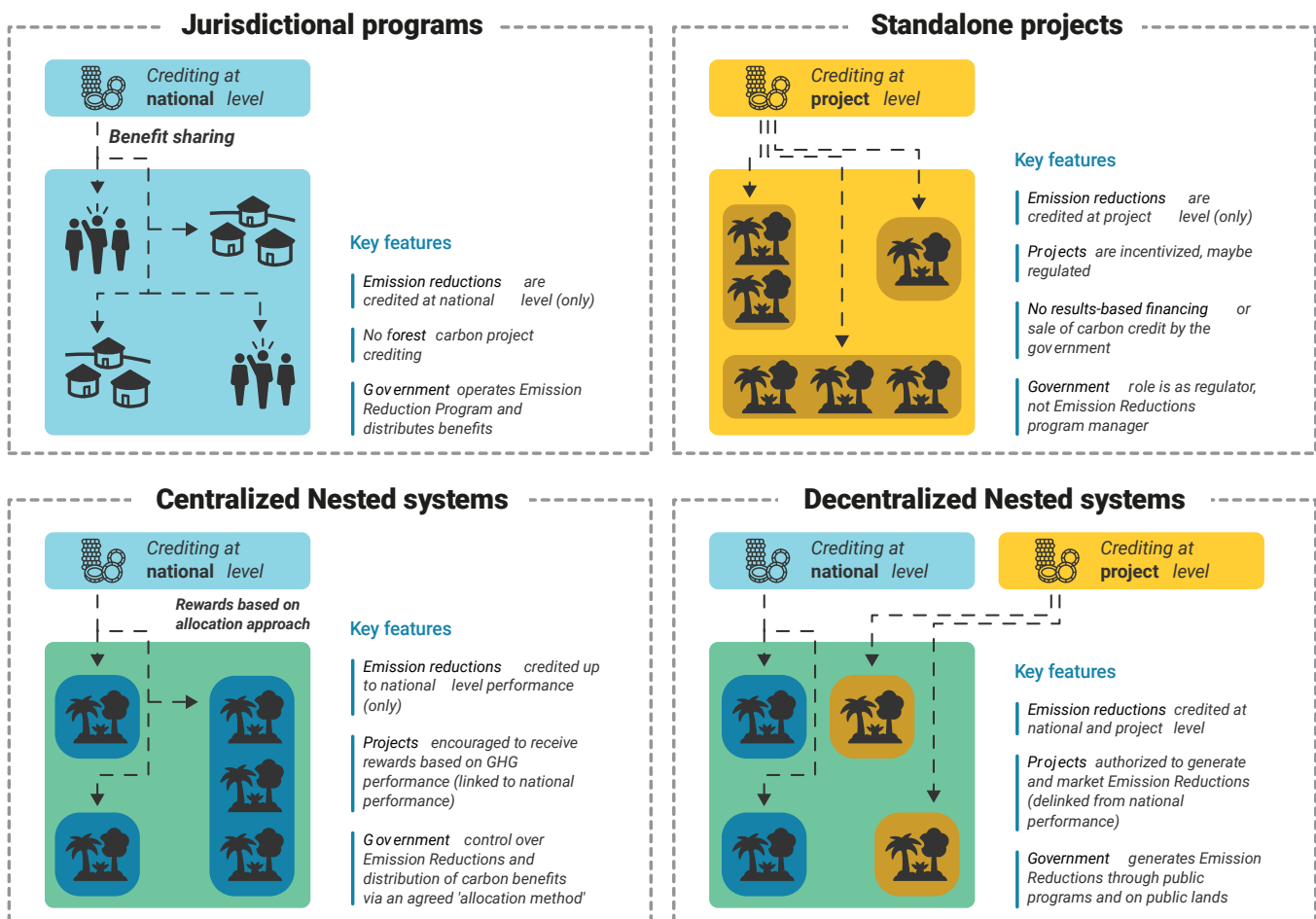
In countries like **Ghana**, since there is no legislation yet in place clarifying the transactions of ERs titles or REDD+ credits, the current understanding of ERs rights is based on the contractual arrangements to be signed with collective bodies representing the interests of relevant local stakeholders. These are reflected in the Hotspot Intervention Areas (HIA) framework agreements and in accordance with the designation of beneficiaries in the benefit-sharing plan.

Current arrangements established among their Ghana Cocoa Forest REDD+ Programme (GCFRP) shares the responsibilities and benefits between the parties. Notably, the government should effectively sign agreements with a large number of stakeholders representing a consistent portion of the intervention area. The current arrangements are likely to also satisfy ART-TREES, while requiring effective implementation in the designated area and formal legal recognition of Community Resource Management Areas (CREMAs).

In **Colombia**, Article 175 of Law No. 1753/2015 establishes that any natural or legal person (public or private) who intends to opt for payments based on results or similar compensations as a result of actions that generate ERs, shall obtain in advance the registry in accordance with the regulations issued by the MADS (Resolution No. 1447/2018). REDD+ projects have to be logged in the registry (RENARE), so that ERs can be set aside in broader reporting at the jurisdictional level (Colombia, 2018).

Overall, the forest tenure regime may have implications on the type of model that is developed in the context of a nested REDD+ system. Therefore, governments need to assess the rights of individuals and communities when deciding how to create incentives and integrate projects into national ERs programmes. In circumstances of tenure insecurity, governments might opt to develop participatory benefit-sharing plans recognizing the rights of eligible communities and individuals to receive benefits derived from REDD+ RBPs.

**Figure 1. Structures for REDD+**



Note: The elaboration of nested REDD+ systems is context-specific, and will often reflect complex pre-existing tenure and rights systems. Source: Streck, C., Dyck, M. & Trouwloon, D. 2021. Amsterdam. Climate Focus. <https://vcmprimer.org/chapter-14-how-does-redd-nesting-work/>

Emission reductions (ERs) rights have been defined in various ways by different carbon crediting programmes. There are also different types and forms of ERs rights.

Identifying ownership of forest and land resources often provides a basis for understanding who owns carbon stored in forests, but does not necessarily for ERs resulting from activities. It may then be necessary to clarify carbon rights under different tenure regimes (e.g. owned by private entities vs collectively managed by Indigenous Peoples), as well as who contributed to REDD+. In addition, forest tenure is not always secured and may depend on layers of rights that are different and at times overlapping. In such cases, having clarity on who the beneficiaries are and what arrangements have been put in place to ensure fair and equitable distribution of REDD+ payments is essential to meet ERs legal requirements (Forest Carbon Partnership Facility [FCPF] Carbon Fund). This might include a description of benefit allocation arrangements with landowners or resource rights holders (Architecture for REDD+ Transactions - The REDD+ Environmental Excellence Standard [ART-TREES]).

In case of tenure insecurity, or when a system of customary rights that allocates land rights to individuals/local communities is not formalized by law, instead of linking ERs rights or benefit allocation arrangements to land or resource ownership rights only, it would be convenient to aggregate those who have contributed in generating ERs under such arrangements, which might include women, youth or concessionaires (e.g. Community Resource Management Areas [CREMAs] in Ghana) who are not landowners. This would allow for more pragmatic solutions in transferring ERs rights to the programme proponent (jurisdiction/state). The expression of their consent will nevertheless be fundamental to ensure their fair engagement in the carbon trading arrangements (free, prior and informed consent [FPIC]).

In other contexts, in order to access forest climate finance, it is sufficient for forest countries to demonstrate their entitlement to claim or receive REDD+ results as a means of demonstrating that no other party has any competing claim (Green Climate Fund [GCF] REDD+ pilot programme).

Country legislation might refer to:

- the right to claim or receive payments derived from REDD+ (e.g. **Argentina, Colombia, Papua New Guinea, Paraguay, Peru**);
- the legal capacity to administer REDD+ results-based payments (RBPs) (e.g. **Chile**);
- the right to benefits arising from RBPs (e.g. **Ghana, Papua New Guinea, Viet Nam**); and
- ER rights or property rights on certified ERs (e.g. **Australia, Chile, the Democratic Republic of the Congo, Fiji, Mexico, New Zealand**).

Those legal provisions are key to providing further clarity on ERs legal implications, while facilitating the access of forest climate finance under different modalities.

To promote a nested approach, consistency between REDD+ project-level, vis-à-vis jurisdictional ERs legal requirements, is needed, taking into account the challenges associated with different geographical scales and limited capacities in developing countries.

Source: Author's own elaboration.

A centralized nested approach might be adequate in countries where the state owns forest resources, but is aiming to encourage different actors to generate REDD+ actions, such as the Democratic Republic of the Congo, Mozambique and Zambia. In this case, while the state is the original owner of carbon stocks and has the capacity to receive REDD+ results, it recognizes the right of forestland operators to benefit from REDD+, such as individuals and communities delegated by law to manage public forest land through concessions, licenses, or national agreements. The government authorizes such actors to benefit from a share of ERs payments, and/or the right to generate a

specified volume of ERs based on ERs allocation (apportioning national-scale REDD+ performance).

The decentralized nested approach is adequate when there are strong private property rights and mixed ownership of land and forest resources. Under this approach, the government claims the ERs rights associated with public lands, and private owners or communities claim the rights derived from their recognized forest and land areas. Communities and individuals are also free to engage in REDD+ projects and generate ERs.<sup>31</sup>

<sup>31</sup> More information is available here: <https://documents1.worldbank.org/curated/en/411571631769095604/pdf/Nesting-of-REDD-Initiatives-Manual-for-Policymakers.pdf>

# National legislation linked to emission reductions rights

## Africa

### Cameroon

There are currently no laws or regulations on carbon rights or benefit-sharing in Cameroon. Article 7 of the Forestry Law (1994) states that the state, regional and town authorities, as well as private individuals, may exercise all rights resulting from the owning of their forests. It follows that the carbon shall belong to the owner of the land where the resource is located (Cameroon, 1994).

Until this area of law is regulated in the country, the REDD+ Strategy establishes that state forests belong to the state, community forests to the community, communal forests to the town, and private forests to private individuals. Based on these classifications, it is likely that the state, as owner and manager of the vast majority of forests in the country, could be the main beneficiary of grants related to carbon rights; nonetheless the government has granted certain privileges to concession holders, who could therefore also benefit from these grants. Local communities and Indigenous Peoples would also be eligible (Cameroon, 2018).

Legal reform in this area would be required to ensure all persons eligible for carbon rights are also responsible for any carbon loss connected to these rights, and facilitate land registration for poorer individuals. Furthermore, given the current existence of a dual system, unifying land management regulation to align market practice with laws and regulations is necessary. Throughout these changes, political and sectorial differences

will need to be taken into consideration where necessary.<sup>32</sup>

### Côte d'Ivoire

According to Article 27 of the Forest Code (2019), ownership of a newly established forest or a planted tree lies with the landowner or the person who established or planted it under an agreement with the landowner (Côte d'Ivoire, 2019). Under an agreement between the parties, the owner of the trees planted may be a person who has concluded an agreement with a holder of a land title or land certificate, while ownership of the land remains with the holder of the land title. Therefore, the owner of a plot of land may be different from the owner of the trees planted on it (EU REDD Facility, 2021).

Carbon sequestered and stored in forests would constitute the “fruit” of the trees planted on the land, albeit an intangible fruit. Therefore, ownership of the carbon stored in forests would be linked to ownership of the trees. Where an individual owns the trees by virtue of holding a land certificate or title, or by agreement which grants them ownership, they are entitled to the fruits of the trees. However, where the land is subject to customary rights instead of a land certificate or land title, the position is unclear.

<sup>32</sup> White & Case country report produced by Amaury de Feydeau, Paul Loisel and Ahmed Boulahcen of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Cameroon.

There is currently uncertainty about how the ownership of a tree planted on land that is subject to customary rights is legally determined. In such a case, the uncertainty over who owns the trees planted on land subject to customary rights is likely to create uncertainty over ownership of the carbon stored in forests.

Some years ago, the government, in close consultation with relevant stakeholders and international experts, drafted a decree to “determine the management rules for REDD+ projects and programmes and related greenhouse gas emission reductions”. Accordingly, carbon credits were considered to be owned by the state when REDD+ projects were undertaken on land owned by the state, or if the state would take part in an international programme on its own behalf, allowing persons with real rights to obtain a share of benefits generated from the programme. The state would transfer ownership of carbon by way of agreement through its Ministry of Economy and Finance.

When a carbon credit would result from a REDD+ project undertaken in the rural domain, not being part of an international programme in which the state is participating in its own right, such carbon credits would be owned by the natural or legal person who obtained approval under the conditions set out in the draft implementing regulation.

Currently, it seems that instead of a draft decree, carbon rights will be regulated in the context of the draft Climate Change Law. In the meantime, the Forest Code (2019) and Rural Domain Law (2019)<sup>33</sup> may be interpreted to determine who owns carbon rights.

The new instrument may also provide more clarity about the tenure risks or opportunities which result from allocating carbon rights to landowners in the country, while greater clarity

may also be required on the types of benefits that beneficiaries will receive.<sup>34</sup>

## Democratic Republic of the Congo

In 2018, the Democratic Republic of the Congo implemented a regime on carbon rights, which were not previously regulated in the country. The regime was implemented by ministerial decree under the Forestry Code (Democratic Republic of the Congo, 2002). Article 3 of the 2018 Ministerial Decree (Arrêté ministériel 47/2018) establishes the procedure for REDD+ investments in the Democratic Republic of the Congo (Democratic Republic of the Congo, 2018).

According to Article 2 of the Ministerial Decree, REDD+ carbon credits refer to rights related to ERs, verified according to carbon methodologies duly approved by the regulator, resulting from a REDD+ project and/or jurisdictional programme. This means that REDD+ carbon credits verified according to both project and jurisdictional standards are considered in this definition, as long as the standard is approved by the minister responsible for forests (the Minister of Environment and Sustainable Development, as the regulator).

Article 3 regulates the legal status of ERs units, clarifying that the carbon stock contained in forests originally belongs to the state. The state recognizes an exclusive right of ownership over the country’s ERs units (UREC) to the holders of a REDD+ investment as soon as it is approved.

According to Article 10, the admissibility procedure refers to (among other things):

- the inclusion of the proposed REDD+ investment in the thematic areas contained in the REDD+ framework strategy;
- the existence of a consultation plan to obtain FPIC; and

<sup>33</sup> Act No. 2019-868 of 14 October 2019 intends to address land tenure insecurity in Côte d’Ivoire, which has decreased private and public actors’ willingness to invest in agroforestry and reforestation activities in the country, and in turn decreased the development potential of these activities.

<sup>34</sup> White & Case country report produced by Matthew Burnell, Will Cashman, Adrien Dumoulin-Smith, Morgan Imbert, and Rhulani Matsimbi of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Côte d’Ivoire. The draft decree was shared by Francesca Felicani-Robles (UN-REDD) who participated in the review process.



- the absence of a previous approved REDD+ investment in the same area and for the same activities, in order to avoid possible double counting.

In case of a favourable opinion, the registrar issues the REDD+ investment holder a national certificate of approval, which establishes the right of ownership over the forest carbon and the ERs units (ERUs) to be generated for the benefit of the REDD+ investment holder, as presented in Article 19. According to Article 35, the holder of a REDD+ investment must also notify the registrar of transactions of ERs and/or carbon units.

The issue of ownership of ERs units should be distinguished from the issue of benefit-sharing from REDD+ investments. According to Article 26, the REDD+ investment holder negotiates a benefit-sharing agreement and plan with stakeholders, according to the principles and models included in the manual in Annex 1 of the order.

The REDD+ investor has to comply with socio-environmental safeguards in accordance with the relevant regulations in force and to respect the rights of local communities and vulnerable social groups (Article 24 and Article 25).

Concerns have been raised at the project level regarding the functioning of the registry. As a consequence, there is a lack of clarity concerning the entity entitled to authorize carbon credit transactions in the absence of the registry, as well as the way subnational actors are engaged in the transactions and who should be informed to ensure transparency in benefit-sharing.

## Gabon

In September 2021, Gabon adopted the Climate Change Law, which contains the requirements related to: entitlement, tracking, and cancellation of GHG emissions allowances; Gabonese carbon credits, as well as other recognized carbon credits (including internationally transferred mitigation outcomes [ITMOs] and carbon stocks); and the ownership of and rights resulting from GHG ERs projects. The Climate Change Law also delineates the procedure and requirements for an operator to carry out a GHG ERs project in the country (Gabon, 2021).

All existing carbon stocks – or improvements to carbon stocks resulting from GHG ERs projects,<sup>35</sup> or from increased GHG absorption – are the exclusive property of the state.<sup>36</sup> Gabon's Ministry of Economy and the Environment & Climate Ministry are jointly mandated with commercializing Gabonese carbon credits. The revenues thereof belong to Gabon's Public Treasury.<sup>37</sup>

However, the state grants legal ownership of improvements to carbon stocks resulting from GHG ERs projects to the projects' proponent(s).<sup>38</sup> Moreover, the state is entitled to 20 percent of the Gabonese carbon credits issued for verified GHG ERs achieved by a GHG ERs project, carried out in accordance with a climate mitigation permit and applicable GHG ERs methodology.<sup>39</sup>

The Environment & Climate Minister, upon recommendation by the Climate Issues Management Authority (OGEC), issues GHG emissions permits to economic operators and may issue GHG emissions permits that exceed sectoral GHG emission allowances specified in the national GHG emissions plan.<sup>40</sup>

Pursuant to the Climate Change Law, the national GHG register will serve as the register of GHG emissions allowances, Gabonese carbon credits, and other carbon credits issued or recognized by the Climate Issues Management Authority (including ITMOs),<sup>41</sup> thus mitigating the risk of any double counting or payment.

<sup>35</sup> While the Climate Change Law consistently refers to "project, programme or activity", this report solely uses the term "project".

<sup>36</sup> More information can be found here: Article 73, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>37</sup> More information can be found here: Article 76, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>38</sup> More information can be found here: Article 74, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>39</sup> More information can be found here: Article 75, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>40</sup> More information can be found here: Article 53 and Article 56, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>41</sup> More information can be found here: Article 31, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

The Climate Change Law provides that when a Gabonese carbon credit is issued to a national GHG register account designated by a project's proponent, legal ownership of the Gabonese carbon credit and any associated carbon stock vests in the account holder.<sup>42</sup>

As with GHG register accounts owned by project proponents that are individuals or groups, if the national GHG register account is state-owned, legal ownership of issued Gabonese carbon credits, and of related carbon stocks, vests with the state.<sup>43</sup>

Once cancelled from an economic operator's GHG register account, GHG emission allowances, Gabonese carbon credits, and other recognized carbon credits can no longer be traded, sold, transferred, or used.<sup>44</sup>

A Gabonese carbon credit constitutes personal property and may be transferred nationally or internationally.<sup>45</sup> International transfers of Gabonese carbon credits, including to a foreign account and/or for purposes of Article 6 of the Paris Agreement, require authorization from the Climate Issues Management Authority.<sup>46</sup>

The national GHG emissions allowance system applies to the forestry sector. The country's national GHG emissions cap is fixed in accordance with the national GHG emissions allocation plan and the country's international commitments and national economic situation.<sup>47</sup> Annually, the Climate Issues Management Authority must issue a GHG emission allowance

to each operator (as applicable); following such issuance, legal ownership of the GHG emission allowance vests in the relevant operator. Greenhouse gas emission allowances are personal property and generally may be transferred domestically between operators in the national GHG emission allowance system, but cannot be transferred outside of said system.

While Gabon has taken several regulatory measures and has made significant progress in clarifying the legal status of GHG ERs, the country's legal framework for forest carbon rights is still evolving. The current legislation does not address how carbon rights are initially established. In practice, it also remains to be seen how the Forest Code (Gabon, 2001) and the Climate Change Law will interact; it is not entirely clear who will be authorised to undertake GHG ERs projects and on which lands/forested areas.<sup>48</sup>

## Zambia

The forest legal framework of Zambia has developed significantly in recent years, including with respect to the clarification of carbon rights to forests and the development of legal mechanisms for implementation of carbon stock management projects and benefit-sharing schemes.

Key developments in recent years include:

- the National Forestry Policy, which includes the definition of forest resource tenure regimes and cost, as well as benefit-sharing mechanisms in respect of carbon (Zambia, 2009);
- the Forests Act, which defines carbon as a form of forest product capable of being owned and traded, as well as identifies ownership rights in respect of forests, including devolution of management to local communities (this recognition of rights relating to carbon as a form of forest product is crucial for benefit-sharing under the REDD+ framework) (Zambia, 2015);

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<sup>42</sup> More information can be found here: Article 87, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>43</sup> More information can be found here: Article 88, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>44</sup> More information can be found here: Article 67, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>45</sup> More information can be found here: Article 89, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>46</sup> More information can be found here: Articles 87–98, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

<sup>47</sup> More information can be found here: Article 45, Climate Change Law (Ordonnance N° 019/2021 du 13/09/2021 relative aux changements climatiques), 2021.

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<sup>48</sup> White & Case country report produced by Claire Janvier, Navy Thompson, Seth Kerschner, and Maria Beguiristain of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Gabon.

- the Forests (community forest management) Regulations, which provide the framework for the appointment of community forest management groups to manage forests on behalf of local community (Zambia, 2018); and
- the Forests (carbon stock management) Regulations, which regulate the application for and grant of permits to conduct carbon stock management projects (Zambia, 2021a).

Taken together, Article 3 of the Forests Act and Article 3 of the Lands Act effectively vest ownership of land, trees and associated forest products (including carbon) in the presidency to keep in trust for Zambians (Zambia, 2006). Rights in respect of land, trees and carbon must accordingly be devolved from the president to local communities.

In particular, Article 3 of the Forests Act provides that the ownership of all trees standing on, and all forest products derived from, customary areas, national forests, local forests, state land, botanical reserves, and open areas, are vested in the president (on behalf of the republic), until lawfully transferred or assigned under the Forests Act or other written law. Accordingly, the president is the legal owner of carbon unless such rights have been expressly transferred or assigned.

The control and management of major forest products (including carbon) on state land, land under leasehold tenure (private land), and customary areas are vested in the Director of Forestry,<sup>49</sup> and any selling, bartering or dealing in any major forest product requires a license or permit.<sup>50</sup> This provides the basic framework for the recognition of forest carbon as a product that can be bought and traded.

Article 29 through Article 35 of the Forests Act regulate the establishment of community forest management groups to oversee the communal control, use and management of a forest. Recognized community forest management groups may apply for entry into a community forestry agreement in accordance with the Community Forest Management Regulations. The list of forest user rights does not expressly

include rights in respect of carbon or carbon stock management; however, these may be captured under the catch-all right.<sup>51</sup>

The community forest management group and the persons to be assigned rights are also required to specify benefit-sharing arrangements.<sup>52</sup> This provides a mechanism for community forest management groups to assign carbon rights and devolve carbon stock management projects, while retaining benefit-sharing for the local community represented by the group.<sup>53</sup>

According to the Forest (carbon stock management) Regulations (2021), permits for forest carbon stock management programmes may be issued in respect of a full range of land types under both forestry and wildlife/biodiversity regulation.<sup>54</sup> Article 6 provides that a range of entities are eligible to hold such permits.<sup>55</sup> An applicant for a permit must demonstrate proof of user rights of the forest or land where the project will be located.<sup>56</sup>

However, because customary tenure is already seen as legitimate de facto ownership of lands, many communities do not see the benefit of formalizing titles. This could leave local communities unable to access the opportunities

<sup>51</sup> More information can be found here: Article 32(2)(k), The Forests Act, 2015.

<sup>52</sup> More information can be found here: Article 17, The Forest (Community Forest Management) Regulations, 2018.

<sup>53</sup> White & Case country report produced by Alex Field, Sophia Cheng and Mukund Dhar of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Zambia.

<sup>54</sup> More information can be found here: Article 4, The Forest (Carbon Stock Management) Regulations, 2021.

<sup>55</sup> Including government agencies, business agencies, international organizations, locally existing institutions, community forest management groups and joint forest management committees.

<sup>56</sup> More information can be found here: Article 5, The Forest (Carbon Stock Management) Regulations, 2021. (In the case of state land, by way of a certificate of title and consent from the Director of Forestry for the use of the forest. In the case of customary land, under a community forest agreement. In the case of a protected area, by way of a consent letter from the institution mandated to manage the protected area. This enshrines community forest management groups, or those nominated by them, as the primary conduits for forest carbon stock management activities on customary land.)

<sup>49</sup> More information can be found here: Article 50(1), The Forests Act, 2015.

<sup>50</sup> More information can be found here: Article 50(2), The Forests Act, 2015.



that benefit-sharing legislation may bring, which is only attached to more formalized land titles (Mason-Case, 2011).

Progress is being made in this respect. The National Lands Policy highlights a key objective: the strengthening of land allocation mechanisms for both state land and customary lands in order to improve security of tenure (Zambia, 2021b). In addition, the Forests Act and the Community Forest Management Regulations have introduced separate mechanisms for local community involvement and benefit-sharing through community forest management groups and joint forest management areas. Nevertheless, the implementation of a new Customary Land Bill in respect of recognition of tenure and rights over

customary land remains outstanding.

The overall legal framework in Zambia is responsive to the eligibility requirements in respect of entitlement to ERs, including respect to land and forest tenure (including rights to carbon), as provided for under the Lands Act and Forests Act. Further clarity regarding customary land tenure and the promotion of community involvement in forest management through community forest management groups and joint forest management is crucial



### BOX 8 Key points, national legislation linked to emission reductions rights in Africa

In **Cameroon**, the Forestry Law (1994) provides that the state, regional and town authorities, as well as private individuals, may exercise all rights resulting from the owning of their forests. The carbon will presumably belong to the owner of the land where the resource is located (the state is the owner and manager of the majority of forests) or to those who contributed to the implementation of projects related to REDD+, if they are meant to be governed by separate laws or regulations. Clarity is still needed.

In **Côte d'Ivoire**, carbon sequestered and stored in forests would constitute the fruit of the trees planted on the land, albeit an intangible fruit. Ownership of the carbon stored in forests would presumably be linked to tree ownership. There is currently uncertainty about how the ownership of a tree planted on land that is subject to customary rights is legally determined. A preliminary draft decree entitled "determining the rules for managing the reduction of greenhouse gas emissions from REDD+ projects and programmes", has resulted from a participatory process and preparatory work involving key stakeholders since July 2022. This preliminary draft decree has not yet met the desired consensus, but discussions are underway with a view to including and elevating the issue within the climate change law.

According to the Ministerial Decree establishing the procedure for REDD+ investments in the **Democratic Republic of the Congo** (2018), "REDD+ carbon credit" refers to rights related to ERs, verified according to carbon methodologies duly approved by the regulator, resulting from a REDD+ project and/or jurisdictional programme. Carbon stock contained in forests originally belongs to the state. The state recognizes an exclusive right of ownership over the country's ERs units (UREC) to the holders of a REDD+ investment, as soon as it is approved. Concerns have been raised at the project level regarding the functioning of the registry for carbon credits in this jurisdiction.

In **Gabon**, all existing carbon stocks are the exclusive property of the state, according to the Climate Change Law (2021). However, the state grants legal ownership of improvements to carbon stocks resulting from greenhouse gas (GHG) ERs projects to the project proponents. A Gabonese carbon credit constitutes personal property and may be transferred nationally or internationally. International transfers require the authorization of the Climate Issues Management Authority (OGEC), including for the purposes of Article 6 of the Paris Agreement.

In **Zambia**, the Forests Act (2015) and Lands Act (1995, last ref. 2006) effectively vest ownership of land, trees and associated forest products (including carbon) in the presidency to keep in trust for Zambians. Rights in respect of land, trees and carbon must accordingly be devolved from the president to local communities. According to the Forest (Carbon Stock Management) Regulations (2021), permits for forest carbon stock management programmes may be issued in respect of a full range of land types. An applicant for a permit must demonstrate proof of user rights of the forest or land where the project will be located.

Notes: Author's own elaboration.

## Asia and the Pacific

### Indonesia

Indonesia's national legal forestry framework has evolved from a historically strict model where the state owned and controlled all of the forests, to a more modern paradigm where the state still maintains exclusive ownership rights of the forests (and the rights to all carbon therein), but simultaneously recognizes customary laws and uses within overarching approved uses that serve either conservation, protection, or production.

Chapter XIV, Article 33 of the 1945 Constitution of the Republic of Indonesia states that "the land, the waters, and the natural resources within shall be under the powers of the state and shall be used to the greatest benefit of the people" (Indonesia, 1945, p. 14).

The Basic Forestry Regulations, in a similar spirit to the Basic Agrarian Law (Indonesia, 1960), allow for the recognition of customary or communal forestry lands that are within the grey area of owned by the nation, and inhabited by the adat community (Indigenous Peoples) (Indonesia, 2021a). Historically, many adat communities live in these forests and are regionally considered to own, cultivate and inhabit these areas.



Entities and individuals that have acquired a forest carbon operation permit from the Ministry of Environment and Forestry (MoEF) hold the right to: (i) manage activities related to forest carbon management during the authorized period, and (ii) trade the forest carbon managed by the holder (Article 9-1, MoEF Regulation No. 20/2012) (Indonesia, 2012).

More recently, Presidential Regulation No. 98/2021 and MoEF Regulation No. 21/2022 regulate carbon trading and carbon pricing (*Nilai Ekonomi Karbon* [NEK]) in the context of international and domestic markets (Indonesia, 2021b; Indonesia, 2022).

“Carbon pricing” (*Nilai Ekonomi Karbon*) refers to the value of each unit of GHG emissions, generated from human and economic activities. They propose to implement both the “cap and trade” and “cap and tax” mechanisms, whereby the government will progressively introduce mandatory “emission caps” and a carbon tax for certain sectors and businesses to govern emission levels and enable carbon pricing.

According to Article 1 of PD 98/2021:

- “carbon unit” refers to a proof of carbon ownership in the form of a certificate or allowance expressed in one tonne of carbon dioxide as registered in the national registry system for climate change (Sistem Registri Nasional Pengendalian Perubahan Iklim [SRN PPI]);
- “carbon rights” refer to the control of carbon by the state;
- “carbon exchange” refers to a system that regulates the registry of carbon stocks (carbon trading) and the ownership status of carbon units; and
- “certificate of GHG ER” refers to proof of ERs by businesses and/or activities that have gone through MRV, recorded in the national registry system for climate change in the form of a registry number and/or code.

Certificate of GHG ERs is prohibited from being used in a contract, which stipulates the transfer of rights of GHG ERs certification value, with other parties in international trading without the minister’s authorization (Article 73, PD 98/2021).

According to Article 8 of MoEF Regulation No. 21/2022 (regarding procedures for implementing carbon economic value), the procedures of carbon trading for the sector or subsector are determined by the related ministers in accordance with their authority after coordinating with the minister administering government affairs in the field of environmental protection and management.

The related ministers may perform an international carbon trading cooperation to produce GHG ERs achievement results in order to achieve the NDC target in subsectors, after coordinating with the minister, as stated in Article 18. Carbon trading may also be carried out across sectors, as stated in Article 23, based on quotas determined by each minister. International trading can, in certain circumstances, allow carbon credits to be transferred to another country and Indonesia to then register a “corresponding adjustment” pursuant to Article 6 of the Paris Agreement.

Effective carbon trading relies heavily on having a transparent and authenticated form of carbon credits. For onshore trading, MoEF Regulation No. 21/2022 provides that carbon credits (ER certificates) are the main type of trading instrument to be recorded in the Indonesian carbon market. Carbon credits are issued by the Ministry of Environment and Forestry to business entities which have succeeded in reducing their emissions level below the stipulated threshold (for sectors with a determined maximum amount of emissions) and/or baseline (for sectors without a determined maximum amount of emissions) (Indonesia, 2021b).

The implementation of RBPs as referred to in Article 30 of Section 1 of MOEF Regulation No. 21/2022 does not lead to the transfer of carbon ownership.

Indonesia’s national legal framework, though complex, is robust and intentional in its alignment with REDD+ principles. The current national regulatory framework complies with the REDD+ RBP pilot programme under the GCF, as evidenced by its approved 2020 RBP funding proposal.

Indonesia is also in compliance with the World Bank Carbon Fund Program’s FCPF, since it is one

of 47 selected FCPF member countries and is a current participant in both the FCPF's Readiness Fund and Carbon Fund (FCPF, n.d.).<sup>57</sup>

Under ART-TREES, various safeguards consistent with the Cancun Agreements must be complied with, including the full and effective participation of relevant stakeholders – in particular Indigenous Peoples and local communities. While Indonesia formally recognizes tenure rights of adat communities, it might be relevant to reinforce the rights on a local level in adherence to ART-TREES safeguards that are specific to the rights of Indigenous Peoples.

## Lao People's Democratic Republic

The Ministry of Agriculture and Forestry (MAF) and the Ministry of Environment and Natural Resources (MoNRE) are the two national institutions with a legal mandate to manage forest resources in the Lao People's Democratic Republic. Although the Land Law grants the Ministry of Environment and Natural Resources broad statutory authority over land use, management of forests is delegated to the Ministry of Agriculture and Forestry (Lao People's Democratic Republic, 2019b). Coordination is required among the two institutions to grant forest land use certificates and other matters related to the use of forest lands.

The Constitution provides that all land belongs to the state, but land use rights may be held by individuals, communities, or other organizations (Lao People's Democratic Republic, 2003). The Land Law fostered a shift towards a private rights approach to forest use rights (MRLG and LIWG, 2021). It allows the government to issue land use certificates for forest land, which "can be used for public purpose, family and business ensuring there are no adverse impacts on forest, soil quality, environment and society".<sup>58</sup>

Correspondingly, both the Constitution and the Land Law state that natural resources belong to the people of the country and are managed by the state.<sup>59</sup>

The Forestry Law clarifies that the rights afforded to private sector actors under both laws are usufruct rights allowing activities including the generation of income "from trade in forest carbon" (Lao People's Democratic Republic, 2019a). "Natural resources," which have been understood to include forest carbon (FCPF, 2018),<sup>60</sup> historically belonged to the same individual or entity that owns the forest rights. In particular, the law indicates that individuals, households, legal entities or organizations that developed, planted, or rehabilitated forests and forest land should enjoy the benefits of carbon trading. As such, carbon trading is designated as a type of forestry business in the legislation,<sup>61</sup> but it does not explicitly provide for ownership in forest carbon.

The law encourages and promotes the utilization of forests as sites for forest carbon trading. It also allows forests to be used for public benefit, such as trade in forest carbon, in all three types of forests defined in the statute.

Specifically, Article 58 suggests forest regeneration activities can entitle participating individuals or entities to benefit from forest carbon trade. Article 126 similarly provides that individuals or entities have "usufruct right for forests and forestland which they have developed in forest and forestland areas provided to them by the State". It further provides that "these usufruct rights allow the conduct of certain activities, such as (...) generating income from ecotourism or from trade in forest carbon".

Article 103, the main provision addressing carbon trading, defines carbon trading explicitly and requires certification by relevant international organizations. Without explaining further, it provides that the state sets "policies, strategies and laws" to regulate their carbon trading

<sup>57</sup> More information can be found here: <https://www.forestcarbonpartnership.org/country/indonesia>

<sup>58</sup> More information can be found here: Land Law, Article 44, 2019.

<sup>59</sup> More information can be found here: Land Law, Article 4, 2019.

<sup>60</sup> More information can be found here: p. 81, [https://www.forestcarbonpartnership.org/system/files/documents/LaoPDR\\_ERPD\\_FinalDraftMay.2018-Clean.pdf](https://www.forestcarbonpartnership.org/system/files/documents/LaoPDR_ERPD_FinalDraftMay.2018-Clean.pdf)

<sup>61</sup> More information can be found here: Chapter 6 of the 2019 Forestry Law provides for trade in forest carbon.

activities “in accordance with international conventions and agreements”.<sup>62</sup>

In addition, the government will likely issue a carbon legislation (Prime Minister’s decree) under the Ministry of Natural Resources and Environment’s coordination aiming to regulate the carbon registry, the authorization of internationally transferred mitigation outcomes and the corresponding adjustments, as well as a legislation on forest carbon projects establishing eligibility requirements, benefit-sharing provisions, safeguarding requirements, and the allocation of the jurisdictional baseline, among other aspects.

The Forestry Law recognizes and lists carbon trading as a benefit to the community and as a business that can be carried out in forests. Article 4 provides that the Forest and Forestland Management Agency will legally recognize the property rights of individuals, legal entities, organizations, and investors in plantations and planted trees within certain designated areas, but the ownership of these forest carbon rights will be left to interpretation or assumed to belong to the same individuals or entities that manage the forests or own trees. It may be appropriate to explicitly clarify carbon ownership under different tenure regimes.<sup>63</sup>

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<sup>62</sup> More information can be found here: Article 103 of Law on Forestry stating that: “Forest carbon trading refers to the payment by legal entities and organizations to those who manage, develop and protect the forest from destruction in order to allow the sequestration of forest carbon at agreed levels that are certified by the international organization concerned. The Government defines policies, strategies and laws for promoting and managing trade in forest carbon, consistent with international conventions and treaties to which the Lao People’s Democratic Republic is a signatory. The Government encourages individuals, legal entities and organizations to conduct trade in forest carbon under international mechanisms for carbon trade, based on agreements with the Agriculture and Forestry sector and the granting of a business license by relevant sectors as prescribed in Article 104 of this law”

<sup>63</sup> White & Case country report produced by Zhengping Lu and Coleman Saunders of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of the Lao People’s Democratic Republic.

According to the Ministry of Agriculture and Forestry:

The draft Benefit Sharing Plan (“BSP”) for the ongoing Emission Reduction programme in six provinces with REDD+ pilot actions proposes to enter sub-agreement contracts with private sector players when planting trees and asks the private tree planters to authorize MAF to transfer ERs free of any third-party interest or encumbrance. Provincial REDD+ Offices and the Provincial REDD+ Task Force would manage and oversee the execution of these sub-agreement contracts for the MAF (Ministry of Agriculture and Forestry, 2020, p. 22).<sup>64</sup>

## Nepal

After the promulgation of the Constitution of Nepal in 2015, the country has been restructured into a three-tiered federal governance system: federal, provincial (seven provinces), and local (753 local government units). The Constitution has clearly defined and distributed power and jurisdiction for three main levels of government. Schedule 5(27) of the Constitution has identified carbon as a service; according to Article 57(1) and Schedule 5(27), carbon services shall be regulated by the Government of Nepal (Nepal, 2015).

The Forests Act recognizes carbon services as one of the environmental services generated from forest ecosystems (Nepal, 2019b). According to Section 44(1.a), the government shall make an appropriate arrangement for the management, utilization and distribution of benefits arising out of environmental services.

The Environment Protection Act states that the Government of Nepal may participate in carbon trade with the mechanisms established by the international treaty, any foreign government or organization, business entity or private sector for the mitigation and conservation of carbon emission (Section 28) (Nepal, 2019a).

The Environment Protection Rule allows private forest landowners to participate in carbon trading with the government; the government shall

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<sup>64</sup> More information can be found here: p. 22, [https://ewdata.rightsindevelopment.org/files/documents/51/WB-P165751\\_irKJtsW.pdf](https://ewdata.rightsindevelopment.org/files/documents/51/WB-P165751_irKJtsW.pdf)

obtain carbon rights from private landowners in accordance with the rules (Nepal, 2020).

According to the Carbon Service Management Provision (Section 107) of the Forest Regulation (n. 2079/2022), the results of carbon accumulation and emission reductions in the forest area derived from the implementation of the program (...) can be sold for a certain period of time through the process of carbon trading accepted by the Government of Nepal internationally (4) (Nepal, 2022).

In order to sell forest carbon services, the forest user groups and other affected local communities shall be notified and prior informed consent of the affected local communities shall be obtained through the process established by the Government of Nepal (6). The Ministry shall prepare a benefit distribution plan with the participation of the Local Government of the area, related private forest owners, forest user groups and affected local communities to distribute the fund derived from carbon services among the Government of Nepal, the Provinces, Local Governments, local communities and private forest owners.

The Government is undertaking an in-depth legal review to provide further accuracy with regards to the implications on private forests, moving ahead in preparing a benefit-sharing plan and specifying the procedures.<sup>65</sup>

## New Zealand

New Zealand has signed several international agreements and joined regional instruments regarding climate change and the role of forestry in removing carbon dioxide from the atmosphere. In part to comply with its obligations under those agreements, the country created a national cap and trade regime (the Emissions Trading Scheme [ETS]) in 2008 through an amendment to the Climate Change Response Act (New Zealand, 2023). The ETS is New Zealand's comprehensive legal and regulatory regime that identifies and regulates carbon rights in post-1989 forests, requires annual carbon storage reporting from rights holders to the government according to a standardized accounting

method, compensates rights holders with New Zealand Units (NZUs), and manages a national market where rights holders can sell their New Zealand Units to emitters.

The enabling legislation for the ETS authorizes the Environmental Protection Authority, the Ministry for the Environment, and the Ministry for Primary Development to track and credit emissions and removals in certain sectors of the New Zealand economy.

Forestry has been included in the ETS as a required sector from the beginning, because of its important role in removing carbon dioxide from the atmosphere through forest growth (Cortés Acosta *et al.*, 2021).<sup>66</sup> Eligible forestland must be at least one hectare, with tree crown cover of over 30 percent per hectare, and the trees must grow to at least 5 metres at maturity.<sup>67</sup>

Persons that store GHGs, such as forest rights holders, can earn New Zealand Units from the government for such storage. The rights holders can either use these New Zealand Units to pay for future emissions or sell them on the marketplace to emitters. Greenhouse gas emitters purchase units on the exchange from persons such as forest rights holders or from the government at auctions, which they then use to “pay” for their emissions by surrendering one unit to the government for each ton of GHG that they emit, which they keep track of through regular measuring and reporting.<sup>68</sup>

Owners of pre-1989 and post-1989 forests own the right to the carbon stored in their forests. Under the Climate Change Response Act, the status of post-1989 forests that are subject to the ETS must be recorded in notices registered on the land title. Owners of post-1989 forests registered in the ETS may lease their forests or license particular rights

<sup>65</sup> For more information consult the ART-TREES Concept Note: <https://art.apx.com/mymodule/reg/TabDocuments.asp?r=111&ad=Prpt&act=update&type=PRO&aProj=pub&table-name=doc&id1=113>

<sup>66</sup> More information is available here: [http://motu-www.motu.org.nz/wpapers/20\\_11.pdf](http://motu-www.motu.org.nz/wpapers/20_11.pdf). Some industry sectors were exempted from the ETS at its creation, like the agricultural sector, which includes livestock and synthetic fertilizers (ICAP, 2019).

<sup>67</sup> White & Case country report produced by Hannah Rubashkin and Sven Volkmer of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2021. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of New Zealand.

<sup>68</sup> More information is available here: New Zealand's Climate Change Response Act (2002), Section 62 and Section 63.



to them, including the right to deforest the land. The obligations of participating in the ETS transfer from the landowner to the forest lessee or licensee only apply if both parties agree to the transfer in writing and notify the Forest Service that the ETS participation obligations have been transferred. If a forestry lease or right is granted and the parties do not notify the Forest Service in writing of the transfer, then the landowner remains the ETS participant with all associated obligations, including annual reporting of the carbon stock in the forest, and associated payments or credits of New Zealand Units for deforestation or afforestation (Ministry for Primary Industries, 2023).<sup>69</sup>

The majority of New Zealand forest stock that is subject to the ETS is grown as plantation farms and is owned by a combination of private individuals and companies, the crown, and Maori landowners (Ministry for Primary Industries and the New Zealand Forest Industry, 2013).<sup>70</sup>

As of 2005, Maori owned approximately 6 percent of the total indigenous forest in New Zealand. Under continuing Treaty of Waitangi this number is growing.<sup>71</sup> While some Maori rights holders engage in managed logging within the bounds of the Forests Act regulations, others are looking for ways to focus on stewardship and conservation of their forests, and move away from logging. REDD+ programs could provide a mechanism for Maori rights holders of pre-1989 forests to make that transition.

The Forest Service has also developed the Permanent Forest Activity to make it easier for the rights holders of permanent forests to earn New Zealand Units and to allow them to earn more New Zealand Units over time if they do not harvest their forests. To participate in the Permanent Forest Activity, rights holders of post-1989 forests must commit for 50 years and refrain from clear fell harvesting their forest; they must also maintain a minimum of 30 percent tree cover.

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<sup>69</sup> More information is available here: <https://www.mpi.govt.nz/forestry/forestry-in-the-emissions-trading-scheme/when-forest-land-ownership-or-land-agreements-change/buying-selling-inheriting-forest-land-in-ets>

<sup>70</sup> More information is available here: <https://www.mpi.govt.nz/dmsdocument/13819/direct>

<sup>71</sup> See above note 16 for a discussion of the Treaty of Waitangi. Also see Miller, R., Alan, R. & Dickinson, Y. 2007. *Maori Connections to Forestry in New Zealand*. Ministry Of Agriculture and Forestry.

The Emissions Trading Scheme can serve as a model for other countries interested in creating a domestic cap and trade regime to help them achieve the goals of REDD+, including incentivizing sustainable forestry, reforesting degraded areas, and halting further deforestation.

## Vanuatu

Under Article 73 and Article 74 of the Vanuatu Constitution (1980, ref. 2013),<sup>72</sup> all land in the country (with the exception of government-owned public land) constitutes customary land belonging to indigenous customary landowners. The constitutional recognition of the rights of Indigenous Peoples over customary land means that specific provisions of the United Nations Declaration for the Rights of Indigenous Peoples (UNDRIP) must also be taken into account in the development of REDD+ activities. Article 10 is particularly significant, which “establishes the principles of Free, Prior and Informed Consent (“FPIC”), meaning that Indigenous Peoples have the right to live on their lands and territories and that decisions with respect to the development of these territories must meet the requirements of FPIC”.

Because 90 percent of the land in Vanuatu is owned under customary regimes and governed by customary law, the ownership of carbon rights will likely be determined by the customary laws relating to the land in question (Ogle, 2014). However, Vanuatu does not have any laws that specifically address ownership of carbon rights on unleased customary land.

So far, the Forestry Rights Registration and Timber Harvest Guarantee Act of 2000 (the “Forestry Rights Act”, last amended in 2006) includes references to a separate property right that enables carbon rights to be decoupled from land rights, thereby providing for the allocation of carbon rights. Under the Forestry Rights Act, the holder of a forestry right may transfer the forestry right to any person, with or without consideration, by an instrument in the form prescribed under Section 2.5(2) of the Forestry Rights Act (Vanuatu, 2006a). A forestry covenant is binding on the assignees and personal representatives of the covenantor and on all successors in title of the covenantor to the land,

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<sup>72</sup> [https://www.constituteproject.org/constitution/Vanuatu\\_2013.pdf?lang=en](https://www.constituteproject.org/constitution/Vanuatu_2013.pdf?lang=en)

unless a contrary intention is expressed in the forestry right (or in some variation of that right). However, the legal framework established by the Forestry Rights Act applies only to leased land, because the grant of forestry rights depends on the prior creation of a lease over the land. Therefore, the Forestry Rights Act does not provide any guidance

relevant to exercising or allocating carbon rights on unleased land.<sup>73</sup>

On the other hand, the Land Reform Act (Cap 123, last ref. 2014) established new procedures and requirements for the grant of leases over customary land and created the Land Management Planning Committee, responsible for approving leases of customary land (Vanuatu, 2006b). It enables traditional institutions (*nakamals*) to make binding decisions: (i) identifying which families, groups,

## Key points, Asia and the Pacific

### BOX 9

#### Key points, national legislation linked to emission reduction rights in Asia and the Pacific

The **Indonesian** regulatory framework does not expressly stipulate who owns carbon. However, according with the constitutional principle (1945) and Article 4 of Basic Forestry Regulations, forests and everything directly attached (including carbon) is primarily owned by the government, including communal/adat lands.<sup>\*\*</sup> However, entities and individuals that have acquired a forest carbon operation permit from the Ministry of Environment and Forestry (MoEF) hold the right to (i) manage activities related to forest carbon management during the authorized period, and (ii) trade the forest carbon managed by the holder (Article 9-1). More recently, Presidential Regulation No. 98/2021 and MoEF Regulation No. 21/2022 regulate carbon trading and carbon pricing (Nilai Ekonomi Karbon) in the context of international and domestic markets, where “carbon rights” refer to the control of carbon by the state; “certificate of greenhouse gas (GHG) emission reduction (ER)” refers to proof of ERs by businesses and/or activities that have gone through monitoring, reporting and verification (MRV), and is recorded in the national registry system for climate change (Sistem Registri Nasional Pengendalian Perubahan Iklim [SRN PPI]).

The Constitution of the **Lao People's Democratic Republic** (1991, last ref. 2003) provides that all land belongs to the state, but land use rights may be held by individuals, communities, or other organizations. The Forestry Law (2007, last ref. 2019) clarifies that the rights afforded to private sector actors are usufruct rights allowing activities including the generation of income “from trade in forest carbon”.<sup>\*\*\*</sup> The law encourages and promotes the utilization of forests as sites for forest carbon trading. It also allows forests to be used for public benefit, such as trade in forest carbon, in all three types of forests defined in the statute. However, it doesn't provide legal certainty as to the ownership of carbon rights in planted forests or trees. Therefore, it may also be necessary to explicitly clarify carbon ownership under different tenure regimes.

Schedule 5 (27) of the Constitution of **Nepal** (2015) has identified carbon as a service. The Forests Act (2019) recognizes carbon services as one of the environmental services generated from forest ecosystems. The Environment Protection Act (2019) authorizes the government to take part in carbon trading for ERs and carbon stock enhancements.

The Emission Trading Scheme (ETS) created in 2008 is **New Zealand's** comprehensive legal and regulatory regime that identifies and regulates carbon rights in post-1989 forests, requires annual carbon storage reporting from rights holders to the government according to a standardized accounting method, compensates rights holders with New Zealand Units (NZUs), and manages a national market where rights holders can sell their New Zealand Units to emitters. Persons that store GHGs, such as forest rights holders, can earn New Zealand Units from the government for such storage. The majority of New Zealand forest stock that is subject to the Emission Trading Scheme (ETS) is grown as plantation farms and is owned by a combination of private individuals and companies, the crown, and Maori landowners.

The **Vanuatu** Constitution (1980, ref.2013) states that all land (with the exception of government-owned public land) constitutes customary land belonging to indigenous customary landowners. Because 90 percent of the land in Vanuatu is owned by customary owners, the ownership of carbon rights will likely be determined by the customary laws relating to the land. The Forestry Rights Act (last amended in 2012) includes references to separate property rights that enable carbon rights to be decoupled from land rights, thereby providing for the allocation of carbon rights; however, it only applies to leased land.

**Notes:** Author's own elaboration.

\* “Adat” refers to the local traditional systems of rights, beliefs and customs as they have evolved over time in different parts of Indonesia.

\*\* Henley & Davidson. 2007, pp. 3-4

<sup>73</sup> More information is available here: Forestry Rights Registration and Timber Harvest Guarantee Act, 2000, consolidated 2006, Section 2.3(1). [Cited 7 July 2021]. [http://www.paclii.org/vu/legis/consol\\_act/fratha603](http://www.paclii.org/vu/legis/consol_act/fratha603)

or individuals own customary land (or are entitled to lease customary land), and (ii) determining and recording who holds use rights over customary land.

A decision of *nakamals* becomes a recorded interest in land. As such, the Land Reform Act may provide a mechanism by which to clarify who owns forest carbon rights in a particular customary land.<sup>74</sup>

## Latin America and the Caribbean

### Argentina

Argentina's legal framework does not explicitly define ERs ownership rights. The country currently has opted to wait for further developments concerning Article 6 of the Paris Agreement. After COP26 in Glasgow and the adoption of the Article 6 Rulebook, it is now expected that the country will move ahead in legislating on the matter.

As indicated in Section 3.5, "Use of Markets", in the NDC (revised in 2016): "Any transfer of emission reduction units achieved in Argentina shall be explicitly authorized by the National Government and, unless otherwise provided for, all emission reductions in the country shall be counted towards achieving NDC goals", and reported to the UNFCCC. So far, carbon credits traded under the voluntary market, which involve adjustments to the NDC, will not require such authorization.

Nevertheless, the country's legal framework provides the foundation to the mandate of the Ministry of the Environment and Sustainable Development (MAyDS) for receiving, managing and administering payments for forest environmental services, including GHG emission fixation in the context of national

REDD+ programmes.<sup>75</sup> In particular, according to Argentine legislation, the ministry is in charge of protecting the value of forest environmental services throughout the territory, in collaboration with the provinces within their jurisdictions, as established in Article 12 of the Law on Minimum Standards for the Environmental Protection of Native Forests Argentina (Argentina, 2007). Therefore, the agreement reached in the context of the Federal Environment Council (COFEMA) between the provinces and the ministry in relation to the GCF REDD+ RBPs, excludes potential claims by the provinces, originally owners of natural resources, on the volume of ERs transacted with the GCF (COFEMA Resolution No. 424, 2020).

As Argentina is a federal state, provinces hold the original domain of the natural resources found in their territory, including native forests: "The provinces have the original dominion over the natural resources existing in their territory" (Constitution of Argentina, 1853 rev. 1994, p. 21).<sup>76</sup> Additionally, "the authorities [provinces] shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education".<sup>77</sup> It is also stated that "the Nation shall regulate the minimum protection standards" enforceable at the national level, while "the provinces those necessary to reinforce them, without altering their local jurisdictions" (Constitution of Argentina, 1853 rev. 1994, p. 5).<sup>78</sup>

The Law on Minimum Standards for the Environmental Protection of Native Forests defines the minimum environmental standards to protect, enrich, restore, conserve, use and sustainably manage native forests. It also establishes a regime and criteria for the

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<sup>74</sup> White & Case country report produced by Elizabeth Kirk, Rucha Phadtare, Alexandra Butler, and Kristin Schultz of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Vanuatu.

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<sup>75</sup> More information is available here: [https://www.greenclimate.fund/sites/default/files/document/fp142-fao-argentina\\_0.pdf](https://www.greenclimate.fund/sites/default/files/document/fp142-fao-argentina_0.pdf)

<sup>76</sup> More information is available here: Section 124, paragraph 2 of the Constitution. <https://faolex.fao.org/docs/pdf/arg77017E.pdf>

<sup>77</sup> More information is available here: Section 41, paragraph 2 of the Constitution.

<sup>78</sup> More information is available here: Section 41, paragraph 3 of the Constitution.

distribution of funds derived from environmental services (including GHG fixation) provided by native forests (Article 1). As it relates to ERs, Article 5 of the Law states that native forests provide the following environmental services, among others: a) conservation of biodiversity; b) soil and water quality conservation; c) GHG emissions fixation; and d) defence of cultural identity. The Ministry of the Environment and Sustainable Development, designated as the competent national authority, is in charge of implementing the national forest protection programme, aiming to “promote the creation and maintenance of sufficient and functional forest reserves for each eco-forest region of the national territory, in order to avoid adverse ecological effects and loss of strategic environmental services” (Article 12, Law 26.331/2007).

There is no definition of PES ownership rights. Instead, the law clearly states that the Ministry of the Environment and Sustainable Development is responsible for protecting the value of the environmental services provided by native forests (Article 12, numeral c). The provinces concur in supporting the ministry’s mandate.

The Federal Environment Council (COFEMA) constitutes the platform for decision-making and policy coordination among provincial jurisdictions and the central administration. Among its objectives, the council aims to formulate a comprehensive environmental policy and manages international financial resources derived from environmental projects. Since the enactment of the Forest Law and the approval of its regulatory decree, the council’s resolutions and decisions have contributed to clarifying and overcoming undefined aspects or existing gaps related to the implementation of the forest law.

Furthermore, to ensure a fair distribution of GCF-derived payments to vulnerable groups, the Ministry of the Environment and Sustainable Development “shall recognize and respect the rights of indigenous communities that have traditionally occupied the lands” (Article 19, Law 26.331/2007).

However, there is room for strengthening this legal framework by taking steps to clarify gaps in the land tenure system, and passing legislation

that takes steps to regulate private individuals’ forestry actions.<sup>79</sup>

## Brazil

The Law on the Protection of Native Forests (Federal Law 12.651/2012) defines carbon credits as a “legal title over a tradable intangible asset” (Brazil, 2012),<sup>80</sup> but does not address the allocation or trade of carbon rights.

The National Climate Change Policy (Federal Law 12.187/2009) establishes in Article 9 that “the Brazilian emissions reductions market will be operationalized in securities/futures exchange and over-the-counter markets, authorized by the Brazilian Securities Commission, in which securities representing avoided GHG emissions will be traded” (Brazil, 2009).

As further recent developments, Brazil also saw the launch of the Forest+ Program (Floresta+) through Ordinance 288/2020 and Ordinance 518/2020 (Brazil, 2020), and the enactment of Federal Law 14.119/2021, which introduced the national policy on PES (Brazil, 2021). The objective of the legislation and policy is to stimulate the growth of VCMs, particularly with regard to carbon credits issued for projects aimed at the conservation and recovery of forests and other native vegetation, including REDD+.

The federal programme for PES created by the legislation, aiming at supporting the payment for these services by the federal government, focuses on actions of maintenance, recovery or improvement of vegetation coverage in priority areas of conservation to avoid habitat fragmentation, the formation of biodiversity corridors, and water resources conservation.

In addition, several states in Brazil have enacted their own laws related to climate change and GHG emissions, such as Acre, Amazonas, Mato Grosso, Pará, Rio de Janeiro, Rondônia, São Paulo, and Tocantins.

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<sup>79</sup> White & Case country report produced by Evan Shaver, Jacob Manzoor and William Quish of White & Case LLP, as well as Pedro Morales of GLZ Abogados, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Argentina.

<sup>80</sup> See Article 3, XXVII of the Forest Code.



## BOX 10 Case study, State of Acre, Brazil

In October 2010, the State of Acre enacted Acre Law No. 2.308/2010, which set forth a policy called the State System of Environmental Services (SISA) that became known as the world's first jurisdictional state-level programme for REDD+. The SISA Act comprised diverse governmental actions and programmes including ecosystem services such as carbon sequestration, maintenance of water and hydrological services, conservation of soils and biodiversity, and valuation of knowledge, most of which remain largely unregulated in Brazil to this day. In addition, the law also created certain institutions to administer and procure funding for SISA, such as the Institute of Climate Change and Regulation of Environmental Services (IMC), the Commission for Validation and Accompaniment (CEVA), and the Company for the Development of Environmental Services (CSDA).

Although SISA is at the forefront of REDD+ legislation in Brazil and the world, and has so far produced encouraging results, there are still many challenges faced by the State of Acre, such as securing funding for ongoing initiatives. Moreover, the disconnection between REDD+ legislation and other states legislation in Brazil creates hurdles in the implementation of SISA.

Source: Author's own elaboration.

More recently, Federal Decree 11.075/2022 has established the National System for Reducing Emissions of Greenhouse Gases (SINARE) and the procedures for preparing the sectoral plans for mitigation of climate change (Campetti *et al.*, 2022). The decree defines concepts such as:

- carbon credit: a financial, environmental, transferable asset that represents the reduction or removal of one tonne of carbon dioxide equivalent, which has been recognized and issued as a credit on the voluntary or regulated market;
- certified ERs credit: a carbon credit that has been registered with the National System for Reducing Emissions of Greenhouse Gases; and
- carbon stock unit: a financial, environmental, transferable asset, representative of the maintenance or storage of one tonne of carbon dioxide equivalent, including all means of carbon storage, except for GHGs present in the atmosphere.

Certified ERs credits may be used for compliance with GHG emission limits or be traded according to the registration rules establishing the National System for Reducing Emissions of Greenhouse Gases. The ERs and removals registered in the national system, in addition to the targets established for the sectorial agents, shall be recognized as certified ERs credits if they meet the system's certification standard (Article 10). The National System for Reducing Emissions of

Greenhouse Gases enables, without the need to generate certified ERs credits, the registration of carbon from native vegetation and carbon stock units (Article 11).

As it concerns benefit rights, the REDD+ experiences in Brazil involve implementing performance-based mechanisms in which the benefits are distributed on the condition that the jurisdictions that receive the resources achieve a predefined standard of performance against a baseline.

The REDD+ National Commission (CONAREDD+) Resolution No. 6/2017 defines that 40 percent of performance-based payments from GHG ERs must go to the federal government due to its efforts in maintaining native forests in protected areas (denominated as "conservation units" in Brazil) and indigenous lands, while 60 percent must go to the states of the Legal Amazon Forests – including Acre, Amapá, Amazonas, Maranhão, Mato Grosso, Pará, Rondônia, Roraima, and Tocantins – using the following criteria: (i) 30 percent of resources must go to states with occurrence of native forest (stock), and (ii) 30 percent must go to states with deforestation reductions (flow) (Brazil, 2017). The stock-and-flow approach, which consists of distributing funding to different land tenure categories according to their balanced contribution to stocks and reducing deforestation, is already being used in the REDD+ jurisdictional systems of Acre and Mato Grosso.

The National Forest Corporation of Chile has prepared “collaborative agreements” (*convenios de colaboración*)\* involving small and medium landowners regarding the non-monetary benefits derived from the implementation of the National Strategy on Climate Change and Natural Resources (ENCCRV). The rights and obligations related to Green Climate Fund (GCF) results-based payments (RBPs) are regulated at the territorial level through those bilateral agreements. Each agreement will vary according to the modality chosen and the nature of the counterpart, and will contain elements set out within the benefit-sharing plan to clarify how benefits will be distributed among the beneficiaries having contributed to generating these payments.

The agreement states that emission reductions (ERs) and emission removals generated from the implementation of the activities reported will be exclusively accounted towards the country’s nationally determined contribution (NDC) targets, in accordance with the methodologies and reports submitted to the United Nations Framework Convention on Climate Change (UNFCCC), in line with the ENCCRV. In order to avoid the risk of double counting and/or double payment, the owner shall not enter into any other contract, act, or agreement involving ERs transactions generated by the activities financed through +Bosques (GCF’s pilot programme for REDD+ RBPs) during the validity of the agreement.

Notes: Author’s own elaboration.  
\* CONAF, 2021, Santiago.

Although Brazil is the first country to have a REDD+ pilot programme approved under the GCF, further legal improvements currently under discussion at country-level shall be achieved by clarifying the allocation of carbon rights and the rules on benefit-sharing. In particular, the adoption of a legislation at federal-level could help to standardize the basic rules regarding: (i) the legal owner of stored carbon; (ii) the conditions to claim the results from the reduction of GHG emissions from deforestation and forest degradation; and (iii) the rules on benefit-sharing, including beneficiaries’ rights and the calculation of the benefits to be received.<sup>81</sup>

## Chile

Chilean law does not explicitly regulate carbon rights. Title to those rights has been contextualized within Chile’s existing legal framework, in particular contract and ownership of land.<sup>82</sup>

The Framework Climate Change Law No 21.455/2022 nevertheless says that to comply with emission standards, certificates may be used to accredit the reduction or absorption of GHG emissions, obtained through the implementation of projects in Chile for this purpose (Chile, 2022). The above is subject to the condition that such reductions or removals: are additional, measurable, verifiable and permanent; have environmental and social benefits; and comply with the NDC.

While there is no specific legislation allocating carbon ownership rights, they can be defined by the agreements governing the transfer of such rights under the RBPs or carbon trading schemes. For example, at an initial stage the National Strategy on Climate Change and Natural Resources (ENCCRV) analysed the nature of carbon stored on lands and trees considering that sequestered carbon is real/measurable, linked to the land, and is permanent (although variable): all characteristics that distinguish real rights from personal rights (CONAF, 2014).

Considering the lack of legislation related to property rights of ERs, any person is legitimated to claim rights related to a certain volume of ERs, based on their property rights on lands. In the context of the implementing measures related to the REDD+ Strategy, this has never occurred, which has been officially convened to the FAO

<sup>81</sup> White & Case country report produced by Dara Jeffries, Isabela Deveza, Joao Lacerda, Joao Villa, Juan Manuel de Remedios, Laura Drzewinski, and Ricardo Pasianotto of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Brazil.

<sup>82</sup> More information is available here: p. 292, above note 26, FCPF, Emissions Reduction Program – ERPD – Chile (2016).

and the GCF counterparts (including to Carbon Fund) during the approval processes. The country is currently developing a benefit-sharing plan that will reduce any potential risk to receive legal claims (Soto. G., CONAF, 2023).

The Framework Climate Change Law states that the long-term climate strategy shall contain at least the following key aspects: levels of GHG absorption and storage to achieve and maintain the Article 4 target; guidelines on ecosystem conservation, ecological restoration, afforestation and reforestation with native species; and technologies and practices for carbon capture and storage. The guidelines will not encourage the planting of monoculture tree plantations (Article 5).

Chile's benefit-sharing programme envisions to redistribute benefits at the regional level and local levels. In particular, the programme attempts to target small and medium forest owners, including agricultural and indigenous communities (ENCCRV).

As it relates to public lands, according to Article 56 of Decree-law 1939/1977 (Chile, 2019), the Ministry of National Assets may allot public property to another public authority to achieve a particular purpose, which may include the execution of REDD+ activities on public lands.<sup>83</sup> The National Forest Corporation (CONAF) therefore can enter into collaborative agreements, subject to authorization from the Ministry of National Assets, with other institutions or legal persons.<sup>84</sup>

In addition, the Framework Law on Climate Change No 21.455/22 defines a system in which the Ministry of Environment would establish GHG emission limits applicable to individual or groups of emitting sources (in tonnes of CO<sub>2</sub> per year) (Chile, 2022). The specific design of the system of GHG emission limits is not yet defined, and could be implemented either as an Emission Trading Scheme (ETS) or as a tradable performance standard. The law also would allow regulated

entities to implement mitigation projects and use the certified reductions to either achieve the standard or transfer those reductions to third parties. A dedicated registry would track the projects and the transfers (ICAP, n.d.).

Overall, the Framework Law on Climate Change would bring Chile closer to having a dedicated registry to track the creation of title and the transfer of ERs credits. Additionally, the Framework Law provides for the verification of participants' compliance with ERs standards attesting to proper ownership and reductions.

To conclude, two areas of importance for this endeavour are improving environmental rights and the rights of Indigenous Peoples, including land rights.<sup>85</sup> Changes to the Constitution could have been an opportunity to clarify how land rights will interact with forthcoming carbon rights and benefit-sharing regimes, and ensure participation of historically marginalized groups in their development, such as Indigenous Peoples and women.<sup>86</sup>

## Colombia

Colombian law treats the ownership of forest land, whether owned by communities, or private individuals or entities, as private property. Private property and rights over the same are guaranteed by Article 58 of Colombia's Constitution (Colombia, 2021). As such, landownership is largely covered by private law (Article 669 and Article 679 of the Civil Code) (Colombia, n.d.). Collective land owned by Afro-Colombian communities as well as indigenous reservations are also considered private property, though exploitation of such land is subject to a specific process. In order to make use of forest resources, permits and authorizations must be

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<sup>83</sup> More information is available here: Decree Law No. 1939/1977 Rules on Acquisition, Administration and Disposal of Goods of the State, Ministry of Land and Colonization, Article 15, Article 56 and Article 57.

<sup>84</sup> This analysis was accepted within the framework of the Carbon Fund and the GCF.

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<sup>85</sup> More information is available here: <https://www.aljazeera.com/news/2021/6/5/chile-activists-eye-chance-for-unmatched-environmental-protection> and <https://www.cfr.org/blog/chiles-constitutional-rewrite-difficult-path-ahead-recipe-inclusion>

<sup>86</sup> White & Case country report produced by Stefan Lyman, Mia Lattanzi, and Wilbert Luna Arellanes of White & Case LLP, as well as Pedro Mauricio Morales of GLZ Abogados, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report is not a legal advice and is not intended to express any opinion on the legal and political systems of the Government of Chile.

granted by the state, regardless of whether the person seeking to exploit the forest resources is the owner of the land. This is because all environmental services derived from biodiversity are part of the country's natural capital, and as such, property of the Colombian State. Carbon captured/sequestered in a forest is therefore an environmental service owned by the state. While a landowner may own the forest, they require authorization from the state to be able to commercialize the sequestered carbon.

For project development in indigenous lands or collective lands owned by Afro-Colombian communities, a process of prior consultation with the relevant communities must be undertaken. Projects developed on private property require agreement with the owner, in addition to applicable permits or authorizations. Such an agreement can be recorded through a commercial contract or a lease of the land.

In 2015, in order to report GHG ERs, the Colombian Congress enacted Law 1753/2015 ("Law 1753"). Through Article 175 of Law 1753, the Colombian government established the National Registry of Reduction of Greenhouse Gas Emissions (RENARE), which includes a national registry of REDD+ programmes and projects and specified dispositions about who has the right to claim payment for results.<sup>87</sup> The RENARE allows for certifications of status reports to be generated for GHG ERs projects and for transactions involving GHG ERs projects to be traced. The certification process is the only way to establish a right in relation to reduced emissions from REDD+ activities.<sup>88</sup>

In addition, Article 175 states that any natural or legal person, public or private, who wishes to opt for payments based on results or similar compensations as a result of actions that result in GHG ERs must first register with the Ministry of Environment and Sustainable Development (MADS). Without an express legal norm regulating the legal nature or ownership of GHG emissions

reported as reduced under the NDC, Article 175 states that the Ministry of Environment and Sustainable Development is the national government entity responsible for accrediting reductions of GHG emissions in Colombia. This legal provision is the only one that establishes a legal attribution or right in relation to reduced emissions from REDD+ activities.

According to Article 10 of Resolution 1447/2018, any holder of a GHG emissions mitigation initiative in the national territory who intends to opt for RBPs or similar compensation, and/or demonstrate compliance with national climate change goals established under the UNFCCC, must register their mitigation initiative in the National Registry of Reduction of Greenhouse Gas Emissions at the start of the feasibility phase (Colombia, 2018a).

Law 1931/2018 ("Law 1931") established the guidelines for the management of climate change mitigation and adaptation efforts. It constitutes a turning point in Colombia's environmental regulatory landscape, creating the legal basis for a national Emissions Trading System (Colombia, 2018b).

Overall, the Colombian legal framework has not expressly regulated the ownership of GHG emissions certified as reduced. It has so far been concerned with defining instruments, systems, mechanisms and institutional arrangements for climate change management, recognizing the importance of those related to reducing GHG emissions from deforestation and forest degradation.

Law 1753/2015 also provided that the Ministry of Environment and Sustainable Development is the only entity with the power or right to accredit, and consequently offer or commit GHG ERs in order to qualify for payments for results. Once this power is exercised by the Ministry of Environment and Sustainable Development and the commitment is registered in the National Registry of Reduction of Greenhouse Gas Emissions, the law provides that such credited emissions may not be subsequently offered through projects in the market. This legal provision, the government's commitment, the operation of the National Registry of Reduction of Greenhouse Gas Emissions, and the accounting system eliminate the risk of double counting or double payment claims on the volume of

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<sup>87</sup> More information is available here: p. 102 <https://www.greenclimate.fund/document/colombia-redd-results-based-payments-results-period-2015-2016> and *Ley 1753 de 2015.pdf* ([dnp.gov.co](http://dnp.gov.co))

<sup>88</sup> More information is available here: p. 102 <https://www.greenclimate.fund/document/colombia-redd-results-based-payments-results-period-2015-2016>



emissions committed in payment by results programs.

However, given that Colombia is in the process of implementing the Integrated Strategy for Deforestation Control and Forest Management (ENREDD+), it may become increasingly critical to define carbon ownership and create legal certainty around associated rights and benefits in order to generate incentives for communities to enable the proper implementation of REDD+ throughout the country. It remains to be seen whether an amendment of the legal framework will form part of the incoming government's environmental arsenal.<sup>89</sup>

## Guatemala

The State of Guatemala owns the majority of forests in the country, although Indigenous Peoples live in 19 percent of them. All forests – regardless of whether they are privately or publicly held – are also part of the state's System of Protected Areas (SIGAP).<sup>90</sup>

Under Article 22 of the Guatemalan Climate Change Law 7/2013, “all the rights, the holding and negotiating on the reduction of carbon dioxide emissions or other greenhouse gases units, as well as the related certificates, belong to the landowners or the possessors of lands, who are conducting [ER] projects” (Guatemala, 2013, p. 4). Article 22 further states that title holders are obligated, however, to register carbon rights and credits before the Country's Registry for Projects seeking to reduce or remove GHG emissions.

While all forests in Guatemala are part of the state's System of Protected Areas, not all forests belong to the state. Indeed, forest landowners can be public

or private individuals, as well as communities.<sup>91</sup> Depending on the forms of land tenure, title holders may have specific or slightly different rights relating to the carbon stored in the country's forests.

Under Guatemalan laws, the state is the owner of public property, and exercises all property rights over the country's territorial reserves (Guatemala, 1996), including carbon dioxide reduction units and certificates, as confirmed by Article 22 of Guatemala's Climate Change Law. When the state owns forests that store carbon, it is entitled to sell those credits in voluntary or regulated international markets.

The state is also entitled to enter, through the National Council of Protected Areas (CONAP), into land-sharing agreements with entities, persons, or communities, whereby third parties may manage and contribute to afforestation efforts in exchange for them selling and benefiting from carbon markets.<sup>92</sup>

The state shares responsibility for managing forests with local actors in many ways. One of them is through forest concessions. Forest concessions also allow concessionaires to benefit from the GHG ERs resulting from the activities that are implemented.

Another form of land sharing agreements are “intentional agreements”, where the state permits the possession of land by third parties, such as indigenous communities, and allows them to exercise rights over carbon units, even when these will never “belong” as a matter of ownership to these third parties.

Under Guatemalan laws, the “owners” of forests (those who have legal title over property) or those who legally occupy forests but lack legal

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<sup>89</sup> White & Case country report produced by Pedro Morales Gómez, Partner at GLZ Abogados, Paula Meléndez Martínez and Chloe Gomez de Orozco of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report producers thank María del Pilar Pardo, Manager at Gestión Ambiental Estratégica for her valuable inputs. The report is not a legal advice and is not intended to express any opinion on the legal and political systems of the Government of Colombia.

<sup>90</sup> More information is available here: Congress of the Republic of Guatemala, Decree No. 4-89, Protected Areas Law, Article 2.

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<sup>91</sup> Cooperative Fund for Carbon Forests, National Program to Reduce Emissions of Guatemala, 12 September 2014, p. 66, <https://www.marn.gob.gt/Multimedios/2601.pdf>

<sup>92</sup> More information concerning the Cooperative Fund for Carbon Forests, National Program to Reduce Emissions of Guatemala, 12 September 2014, p. 68 is available here: <https://www.marn.gob.gt/Multimedios/2601.pdf>. The State has entered into some benefit-sharing mechanisms for protected areas already, including: i) The Fund for the Tropical Forest Conservation (El fondo para la conservación del bosque tropical), created by Agreement between Guatemala and the United States of America regarding the Law of Conservation of Forests (Tropical Forest Conservation Act – TFCA); and ii) the Foundation for the Conservation of Nature, which manages multiple sources of economic financing to implement projects focused on conservation.

title over them (known as “legal possessors” under Guatemalan laws) are entitled to exercise property rights over carbon stored in such forests.<sup>93</sup> While the country’s Civil Code states that the existence of a legal title is a requirement

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<sup>93</sup> Private property is a constitutionally protected right in Guatemala. See the Constitution of the Republic of Guatemala (1985) Article 49: “Private property is guaranteed as a right inherent in the human person. Everyone can freely dispose of their property in accordance with the law”. Guatemala’s Civil Code describes various types of “private property”, including movable and immovable property (bienes muebles y bienes inmuebles). Immovable property comprises land, space, mines and water, as well as “parts that integrate” immovable property, and “accessories” to such property. See Civil Code of the Republic of Guatemala, 1985, Article 445, Article 447, and Article 450. In the case of carbon units, these are considered an “accessory” of immovable property (forests) where they are situated. See Ministry of Environment, Final Report: Diagnóstico del Marco Jurídico ambiental guatemalteco en los temas de derechos de propiedad sobre bienes y servicios ambientales y elementos de cambio climático vinculados a REDD+ en el marco del Decreto 7-2013, 2015, p. 45: <https://www.mam.gob.gt/Multimedios/1548.pdf>

to exercise private property rights,<sup>94</sup> the Climate Change Law made an exception to allow “legal possessors” of land to exercise rights to carbon stored in forests. For possession to be legal under Guatemalan laws, “possessors” must be farmers in conditions of poverty or without lands (or with insufficient lands). In addition, the lands which “possessors” occupy, should not be registered under a private person’s name (Guatemala, 1999). As title holders, private owners or legal possessors can participate in carbon reduction programs to access international carbon markets. Accordingly, Guatemalan laws also allow private proprietors to revert and assign their rights to carbon in forests to the state for monetary compensation.

The Constitution also establishes, with respect

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<sup>94</sup> See Civil Code of the Republic of Guatemala, 1985, Article 460. Guatemalan forest incentive program PINFOR clarifies that forests may be privately owned insofar as the private proprietor has a formal legal title over the property. See above Section IV.





### BOX 12

### Key points, national legislation linked to emission reductions rights in Latin America and the Caribbean

The Native Forest Law 26331/2007 of **Argentina** states that the Ministry of the Environment and Sustainable Development (MAyDS) is responsible for protecting the value of the environmental services provided by native forests, and the provinces concur in supporting the mandate of MAyDS. In order to ensure a fair distribution of payments to vulnerable groups derived from the Green Climate Fund (GCF), MAyDS “shall recognize and respect the rights of indigenous communities that have traditionally occupied the lands”.<sup>\*</sup> However, there is room for strengthening this legal framework by taking steps to clarify gaps in the land tenure system and passing legislation that takes steps to regulate private individuals’ forestry actions.

The Forest Code of **Brazil** (Federal Law 12.651/2012) defines a carbon credit as a “legal title over a tradable intangible asset” but does not address the allocation or trade of carbon rights. In terms of recent developments, Brazil launched the Forest+ Program (Floresta+) and the enacted the Federal Law 14.119/2021 which introduced the national policy on PES. The objective of the legislation and policy is to stimulate the growth of VCMs, particularly with regard to carbon credits issued for projects aimed at the conservation and recovery of forests and other native vegetation, including REDD+. More recently, Federal Decree 11.075/2022 has established the National System for Reducing Emissions of Greenhouse Gases (SINARE) and the procedures for preparing the sectoral plans for mitigation of climate change. Although Brazil is the first country to have a REDD+ pilot programme approved under the GCF, further legal improvements currently under discussion at country-level shall be achieved by clarifying the allocation of carbon rights and the rules on benefit-sharing in the country.

While there is no legislation dictating the definition of carbon rights or emission reductions (ERs) in **Chile**, they can be defined by the agreements governing the transfer of such rights under the results-based payment (RBP) scheme or carbon trading scheme. For example, the National Strategy on Climate Change and Natural Resources (ENCCRV) has analysed nature of carbon stored on lands and trees considering that sequestered carbon is real/measurable, linked to the land, and is permanent (although variable): all characteristics that distinguish real rights from personal right. On the other hand, the new Framework Law on Climate Change brings Chile closer to compliance of ERs legal requirements by having a dedicated registry to track the creation of title and the transfer of emission reduction credits.

In **Colombia**, any natural or legal person, public or private, who wishes to opt for results-based payments or similar compensation as a result of actions that result in GHG ERs must first register with the Ministry of Environment and Sustainable Development (MADS) (Law 1753/2015), the national government entity responsible for accrediting the reduction of GHG emissions in the framework of national or subnational programs. The National Registry of Reduction of Greenhouse Gas Emissions (RENARE) is also established by this law, which includes a national registry of REDD+ programmes and projects, and specified dispositions about who has the right to claim payment for results.

While all forests in **Guatemala** are part of the state’s System of Protected Areas (SIGAP), not all forests belong to the state. Forest landowners can be public or private individuals, as well as communities. Depending on the forms of land tenure, title holders may have specific or slightly different rights relating to the carbon stored in Guatemalan forests. As title holders, private owners or legal possessors can participate in carbon reduction programs to access international carbon markets. Accordingly, Guatemalan laws also allow private proprietors to revert and assign their rights to carbon in forests to the state for monetary compensation.

**Notes:** Author’s own elaboration.

\* Full reference entry here

to land tenure, that the lands of indigenous communities or any other forms of communal or collective land tenure will enjoy special protection from the state, which guarantees their possession and development, in order to ensure all the inhabitants a better quality of life. In accordance with Guatemalan laws, “communities” may therefore also exercise property rights over carbon stored in forest, insofar as those forests are owned by indigenous lands, and/or are possessed by Indigenous Peoples, in accordance

with the state’s laws on the legal possession of property (Guatemala, 1999). Communities can own or legally possess lands with forests in accordance with Guatemalan laws (Guatemala, 1999).

In 2014, the government created an interinstitutional coordination group, comprised of the Ministry of Environment, the Ministry of Agriculture, National Forest Institute (INAB), and the National Council of Protected Areas, to

prepare a strategy and implement a REDD+ project in the country.<sup>95</sup>

The government offered early opportunities for REDD+ projects to participate in the country's REDD+ government programme, developed under the Inter-American Development Bank and the FCPF's Carbon Fund. All future REDD+ projects were required to register in Guatemala's upcoming National Registry of REDD+ Initiatives.

Overall, Guatemala's legislation, regulations, and governmental policy clearly define who owns the carbon rights in forests and how those rights can be transferred between the state and private parties, however important gaps in the regulation of carbon markets could be improved.<sup>96</sup>

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<sup>95</sup> See Mid-Term Report of Guatemala, 3 May 2016, from the Government of the Republic of Guatemala: <https://www.marn.gob.gt/Multimedios/3941.pdf>

<sup>96</sup> White & Case country report produced by Pedro Morales Gómez, Partner at GLZ Abogados and Viviana Gomez of White & Case LLP, in the context of the collaborative work jointly developed with the UN-REDD Programme, 2022. The report does not constitute legal advice and is not intended to express any opinion on the legal or political systems of the Government of Guatemala.





# Conclusion

In countries like Côte d'Ivoire, the Lao People's Democratic Republic, and Viet Nam, legal options aiming to clarify ERs rights are still under discussion, encouraged by the willingness of governments to find viable solutions that would allow them to access forest carbon finance under different modalities. In other countries like Ghana, there is still a need to take additional steps to back up ERs transactions, but the setup is already in place. Some countries like Costa Rica are facing challenges on a jurisdictional scale in signing individual carbon devolution agreements with each forest owner, but do indeed comply with jurisdictional requirements. However, each of them is actively working to better define ERs rights by expanding existing laws and institutional frameworks, and making efforts to integrate and adapt to new developments.

When the state primarily owns forest resources, but forests are allocated to organizations, individuals and communities for long-term forest management purposes, decisions have to be made in a participatory manner to ensure the expression of rights of all relevant stakeholders, including women and other marginalized groups. Simultaneously, these decisions must ensure the fair and equitable distribution of REDD+ benefits to all beneficiaries. Stakeholder engagement and building trust among parties is an indispensable key pillar of the law-making process.

Recently, countries like the Democratic Republic of the Congo, Gabon, and Papua New Guinea have adopted or amended their legislation. In Gabon, all existing carbon stocks are the exclusive property of the state (Climate Change Law, 2021), and the state grants legal ownership of carbon stocks resulting from GHG ERs projects to the project proponents. In the Democratic Republic of the Congo, "REDD+ carbon credits" refer to rights related to ERs, verified according

to carbon methodologies, duly approved by the regulator, resulting from a REDD+ project and/or jurisdictional programme. Papua New Guinea's recently gazetted Climate Change Management Amended Act No. 25/21 contains a section dealing with REDD+ transactions by the government (78b), and another titled "Carbon rights and ownership" (92a). Finally, in Colombia, any natural or legal person, public or private, who wishes to opt for payments as a result of ERs actions, must first register with the Ministry of Environment and Sustainable Development (MADS) (Law No. 1753/2015).

As forest countries progress in those efforts, certain aspects might be considered:

- There is a need for more clarity in the interpretation of ERs rights to enhance trust among the actors involved in REDD+ schemes, including not only substantive rights, such as to carbon and sale of credits, but also procedural rights, rights to the consultation process, and building trust (Peskett and Brodnig, 2011).<sup>97</sup>
- Recognizing the validity of national legal and policy instruments is important, in spite of their strengths and weaknesses, from the jurisdictional-level to the project-level.
- In most cases, further clarity on carbon ownership under different tenure instruments is still needed, accompanied by benefit-sharing agreements. Associate beneficiaries of REDD+ payments with forest land rights holders include not only landowners, but also holders of usage rights and recognized customary rights.

<sup>97</sup> More information is available here: <https://documents1.worldbank.org/curated/en/700581468331843375/pdf/658640WP00PUBL0ng0and0Carbon0Rights.pdf>

In conclusion, it is essential to recognize the absence of a universally agreed-upon definition for terms like “carbon” or “ER rights.” Instead, the options may vary, particularly based on whether forests are owned by the state or private entities and communities. Distinctions in responses to clarify ERs rights also emerge between common law and civil law systems. Considering the crucial role of governments in RBPs and national transactions, acknowledging

their responsibilities, including developing and implementing REDD+ policies, creating registries, and addressing challenges like double counting and non-permanence risks associated with ERs, is paramount. These complexities underscore the necessity for clearer definitions of these terms, fostering coherence, transparency, and effective governance in global environmental conservation efforts.



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# COMPARATIVE STUDY OF CARBON RIGHTS IN THE CONTEXT OF JURISDICTIONAL REDD+

CASE STUDIES FROM AFRICA, ASIA AND THE PACIFIC,  
AND LATIN AMERICA AND THE CARIBBEAN

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