

Subnational governments and jurisdictional approaches to REDD+ in Peru

An analysis of the current legal and policy framework

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Key Messages

1. There is much interest in jurisdictional approaches to REDD+ from new sources of climate finance and voluntary market mechanisms (e.g., LEAF Coalition). Given this interest, it is important to consider how national policy and regulatory frameworks can facilitate these jurisdictional approaches.
2. Peru is a useful case study given that some of the country's subnational governments have signed agreements for the sale of emission reductions from future REDD+ programmes in their jurisdictions.
3. Currently, there are no policies or regulations for jurisdictional initiatives by subnational governments in Peru. However, the national government is developing rules under the National Registry of Mitigation Measures (*Registro Nacional de Medidas de Mitigación*, or RENAMI) and is considering guidelines for nesting initiatives using the Forest Reference Emissions Level (FREL) and the Forest Reference Level (FRL) for the Peruvian Amazon biome that could provide relevant rules for these types of jurisdictional initiatives.
4. Legal uncertainties remain for jurisdictional approaches led by subnational governments. These include defining the areas within their jurisdictions that could be part of an initiative, whether the legal framework allows subnational governments to carry out carbon market transactions, and how they would receive and manage the proceeds of those transactions.
5. This Infobrief reviews Peru's current and forthcoming policy and legal framework to understand how subnational governments can be involved in jurisdictional approaches and to assess where the national government rules are heading.

Introduction

Jurisdictional approaches to the implementation of the United Nations Framework Convention on Climate Change (UNFCCC) mechanism to Reduce Emissions from Deforestation and Forest Degradation (REDD+) are gaining favour. They include the development of carbon-credit mechanisms with jurisdictional pathways; e.g., the Lowering Emissions by Accelerating Forest Finance (LEAF) Coalition and the Integrity Council for the Voluntary Carbon Market (ICVCM). These approaches are led by governments at the national and subnational levels, and seek to protect forests, reduce emissions, contribute to sustainable development, and improve livelihoods across one or more legally defined territories (Boyd et al. 2018; Stickler et al. 2018). They have the potential to create a supportive pathway for implementing REDD+ (Boyd et al. 2018; Wunder et al. 2020). Subnational governments are central to the implementation of such approaches, given their responsibilities over land use and forest governance, and their geographical proximity to the communities and other actors who manage and make land-use decisions on the ground (Stickler et al. 2018).

Subnational governments may lead or actively participate in the development and implementation of REDD+ initiatives in their jurisdictions in order to facilitate a better alignment of those initiatives with public policies and priorities (Boyd et al. 2018).

The attention paid to the role of subnational governments in climate action, including jurisdictional approaches to REDD+, has been accompanied by financial commitments and the introduction of ad hoc standards. For example, LEAF — a coalition of governments and large private companies that was launched in April 2021 — has committed over USD 1.5 billion to purchase carbon credits from jurisdictional REDD+ programmes.¹ LEAF requires initiatives to comply with The REDD+ Environmental Excellence Standard (TREES), an independent standard with “precise and comprehensive

¹ See <https://emergentclimate.com/wp-content/uploads/2022/11/press-release-leaf-coalition-commitments-top-1.5-billion.pdf>.

requirements² for REDD+ activities at jurisdictional and national scales. In a similar vein, Verra's Jurisdictional and Nested REDD+ Framework targets jurisdictional approaches, seeking to integrate and link local-level initiatives with government goals at a jurisdictional level.³

However, the success of jurisdictional programmes will not depend solely on more financial commitments or more robust carbon market standards. REDD+ countries have a range of legal and institutional arrangements that will affect how jurisdictional initiatives can be designed and implemented, and these factors need to be considered in advance. As the Paris Agreement recognizes, subnational governments, which could implement these jurisdictional approaches, are key to achieving global climate goals "in accordance with respective national legislations of Parties".⁴ Current discussions catalysed by jurisdictional interest in REDD+ in Peru — a REDD+ early mover, with the world's fourth-largest tropical forest cover — exemplify the various factors that must be considered. These include the various decision-making structures in unitary and federal systems of government; the extent of effective decentralization of decision-making powers to subnational governments; the national REDD+ regulations related to nesting of REDD+ projects in the national REDD+ efforts, safeguards and benefit-sharing; and the relevant capacities of subnational governments.

This Infobrief examines Peru's legal framework and the institutional arrangements that are relevant to jurisdictional approaches, with a focus on regional governments. This examination is important given the ongoing REDD+ regulatory process led by the national government (Peña and Sarmiento Barletti 2022), and the increasing interest by subnational governments — in collaboration with national and international private-sector actors — in access to carbon markets. The Infobrief aims to provide lessons for other REDD+ countries who are developing or considering the development of legal and institutional arrangements for jurisdictional approaches that consider subnational governments. This analysis is also useful to financial mechanisms or voluntary market standards interested in engaging with, facilitating or investing in jurisdictional initiatives by subnational governments.

Carbon markets and jurisdictional approaches in Peru

Peru has supported market mechanisms to finance climate change mitigation efforts for almost two decades. The country participated in the Clean Development Mechanism (CDM) under the Kyoto Protocol, and its nationally determined contribution (NDC) explicitly supported market-based mechanisms to increase climate finance (Peña and Sarmiento Barletti 2022). Since 2006, REDD+ initiatives in Peru have been participating in voluntary carbon markets.⁵ More recently, regional governments, Peru's highest subnational level of government, have shown interest in developing jurisdictional REDD+ programmes. By the end of 2022, two Amazonian regional governments — Ucayali⁶ and Madre de Dios⁷ — had signed agreements to design and implement jurisdictional REDD+ programmes with Mercuria, a Swiss energy and commodity-trading company. At the time of writing, however, the Ministry of the Environment (Peru's national REDD+ authority) opposed the agreement signed by Ucayali.⁸

Given the interest of regional governments in REDD+ jurisdictional programmes, various legal questions arise, including whether these subnational authorities have the mandate to set up these programmes, and if they do, what areas of their territories can be included. There are also questions about whether jurisdictions themselves can sign agreements for the purchase and/or transfer of carbon credits, and whether and how they will be able to use the income from those transactions. Another important issue to consider is whether subnational jurisdictions would need only to comply with national legislation or would also need to go through a review by the Ministry of the Environment. And finally, an important question arises regarding the transparency and information mechanisms associated with the negotiation of contracts and the design and implementation of jurisdictional approaches, particularly considering Indigenous Peoples' recognized right to prior consultation in Peru.

2 See <https://www.artredd.org/trees/>.

3 See <https://verra.org/programs/jurisdictional-nested-redd-framework/>.

4 See the Preamble of the Paris Agreement.

5 See <https://www.reddprojectsdatabase.org/view/projects.php?id=604&name=Peru>.

6 See <https://redducayali.pe>. Available in Spanish and English.

7 See <http://octi.regionmadrededios.gob.pe/pagina/PJMDD>.

8 Ucayali's Technical Commission for the Regional Negotiations of the Ecosystem Services met in June 2022 to discuss how to respond to the official communication from the environmental prosecutor of the Ministry of the Environment that opposed this agreement. See the meeting's minutes here (in Spanish): <https://cdn.www.gob.pe/uploads/document/file/3455290/ACTA%20REUNION%20DE%20TRABAJO%20003-2022.pdf>.

Legal and policy considerations

In Peru, a range of private and public actors can hold carbon rights. The Constitution (Art. 66) places forests under state control as well as, by extension, the ecosystem service of carbon sequestration that these forests provide (Peña 2014 and Wieland Fernandini et al. 2014). Based on the Forest and Wildlife Law (No. 29763) and Peru's Payment for Ecosystem Services Law (No. 30215) and the regulations of these laws,⁹ it is generally understood that actors who hold legal title to forests can develop or participate in REDD+ programmes or initiatives and can be entitled to receive economic benefits for their role in maintaining or enhancing the forest ecosystem services that produce carbon emissions reductions.¹⁰

A narrow interpretation of the right of forestry titleholders to REDD+'s "economic benefits" could include access to benefit-sharing mechanisms, but exclude a prior right to owning carbon credits. However, the same provision could be interpreted more broadly to mean that owning carbon credits is part of these "economic benefits," just as forestry titleholders have ownership rights to the proceeds from their other uses of the forest.¹¹ Many REDD+ initiatives have assumed that titleholders to land and forests have ownership rights to carbon credits, and they have developed contracts and transactions in the voluntary market following this interpretation. This assumption has not been legally contested.

In theory, government agencies that hold rights over forested lands as owners or administrative stewards may potentially be part of a REDD+ initiative or programme.¹² Regional governments, "within the framework of their competencies," could be part of a REDD+ initiative that includes "regional conservation areas, the forests under their administration, and the ecosystems located in the lands they own."¹³ The use of the term "forests under their administration" would likely mean that regional governments cannot claim the carbon rights for a hypothetical REDD+ jurisdictional initiative in the entirety of the forest inside their jurisdictions, but only over "free"

forest (e.g., forest with no other title). This is, however, not straightforward; for example, it remains unclear who would be entitled to carbon rights from forests with overlapping legal uses, such as the case of Indigenous Peoples living in regional conservation areas (protected areas administered by regional governments). Further, a provision in Peru's Organic Law of Regional Governments of 2002 (No. 27867) authorizes these governments to "formulate plans, develop and implement programs for the sale of ecosystem services in regions with forests or protected areas."¹⁴ The phrase "sale of ecosystem services" seems oddly worded, but likely reflects an early understanding about payment for ecosystem services (PES) mechanisms when the law was passed. It may be interpreted as supporting the idea that regional governments can develop or be part of jurisdictional REDD+ programmes and "sell" carbon credits, implying that they have some kind of ownership right over them.

Potentially, regional governments could take on roles such as facilitators or aggregators in a jurisdictional REDD+ programme as part of their more general purviews. Thus, a regional government could develop a jurisdictional REDD+ scheme that not only includes forests under its direct administration, but also forests with private or communal titleholders who agree to participate in the programme. In this hypothetical case, titleholders would receive benefits from public investment projects or sustainable agricultural support programmes, or other in-kind or monetary incentives or payments as part of the initiative's benefit-sharing plan.¹⁵ Regional governments are also legally authorised to participate in PES mechanisms, including those included in REDD+ initiatives, as *retribuyentes* (i.e., "payers" or "buyers").¹⁶ Under this authorization, a regional government could, at least in theory, purchase carbon credits from REDD+ initiatives within its jurisdiction as part of an incentives programme.

Despite these mandates and legal authorizations, which would seem to allow a regional government to set up a REDD+ jurisdictional programme, there is a major legal roadblock in the constitutional limitation to government entities to engage in business and commercial activities. Article 60 of the Constitution prohibits any level of government from engaging, directly or indirectly, in "business activities" unless expressly authorized by law when there is "high public interest or evident national advantage." In principle, if selling carbon credits is understood as a "business activity" — and since Congress has not passed a law exempting regional governments of the prohibition to engage in these activities — regional governments would be barred from setting up REDD+

9 See the Regulations for Forestry Management (Supreme Decree 018-2015-MINAGRI) and the Regulations of the *Mechanisms of Payment for Ecosystem Services Law* (Supreme Decree 009-2016-MINAM).

10 See the Regulations of the *Mechanisms of Payment for Ecosystem Services Law* (Arts 6.1c, 7.1 and 29.3). See also the *Forest and Wildlife Law*, which recognizes the right of all forestry titleholders to "the economic benefits stemming from the ecosystem services that are a consequence of the [forest] management" (Art. 60).

11 See the *Organic Law for the Sustainable Use of Natural Resources* (No. 26821), Arts. 4, 19 and 23.

12 See the Regulations of the *Mechanisms of Payment for Ecosystem Services Law*, Art. 7.1.

13 See the Regulations of the *Mechanisms of Payment for Ecosystem Services Law*, Arts. 7.1g, 12.1, and 13.1.

14 See the *Organic Law of Regional Governments*, Art. 53.

15 See the Second Complementary and Final Provision of the *Payment for Ecosystem Services Law*.

16 See the *Mechanisms of Payment for Ecosystem Services Law*, Art. 13.1.

jurisdictional programmes that require them to engage in trading emission reductions.

Assuming they could overcome this constitutional restriction (e.g., by successfully arguing that these are not business activities, or by having Congress pass a law exempting them of the prohibition), regional governments interested in setting up a jurisdictional programme must consider two additional legal issues - complying with the national REDD+ rulebook, and complying with government budgetary and financial laws.

Complying with the national REDD+ rulebook

Regional governments would need to comply with the REDD+ rulebook being developed by the Ministry of the Environment, Peru's national REDD+ authority. The rulebook determines which activities are considered official REDD+ actions, and will define nesting and the mandatory use of the deforestation FREL/FRL for the Amazon biome developed by the national government, as well other important issues, including the government accreditation of voluntary standards for carbon markets (Peña and Sarmiento Barletti 2022). In addition, the rulebook includes the guidelines for registering REDD+ initiatives in the forthcoming National Registry of Mitigation Measures (*Registro Nacional de Medidas de Mitigación*, or RENAMI). The Ministry will review initiatives against a set of requirements and criteria, including compliance with safeguards, before they are registered with RENAMI and authorised to claim and sell official emissions reduction units (*unidades de reducción de emisiones*) for carbon markets (Peña and Sarmiento Barletti 2022). RENAMI will also be key to any jurisdictional programmes intending to sell emission reduction units through cooperative approaches under Article 6.2 of the Paris Agreement that require corresponding adjustments (relating to carbon credits that are traded between countries), which the national government will need to authorize in advance.

More generally, voluntary standards already require REDD+ initiatives to comply with national regulations. For jurisdictional initiatives led by subnational governments, the Architecture for REDD+ Transactions programme (ART) has created a procedure. It requires "a letter from the relevant national entity authorizing the Participant's application to and participation in ART. The letter will attest that the national government will support the Participant by aligning accounting and reporting as required under the Paris Agreement and towards NDCs, including addressing double counting."¹⁷

¹⁷ <https://www.artredd.org/wp-content/uploads/2020/04/TREES-v1-February-2020-FINAL.pdf>, p.18

Complying with government budgetary and financial laws

Regional governments must also consider budgetary and financial laws, as well as regulations regarding the sale of government assets.¹⁸ It is possible that the emission reduction units from jurisdictional approaches could be deemed to be government-owned financial assets. This would imply that carbon transactions would need to follow regulations governing transactions of similar government assets, including appraisal rules to establish a price or a competitive process to choose buyers. Related specific legal questions include, for example, which regional government offices would need to sign off on carbon sales, under what procedure carbon credits would be appraised and how their prices would be set, and whether (and how) regional governments would incorporate emission reduction units as assets in their accounting system. These are important issues to consider for government institution that are subject to oversight concerning the use of government assets and public funds, and whose decision-making processes are bound by principles of transparency and accountability.

Even in the hypothetical case that a purchase agreement was finalised, additional legal issues need to be clarified. A key question is how regional governments would incorporate the proceeds from the sale of emission reduction units into their budgets; as soon as those proceeds are included in their budgets, they would become public funds subject to relevant legal rules. Another important question is what activities these funds could be spent on or invested in (e.g., considering rules placing limits on transfers of public funds to individuals, or restrictions to channelling them through independent trust funds without the Ministry of Economy and Finance's authorisation).

A potential pathway around these regulations is to foster a partnership between regional governments and Profonanpe, Peru's national environmental trust fund, to administer the proceeds from subnational jurisdictional programmes. Profonanpe was created by the national government, but is run independently and under private law so it does not follow the government's rules for the use of public funds. Currently, Profonanpe has the mandate to administer the REDD+ results-based funds from the Joint Declaration of Intent, an agreement between Peru, Norway and Germany.¹⁹ In the future, the government could expand this mandate to include results-based funds from jurisdictional approaches, either as an obligation for regional governments or on a voluntary basis.

¹⁸ Some of the main laws are the Legislative Decree of the National Public Budgetary System, Legislative Decree No. 1440, and the annual public sector budget laws (see, e.g., the Public Sector Law for the Fiscal Year 2023, Law No. 31638).

¹⁹ See Supreme Decree 001-2023-MINAM.

Another precedent to consider is the engagement by the protected areas Service (*Servicio Nacional de Areas Naturales Protegidas por el Estado*, or SERNANP) in REDD+ projects developed by NGOs under administration contracts. Pursuant to these arrangements, the NGOs have commercialised government-owned carbon credits in the voluntary market; this was done prior to the Ministry of the Environment's ongoing development of the REDD+ rules. These transactions do not seem to have followed the regulatory arrangements for the trade of government-owned financial assets. Rather, they seem to follow SERNANP's regulations that govern REDD+ initiatives in national protected areas.²⁰ These regulations explicitly recognize that the "carbon certificates generated [by these REDD+ projects] belong to SERNANP, that can transfer the power to trade them [to the organizations that hold administration contracts]."

In general, regional governments, the organizations working with them to develop jurisdictional programmes, and those implementing the voluntary standards seeking to support them, must work closely with the Ministry of the Environment and the Ministry of Economics and Finance to continue to discuss and find clarity regarding these issues. These ministries may need to develop specific regulations or create an *ad hoc* jurisdictional pathway.

Conclusions and recommendations

Interest in REDD+ jurisdictional programmes has increased in recent years, driven in part by the assumption that funding, alongside technical tools and knowledge, may be all that is needed to roll out these programmes. However, this Infobrief shows that before these programmes can be designed and implemented, their proponents must understand national policies and legal frameworks, both existing and under development in each country, that may facilitate or constrain their implementation. This concerns not only legal frameworks for REDD+, but other government functions and procedures.

Based on our analysis, we propose three recommendations for policymakers and private actors regarding the design and implementation of REDD+ jurisdictional programmes:

There is a need for multilevel and multisector coordination among government actors, led by the Ministry of the Environment, to establish the appropriate frameworks for jurisdictional approaches. This includes deciding the

most appropriate jurisdictional model for Peru, including whether or how regional governments may be involved. It also requires that new laws or regulations be passed, or existing ones be amended to promote and support this jurisdictional model and provide legal certainty for investors and carbon markets.

The interest by investors in forward finance agreements (between a buyer and a seller to trade an asset at a specified price at a future date) or carbon credits purchase commitments for jurisdictional programmes is a positive signal. However, investors and proponents alike must clarify ongoing regulatory and legal dynamics and existing gaps in order to avoid creating challenges for jurisdictional approaches led by subnational governments. In Peru, proponents of these agreements may unnecessarily place their subnational government counterparts at legal risk (given the national government's finance and budgetary laws, for example). In addition, promoting or supporting subnational jurisdictional programmes that are not aligned with national REDD+ rules and the FRL/FREL may also clash with processes for nesting REDD+ actions, which could compromise the rigour of national carbon accounting. This may eventually impact the market's perception of the environmental integrity of Peruvian emissions reductions to the detriment of investors' own interests.

Interested donors and development agencies that are supporting standards and market mechanisms with subnational pathways should collaborate with national REDD+ authorities by providing funding and technical support to develop regulations and guidelines for jurisdictional approaches that consider all the legal issues discussed in this Infobrief, and that are effective and transparent. These regulations and guidelines will also need to equitably include the concerns and participation of the men and women of forest-based communities that have been doing a large part of the work of keeping forests standing in parts of the Global South.

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²⁰ See Directive 001-2014-SERNANP, approved by Presidential Resolution No. 26-2014-SERNANP.

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