



Forest tenure rights and REDD+

From inertia to policy solutions

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- In many developing countries, tenure in forests is not clear and subject to dispute. This will place limits on the effectiveness, efficiency and equity (3Es) of REDD+.
- In spite of the attention paid to the problem of insecure tenure to date, there has been little progress toward clarifying tenure arrangements.
- National governments need to take proactive steps to clarify tenure.

Introduction

Insecure forest tenure has long been associated with deforestation and degradation (Southgate and Runge 1990; Brown and Pearce 1994; Kaimowitz and Angelsen 1998). But secure tenure may also lead to more forest conversion, unless there are changes in other incentive structures (Tacconi 2007a; see also Chapter 10). REDD+ seeks to put in place incentives to reduce deforestation and degradation. Policy papers on forests and climate commonly assume that resolving problems of ill-defined or weak tenure¹ is key to REDD+ success.

¹ In this chapter, we define forest tenure as the right, whether defined in customary or statutory terms, that determines who can hold and use forest lands and resources, for how long, and under what conditions. The term 'property rights' is analogous, though it tends to focus more narrowly on ownership.

According to the Stern Review (2006), 'At a national level, defining property rights to forestland ... and determining the rights and responsibilities of landowners, communities and loggers, is key to effective forest management. This should involve local communities, respect informal rights and social structures, work with development goals and reinforce the process of protecting the forests'. Similarly, Eliasch (2008) states, 'Only when property rights are secure, on paper and in practice, do longer-term investments in sustainable management become worthwhile'. Multilateral, bilateral and national policy documents on REDD+ readiness also stress the need to clarify tenure before implementing REDD+.

Nevertheless, there is a noticeable gap between what is said and what is done. Most countries have not paid serious attention to reforming forest tenure. This suggests that countries believe that tenure reform is not that important to REDD+ outcomes, that it is politically sensitive or that they do not know what should be done. This chapter argues that weak and ambiguous tenure is detrimental to the effectiveness, efficiency, equity and benefit sharing of REDD+, and may threaten forest communities. We propose concrete steps to address the problem.

Four sections follow. The first discusses tenure reform in relation to REDD+. The second asks why tenure is important for REDD+ outcomes. The third suggests processes and policies for assuring that tenure receives greater attention. The final section draws conclusions.

Tenure reform and REDD+

Some proactive efforts to address forest tenure problems and lay the foundations for REDD+ have been taken. For example, the negotiating text in the COP deliberations refers to the importance of resolving tenure issues (e.g., UNFCCC 2009c: 45, 109). A review of 25 Readiness Plan Idea Notes (R-PINs) shows that almost all the countries reviewed recognise the need to clarify land tenure in preparation for implementing REDD+ (Davis *et al.* 2009). Many REDD+ projects have gone for third party certification according to Climate, Community and Biodiversity Alliance (CCBA) standards. These require that 'In the event of unresolved disputes over tenure or use rights to land or resources in the project zone, the project should demonstrate how it will help to bring them to resolution so that there are no unresolved disputes by the start of the project' (CCBA 2008).

In spite of these positive signs, there is general inertia on resolving forest tenure. In spite of much discussion,

many R-PINs suggest a very limited analysis (and in some cases understanding) of the existing situation with regards to conflicts over tenure

and potential obstacles to reform and implementation. Issues such as the source and location of land use conflict, the role of judicial or alternative mechanisms for resolving conflict, and the nature of customary practices and indigenous rights are not consistently addressed. Furthermore, few countries address the need to clarify carbon rights within existing tenure systems. Given the strong consensus amongst participating countries that improving tenure security is critical for REDD, a deeper and more practical discussion of how these issues may be resolved will be needed in the R[eadiness]-Plan. (Davis *et al.* 2009)

How will tenure affect REDD+ outcomes?

The importance of tenure for REDD+ is obvious. REDD+ is essentially a broad set of policies to prevent or slow deforestation and degradation, and increase forest carbon stocks. A subset of these policies allocates rewards to carbon rights holders who achieve REDD+ objectives, either as measured directly by changes in forest carbon stocks or by proxies for those changes (Meridian Institute 2009b). But who are the legitimate carbon rights holders? In most developing countries, the answer to this question is not always clear – forest tenure is contested, rights overlap and are not secure. Tenure must be clarified, not only to create incentives for those managing the forests and to properly assign benefits, but also to protect people whose rights could be usurped if REDD+ leads to a rush of command-and-control measures to protect forests, or if REDD+ leads to a resource race when the value of forests increases.

In principle, the right holder to carbon need not be the right holder to forest land and trees. This implies that carbon rights can be assigned without reform of forest tenure. But, in practice, if carbon rights and tenure rights are two different things, this could favour those seeking to capture carbon rents, and block or decrease benefits to local people. Separating tenure rights from carbon rights could complicate already complex and contested arrangements, and could be an excuse not to make necessary reforms.

Contested and overlapping claims

A fundamental reality of contemporary forest tenure in developing countries (and some developed countries) is that it involves contestation between the state and civil society (Ellsworth and White 2004; Fitzpatrick 2006). In developing countries, the state claims ownership over most forests. Colonial and postcolonial state policies usurped, or at least failed to recognise, the rights of forest dwellers (Peluso 1995; Pulhin *et al.* in press). Today, people living in forests continue to claim customary rights, even though states often do not recognise such claims to vast areas of forest. Likewise, indigenous people and other traditional forest dwellers reject state control over forests they view as their own (Lynch *et al.* 1995; RRI 2008; Sunderlin *et al.* 2008a).

Forests are also subject to multiple and overlapping claims. In some regions, forests are often considered to be unclaimed 'wastelands', and are open to both spontaneous and planned colonisation for agriculture. Clearing forest is often seen as a way to demonstrate and defend property claims. Peasants, loggers and wealthy agriculturalists continue to occupy many forests, such as the vast lowland areas of the Amazon. Forest dwellers may already claim customary rights over these areas and conflicts may arise over whose claim will be formally sanctioned by the state. The less powerful claimants, such as indigenous or other marginalised groups, often lose out (Toni 2006a; Larson *et al.* 2008; Cronkleton *et al.* 2009).

In recent decades there has been a partial, though still somewhat limited, attempt to recognise or restore tenure rights to forest peoples. Between 2002 and 2008, the area of the global forest estate administered by governments decreased from 80.3% to 74.3% in 25 of the world's 30 most forested countries. There have been corresponding increases in the area of forest designated for use by communities and indigenous peoples, and the area owned by communities, indigenous peoples, individuals and firms (Sunderlin *et al.* 2008a).

In spite of this move forward, REDD+ schemes are getting underway in a world where forest tenure is not generally clear and where people who live in forests are often at a disadvantage. Not only are customary claims mostly unrecognised in many countries but, even where there are clear statutory rights or title for local people, they may not be enforced (Larson *et al.* 2008, in press-a).

Given the history of contested and overlapping rights, it is clear that there may be difficulties when REDD+, a major new economic opportunity in forestry, gets underway. It is easy to imagine that the less powerful stakeholders could be sidelined in conflicts over resource tenure. It is also easy to imagine that states could find it desirable or necessary to impose a command-and-control forest protection approach to maintain the stream of national REDD+ income if REDD+ fails to allocate benefits and management responsibilities successfully.

REDD+ is still in its early stages, so concerns about tenure have not fully emerged. Some demonstration sites do not have problems with tenure because they are showcase projects located in places where tenure is not ambiguous. Scaling up REDD+ in countries where tenure is contested will inevitably be difficult. REDD+ benefits have not yet begun to flow and, in most cases, arrangements for sharing the benefits from REDD+ have yet to be defined. Many stakeholders are not fully aware of what is at stake. Once benefits start to flow, those left out will start to protest. The larger the income from REDD+, the greater will be the dissatisfaction. The marginalisation of forest

dwellers in most countries – and the insecurity of their tenure – risks leading to a situation where their share of national REDD+ income will be small.

Tenure and the 3Es

If REDD+ is scaled up before tenure is clarified, and particularly before there is formal recognition of local property rights, the 3Es of REDD+ will be undermined in a number of ways.

Limit policy options. Unclear or contested tenure limits policy options. For example, REDD+ projects based on payments for environmental services (PES) or on community forestry are riskier without secure tenure. This means REDD+ might have to rely mainly on other kinds of policies and measures (e.g., enforcement). In this case, capital cities and central bureaucracies could reap a large share of REDD+ benefits, and those whose rights and livelihoods are neglected may be dissatisfied and even retaliate. All these policy limitations reduce attainment of effectiveness, efficiency and possibly also equity.

Share REDD+ benefits unequally. Unclear or contested tenure mean that contracts and benefits could accrue to relatively few large forest owners, local or national elites, or non-forest stakeholders. This will increase inequity, and trigger resentment and conflict, especially if REDD+ funds are captured by powerful elites.² Unequal distribution of contracts and benefits could also mean sub-optimal REDD+ coverage, a loss of legitimacy and a failure to convince forest resource users to change their behaviour. A skewed system could produce a run on forest resources as powerful claimants take control of areas claimed by communities or smallholders. Those who have been left out could retaliate and sabotage projects, further reducing effectiveness and efficiency.

Increase conflict. Governments could renew and increase state control of forests to expand the area covered by REDD+. This could cause or aggravate a ‘guns and fences’ model of forest conservation that excludes people. More state control might also mean that people are evicted from forests they depend on for livelihoods. More violation of customary tenure and other rights, more conflict over forests, and retaliation by those whose rights and livelihoods are neglected will reduce the effectiveness, efficiency and equity of REDD+.

Clarifying tenure

The acknowledged need to clarify forest tenure should motivate states to move ahead on reform, but as yet this has not happened. Why is there a gap between

² Local stakeholders could receive an inadequate share of REDD+ benefits either because they are left out entirely (i.e., not recognised as right holders or are not granted benefits because they are protecting rather than damaging forests). Or they could get a minimal share because they have no leverage to demand a larger share, in part because of the history of rights dispossession.

Box 11.1. Insecure tenure limits REDD+ payments for environmental services schemes

Payments for environmental services (PES) schemes require certain fundamental preconditions, one of which is 'the exclusiveness of rights to the land providing the service in question' (Börner *et al.* in press). That is, land holders – those receiving payments – have to have the right to exclude other people who could use forest and land resources in ways that are incompatible with providing the contracted service.

Börner *et al.* assesses the outcomes of PES schemes in a variety of land tenure categories in the Brazilian Amazon: indigenous land, protected areas, formal rural settlements and private land, as well as unclassified public land. They point out that 'land-tenure chaos ... represents the single largest impediment to our analysis, and to REDD implementation'. In particular, even if lands are well defined in practice, land registries are often inaccurate and outdated; hence there is no way to distinguish the areas that are poorly defined from unclassified public land. Unclassified public lands account for 24% of Amazon lands, and do not qualify for REDD+ payments because those who live there cannot usually guarantee the exclusion of third parties.

The result is that 'pre-existing ill-enforced environmental legislation, undefined tenure and tenure insecurity' mean that PES schemes will only work in about one-third of the area where deforestation is a threat. In the other two-thirds, there is no clear information on tenure and so it is not possible to identify who should receive payments.

But the problem of tenure is not limited to unclassified public land. Even in areas where communities have *de jure* exclusion rights they are not always able to exercise them. That is, they 'lack the control and government support to effectively prevent invasions by powerful commercial interests'.

The study shows that it is important to assess *de facto* land tenure rights as well as the dynamics of deforestation, arguing that deforestation can be stopped only by actions that *de facto* delimit land tenure and 'effectively stop invasions'. It also shows that it is important to clarify land tenure in order to increase the potential for REDD+.

what is said and what is done about forest tenure? Clarifying forest tenure and tenure reform have been bogged down for years in most developing countries. Efforts to resolve tenure issues have been blocked by special interest

groups, and hampered by insufficient funding and a lack of technical capacity (Sunderlin *et al.* 2008a). Two other factors are specific to REDD+: first, a lack of understanding of how tenure will constrain REDD+ implementation and, second, an international policy context that contributes to inertia. For example, the Forest Carbon Partnership Facility (FCPF) has been criticised for working without participation and consultation, and for implying that control of national forests should rest with governments (Forest Peoples Programme 2008). As explained by Griffiths (2008), ‘Existing intergovernmental proposals on decisions on REDD contain no clear commitments to address rights and equity issues’.

We believe that political will is the key to resolving tenure rights. In other words, if leaders at the national and international levels are convinced that clarifying tenure is necessary for REDD+ to succeed, then they will allocate funds for this to happen, develop the capacity and clear the institutional blocks. With this in mind, we propose processes and policies to clarify forest tenure.

Processes

Clarifying forest tenure for REDD+ can be advanced in five ways:

1. **Analyse the consequences of inaction.** National tenure experts can qualitatively envision and quantitatively analyse the consequences of inaction on forest tenure reform. Experts can construct scenarios starting from the assumption that REDD+, when scaled up, will usually be implemented where disputes and lack of clarity about tenure clarity are the norm. These exercises should attempt to specify, in particular, the costs of inaction in terms of the 3Es. The results should be open to public debate and response.
2. **Assess the obstacles to moving forward.** If the cost of doing nothing is found to be unacceptable, the next step is to understand the obstacles to forest tenure reform. A useful starting point would be to ask to what extent obstacles, such as manipulation by special interests, lack of funds and insufficient capacity, do or do not apply in the national context.
3. **Create, resuscitate or improve national planning for forest tenure reform.** The assessment of obstacles to moving forward will suggest some ways to set reform of forest tenure in motion, or revive or improve it. This exercise should go beyond describing the obstacles and identify what will encourage and assist reform of forest tenure. This process should be bottom-up and consultative to ensure that constraints and opportunities for reform are fully informed by local voices. Moreover, attempts should be made to ascertain whether or not there are government ministries or departments that will be involved in REDD+ and could assist in the tenure reform process, but are not part of the discussion.

4. **Generate or improve national information on forest land tenure.** Most countries lack information, such as reliable maps, on national forest tenure. In preparation for its Forest Resources Assessment 2010, the FAO has been encouraging governments to substantially improve data on national forest tenure. This is an opportunity for governments to develop information on forest property rights and maps of likely REDD+ areas, disseminate them widely and make them publicly accessible. Efforts should include generating 'counter maps' of the claims and land uses of marginalised people (Peluso 1995; Chapin *et al.* 2005).
5. **Public consultations on REDD+.** As countries move from the R-PIN to the readiness plan (R-Plan) phase, they are encouraged to hold public consultations on the implementation of REDD+. At these meetings the government should present detailed proposals for REDD+ implementation, together with the results of the visioning exercise, assessment of obstacles, options for tenure reform and information on national forest tenure. The government should invite public input – seeking informed consent for the implementation of REDD+ and local involvement in shaping REDD+ design and implementation – based on a thorough understanding of the tenure situation.

Policies

We assume that taking these steps will stimulate national political will to resolve tenure issues in advance of REDD+ implementation. In this case, it will be important to reinforce the momentum by implementing national policies to reform forest tenure, national policies that complement and reinforce clarification of tenure, and international policies.

It is more than likely that REDD+ will get underway without thorough tenure clarification and reform. But, rather than deter governments, this should encourage them to introduce policies and practices that will move tenure reform forward. With long-term reform in mind, there is much that can be done in the short term. For example, policies can pay attention to the principle of Free Prior and Informed Consent (FPIC) and to the 2007 United Nations Declaration on the Rights of Indigenous People (UNDRIP). These are vital to assuring protection of local rights in the course of implementing REDD+.

A number of important issues should be taken into account in reforming and implementing national forest tenure policies (see Larson *et al.* in press-a).

Recognition. Models that recognise forest rights include, for example, indigenous territories, ancestral domain lands, extractive reserves, communal

or community forests, concessions, and agroforestry communities. Choosing an appropriate model should be based on a thorough understanding of the options and should be negotiated with claimants.

Implementation. It has often been difficult to implement legal reforms. Ongoing political will is particularly important to support marginal groups. In a number of cases, inadequate resources or capacity, dragging feet and granting rights to competing claimants have impeded progress. Participatory mapping with experienced facilitators has proved effective in establishing local claims, although poor mapping can escalate, rather than resolve, conflicts (Walker and Peters 2001; Fox 2002).

Conflict resolution. Recognising the rights of one group may infringe on the rights of other customary users. This means taking care to understand and adequately address multiple and overlapping claims. Clear rules, fair recourse and ways of resolving conflict need to be established.

Representation. Recognising forest tenure rights, particularly in implementing REDD+, means identifying people who will represent groups that hold rights. This is often a difficult task that has less to do with choosing a representative who will be accountable, and more to do with facilitating the creation of institutions that represent rights holders.

Although tenure reform is critical to the success of REDD+, it is not sufficient. There are other factors related to governance that must be considered as well – transparency, accountability, financial due diligence and control of corruption. National policies should ensure that REDD+ monitors more than carbon (RRI and RFN 2008). Transparent, independent monitoring systems should also examine the effects of REDD+ on rights and livelihoods. Attention should also be paid to rights that complement and reinforce tenure (citizenship, civil rights, human rights, gender equity) (Colchester 2007; Brown *et al.* 2008; Seymour in press) and to removing constraints in the forest regulatory environment that affect options for the poor (RRI 2008).

Finally, policies and practices at the international level should stipulate clear forest tenure in both policy and practice. Among the most important steps that could be taken is putting in place a policy that makes the payment of REDD+ funds conditional on the recognition of rights and adequate forest governance (RRI 2008). The FCPF, Forest Investment Programme, UN-REDD, and REDD+ donor countries could take a leading role in making this happen.

Box 11.2. Titling indigenous territories in Nicaragua

The recognition of indigenous land rights in Nicaragua demonstrates some of the ways in which political will for reform is constructed, as well as several challenges for such reform. In 1987, as several decades of war came to an end, Nicaragua's new Constitution formally recognised the rights of indigenous and ethnic communities to their cultural identity, forms of organisation and property. Nevertheless, a law addressing indigenous land rights was not passed until 15 years later, after a prolonged legal and political struggle.

In 1995, the Nicaraguan Government granted a forest concession on lands claimed by the Sumu-Mayangna community of Awas Tingni without obtaining the prior approval of the regional council of the Autonomous Region, as required by law. The community filed suit, and the Supreme Court found the concession unconstitutional in 1997. The Government ignored this ruling, however, and Awas Tingni took its case to the Inter-American Court for Human Rights.

In 2001, the international court ruled in favour of Awas Tingni, finding that the Nicaraguan Government had violated the American Convention on Human Rights as well as the community's rights to communal property as guaranteed by the Nicaraguan Constitution. The court ordered the state to create an effective mechanism for demarcation and titling for indigenous communities 'in accordance with their customary laws, values, customs and mores' (judgment, cited in Anaya and Grossman 2002). It took 2 more years, significant grassroots lobbying and pressure from the World Bank to get the Communal Lands Law enacted, and another 2 years to get the government agencies responsible for demarcation and titling established and budgeted. Meanwhile, many communities and institutions sought funding from NGOs and donors to support participatory mapping processes.

The titling of indigenous territories did not progress until presidential elections in 2006 changed the party in power – the same party that had written indigenous rights into the Constitution as part of the peace process. Several titles have since been granted. Conflicts have increased over time, however, with the delays in the process (Finley-Brook 2007). These include conflicts between indigenous communities, as well as between non-indigenous colonists. The law guarantees rights only to those colonists living inside indigenous areas prior to 1987; for others, it requires indemnification for which communities have no funding. Some colonists have claimed rights to form their own territories as other 'ethnic communities' protected by the law.

Finally, there is the issue of representation. Communities come together to form territories and elect territorial authorities to represent them, but indigenous political leaders have sometimes refused to recognise the elected authorities and have promoted a different territorial configuration. Some believe that a few individuals are manipulating the process to gain political and economic control over the region (Larson *et al.* in press-b).

Conclusions: How tenure reform can support REDD+

Tenure reform (clarification of property rights including statutory recognition of customary claims) could improve REDD+ in terms of effectiveness, efficiency and equity.

If REDD+ is to be *effective* in increasing forest carbon sequestration in a reliable and lasting way, schemes must engage legitimate stakeholders whose claims to forest benefits are backed up by law and will be defended in the event of any dispute. If REDD+ is to be *efficient* in sequestering carbon at minimum cost, then responsibilities and rewards in REDD+ must be stable and predictable. If REDD+ is to be *equitable* and distribute costs and benefits fairly, then appropriate stakeholders and beneficiaries must be involved. Forest dwellers should not be disadvantaged by competition for resources as a result of insecure tenure. All these objectives presuppose a degree of clarity in statutory forest property rights that often does not exist.

Although there is widespread recognition of the importance of clarifying tenure before implementing REDD+, action has been worryingly slow. There are several ways to move forward. These include measuring and anticipating the consequences of inaction, identifying the obstacles to clarifying tenure, reforming tenure, improving national tenure information and holding public consultations on REDD+.

Policies could incorporate FPIC and UNDRIP, put in place measures to reinforce governance of REDD+ (e.g., financial transparency and accountability), and make the flow of REDD+ funds contingent on the recognition of rights and adequate governance.

Forest tenure ambiguity and conflict have a long history in most countries. It is not a new issue. Tenure reform is important for reasons that transcend REDD+. It should be viewed as an end in itself, and not just as a means to help REDD+ succeed. Yet REDD+ has made the argument for resolving tenure issues even stronger. Now that REDD+ has given visibility to forest tenure issues on the international stage, it is hoped that political will and funds can be mobilised to address the issue in a comprehensive and durable way.

