CARBON RIGHTS IN BRAZIL

A Case Study by Thiago Chagas

Key Points

Legislation on REDD+ is currently under development in Brazil. This clarifies which types of activities are eligible for REDD+, creates a committee to oversee REDD+ implementation and creates different types of REDD+ credits for fund and market based REDD+ systems. Key issues relevant to indigenous peoples include:

- Ownership of CREDDs (the tradable REDD+ credits) would likely follow the ownership of the land and forest.
- The Bill explicitly mentions some participatory rights and benefit-sharing rules to protect the rights of indigenous peoples, traditional communities and small rural producers, including the observation of the principle of prior and informed consent.
- The Bill makes progress by announcing the creation of a dedicated dispute settlement procedure for REDD activities which re-affirms traditional communities' rights to participation in accordance with international agreements ratified by Brazil, and introduces specific provisions to deal with areas occupied by traditional communities and indigenous peoples which are not yet formally recognized by the federal government as such.

Despite these developments there is still some debate as to whether indigenous peoples can autonomously engage in, and benefit from REDD+ in Brazil. Whilst the proposed REDD Bill recognizes the rights of traditional communities, there are still some concerns that it cannot really guarantee that they will be the beneficiaries of REDD initiatives.

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Background

Brazil does not have a national law that specifically addresses the legal nature and ownership of carbon credits or rights to greenhouse gas (GHG) emission reductions and/or removals. It is however expected that the implementation of the Brazilian Climate Change Policy, which promotes the development of an organized Brazilian carbon market overseen by the Brazilian Securities and Exchange Commission, will lead to an eventual clarification of the precise nature and ownership of tradable carbon rights.

Some legislation at state-level already refers to rights derived from measures that reduce or remove GHG emissions, but stops short of clearly stating how these rights to emission reductions are to be treated outside the governmental programs they create. For instance the Amazonas State Climate Change Policy establishes the general legal framework for promoting carbon offset projects and payments for ecosystem services within land owned by the State, and assigns the rights to exploit environmental products and services (implicitly including carbon rights) to a public-private institution created for this purpose.[1]

In the absence of particular legal treatment, general provisions of constitutional and civil law are applied to define initial ownership of these credits or rights. The Brazilian Civil Code states that the ownership right shall include the right to use, dispose of , and legally defend the property against unlawful possession. The Civil Code further states that the accessories or products derived from "a thing" belong to the owner of that thing unless stipulated otherwise by specific rule or contract (e.g., the rights to accessories and products may be transferred via usufruct, lease or the grant of surface rights).

As a general rule this implies that the right to exploit GHG benefits associated with a certain activity rests with the owner (or rightful holder) of the physical asset or process that generates

Box 1

The legal nature of emissions reductions and carbon credits in Brazil

Legislative proposals already introduced in the Brazilian Lower House in 2007 attempted to bring some clarity over the legal nature of emission reductions and carbon credits. These bills of law equated certified emission reductions (CERs) from the Clean Development Mechanism to securities for tax and financial regulation purposes, making CER transactions subject to the oversight of the Brazilian Securities and Exchange Commission. However, this position has been criticised by the Brazilian Securities and Exchange Commission as being ill-suited for CERs. Arguments for this included the clear distinction between a CER and a derivative and the fact that investors and project developers would gain little or no additional regulatory certainty from such characterization. Additional debate over ownership of CERs has been triggered under the Brazilian alternative renewable energy program (Proinfa), where a Federal Decree regulating the program assigned the rights to revenues from the sale of CERs from projects subsidized by the Proinfa to Eletrobrás (Brazil's chief public energy utility).

[1] See Law 3.135 of 5 June 2007 establishing the Amazonas State Climate Change, Conservation and Sustainable Development Policy, article 14, and Law 3.184 of 13 November 2007. The latter provides for an 'onerous assignment' of the rights to exploit environmental services and products from the State to a private foundation, Fundação Amazonas Sustentável. With respect to other state-level initiatives and carbon rights, see also Sao Paulo State Decree further regulating Law 13.798 of 9 November 2009 establishing the State Climate Change Policy, article 32, available at: http://www.saopaulo.sp.gov.br/spnoticias/lenoticia.php?id=210829

the climate benefit. In the specific context of forest-related credits there is a presumption that any GHG rights are initially held by those that either directly own the forest resource or are entitled to exercise certain powers of ownership over the forest resource.

Rights to land and forest

While the Brazilian Federal Constitution clearly embraces the right to private property and ownership, it also defines its limits by asserting the principle of "social destination" of the property (Brazilian Civil Code). For rural properties, the social destination principle embodies

1. rational and adequate use (including of natural resources);
2. preservation of the environment; and
3. compliance with labour laws and provisions on workers' welfare.

In addition, the Constitution explicitly elevates key biomes in Brazil (such as the Amazon Rain Forest and the Atlantic Forest) to the category of 'national heritage', imposing on both society and the State the obligation to preserve and the right to use the natural resources contained therein.[2]

Acquisition of land in Brazil is made effective via the filing of the relevant legal instruments with the competent real estate registry that serves as a depository of all relevant information related to land (including ownership and any other securities or property interests that may fall upon the land or real estate). When the transfer of land and/or real estate property is not given publicity via the recording of the transaction with the appropriate real estate registry, such transfer can only generate inter-personal rights (i.e., rights and obligations as established between the contracting parties) and will not allow for full legal protection against third-party interests. According to the Brazilian Civil Code, whoever owns the soil is also presumed to own the sub-soil,[3] the surface and forest resources above the surface.[4] Ownership of forest may however be separated from the ownership of the land through contractual arrangements (e.g., lease agreements, concession of usufruct and surface rights).

The Brazilian Forest Code, a federal law regulating the use of forests in the national territory, defines forests as 'common-interest' resources which can be privately owned provided the relevant norms in the Forest Code and elsewhere are observed. This includes, for instance, restrictions on the exploitation of forest resources in legal reserve and permanent preservation areas (see Box 2), and in land occupied by indigenous communities. In

[2] See Federal Constitution, article 225. The right to use natural resources has to be exercised within the limits and principles established in the Constitution. However, this right can clash with the obligation to preserve. This is mostly seen through controversial debates surrounding the implementation of large infrastructure projects such as large hydropower projects.

[3] The sub-soil does not extend to minerals and fossil fuel deposits that are owned by the state. Landowners can, however, use certain minerals found in the immediate subsoil for e.g. construction.

[4] The ownership right does not include however rights to the mineral and water resources in the sub-soil. See Brazilian Civil Code, article 1230.

addition, the use of private (primary) forests is conditioned on the issuance of specific environmental authorization or permits by the relevant governmental authority, and the adoption of adequate forest management techniques (Forest Code).

Forests located in public lands are deemed public forests and their management by private entities is subject to a specific public concession regime (Antoani 2005). The rights to forest resources under the concession regime are confined to those expressly foreseen in the concession agreement and exclude, among others, the right to trade or market carbon credits that may be derived from avoided deforestation activities.[5]

Box 2

Forest management requirements in legal reserves and permanent preservation areas

The legal reserve is an area located within rural properties set aside for the purposes of conservation and sustainable use of natural resources. The portion of the rural property that must be set aside as legal reserve varies from 20% to 80%, depending on where the property is located. Permanent preservation areas, in turn, are areas explicitly defined by law where exploitation of forest resources may only occur in cases of declared public interest. These include, for instance, riparian areas, areas sustaining endangered fauna and flora, and summits of hills or mountains. Note, however, that changes to the Brazilian Forest Code are currently being debated in the Congress. Modifications being discussed include a potential decrease of permanent preservation areas adjacent to river banks, withdrawal of the obligation to maintain a minimum forest set aside for small landowners, and the concession of amnesty to rural producers who have illegally deforested their lands prior to the enactment of the new law.

Indigenous lands

Lands traditionally occupied by indigenous peoples are deemed public lands. These lands are, by virtue of constitutional rights, inalienable (Federal Constitution, article 231). Indigenous communities have exclusive usufruct of the land in which they reside, while the Federal Government retains the right to intervene in such areas for reasons of recognized national interest (e.g. sovereignty protection, national development and exploitation of mineral resources) (Federal Constitution, article 231 and Law 6.001, article 24).

The exclusive land usufruct by indigenous peoples includes the right to use and exploit natural resources present in the soil, rivers and lakes (and its products and accessories) and to benefit from the proceeds of such use and/or exploitation. An expansive interpretation of these provisions would endow indigenous peoples with rights to carbon sequestered in their lands, a position defended by some legal practitioners in Brazil and thus far not challenged by the Federal Government (see box 3) (Federal Constitution, article 231 and Law 6.001, article 24).

REDD specific legislation

Brazil is discussing the implementation of a national system to promote efforts to reduce

[5] See Law 11.284 of 2 March 2006, article 16. While the law refers to "carbon credits", the law fails to define what carbon credits are. It may, however, allow for the commercialization of carbon credits related to reforestation activities.

Box 3

Can indigenous peoples autonomously engage in REDD+?

Some studies concerning the rights of indigenous peoples and forestry projects have emphasized that the exclusive usufruct enjoyed by indigenous peoples can be equated to a de facto ownership of the land and its resources. While originally belonging to the state, indigenous lands are subject to a very confined use regime and their exploitation by public authorities is limited to very special circumstances prescribed in law. Hence, indigenous peoples would be the de facto owners of the forest and other natural resources found in indigenous lands, including any rights that may be derived from carbon sequestered and removed. There is however still some debate as to whether indigenous peoples would have autonomous legal capacity to negotiate and conclude carbon-related agreements and to what extent they would need to be assisted by the State for participating in REDD+ projects (Telles do Valle, 2009). In this context, it is important to note that the REDD Bill currently being discussed in the Brazilian Congress (see below) requires the mandatory participation of a public entity responsible for promoting and protecting the rights of indigenous peoples in Brazil whenever indigenous lands are used for hosting REDD+ initiatives.

emissions from deforestation and forest degradation (REDD) via the use of both public funding and market-based mechanisms.[6] Bill of law 5.586/2009, currently making its ways through the Brazilian Lower House, establishes a national REDD system and defines some basic rules on eligibility and approval of REDD activities in Brazil.[7]

This bill has been revised, and the most recent and more detailed version of the bill (the REDD Bill) provides a more comprehensive regulatory framework by addressing some of the key aspects which were left out in the original version. The REDD Bill clarifies that REDD activities shall encompass conservation measures, sustainable management of forests and enhancement of carbon stocks (jointly REDD+) and also foresees the creation of a committee to oversee and further regulate the implementation of REDD+ activities.

The REDD Bill also proposes the creation of two different types of REDD units as a way to address the dichotomy between market and non-market based funding. A general category of REDD units, known as UREDD, entitles holders to receive benefits from national and international funding other than market-based (i.e. national and international funding in the form of grants). UREDDs would be non-tradable registerable units each representing one tonne of verified emission reductions or removals from eligible REDD+ activities. A share of UREDDs could potentially qualify to generate certified REDD units ("CREDDs"), which are defined as tradable intangible rights. In contrast to UREDDs, CREDDs can be used as offsets for compliance both domestically (in the event of

[6] Note that after heavy lobbying of some Amazon states, the Federal Government seems to be gradually re-visiting its position towards the use of market incentives and offsetting strategies for REDD. A task force to discuss financing options for REDD (known as "Task Force on REDD and Climate Change") created by a joint effort of the nine Amazon region States (and with support from the Federal Government) announced that consensus is emerging that Brazil should support at least three forms of funding for REDD: (i) direct public sector funding; (ii) market-linked funding without the creation of tradable carbon units; and (iii) carbon market funding with the creation of tradable carbon units.

[7] Available at http://www.camara.gov.br/sileg/Prop_Detalhe.asp?id=441407. This original (and shorter) version of this bill, proposed by Congresswoman Lupercio Ramos, explicitly defined REDD units as a security. This definition however has been dropped in the newer and more comprehensive draft of the bill.

future state and municipal targets), as well as internationally (e.g. under foreign emissions trading programs or to assist in the achievement of a country's GHG reduction commitments under the UNFCCC). A REDD committee would be responsible for determining the quantitative and qualitative criteria for the generation of CREDDs.[8]

Although not specified, ownership of CREDDs would likely follow the ownership of the land and forest. CREDDs could be transferred through contractual arrangements and title would be recorded via registration with a Brazilian REDD registry system. Importantly, the Bill seems to treat the rights and obligations associated with REDD+ in a similar way to real property rights by determining that the link between the REDD activity and land shall be maintained, regardless of the changes in ownership of the land. This means that a new owner of the land would become responsible for taking forward the REDD activities on the acquired land.

In addition, the REDD Bill explicitly mentions some participatory rights and benefit-sharing rules to protect the rights of indigenous peoples, traditional communities and small rural producers, including the observation of the principle of prior and informed consent. For activities carried out in conservation units and indigenous lands, "at least 70% of the resources received with the project must be applied in the area of the project in a way that prioritizes actions of protection and of sustainable development, with an emphasis on beneficiary residents and neighboring beneficiaries" (REDD+ Bill, article 12). For REDD projects developed in private lands, however, the Bill simply states that benefit-sharing arrangements should be made with local communities when these communities have contributed to the REDD efforts. This has already raised some concerns from environmental and social NGOs, because whilst the proposed REDD Bill recognizes the rights of traditional communities, it cannot really guarantee that they will be the beneficiaries of REDD initiatives.[9] While it is true that the current Brazilian land tenure situation in the Amazon region coupled with the government's relatively weak enforcement capabilities make this a real risk, the recently

"Brazil is discussing the implementation of a national system to promote efforts to reduce emissions from deforestation and forest degradation (REDD) via the use of both public funding and market-based mechanisms."

[8] Article 8 of the REDD+ Bill already advances two conditions for the creation of CREDDs: (i) that the overall rate of deforestation and forest degradation in the country is actually reducing; and (ii) in the event of a CREDD being used as an offset to emissions of a foreign country, such country has put in place comparable GHG mitigation efforts.

[9] See news piece available at http://www.socioambiental.org/nsa/detalhe?id=3143 (accessed on 18 August 2010). Note that a previous version of the substitutive stated that, in case of REDD+ projects developed in private lands, at least "10% of the resources gained with the project must be directed to neighbouring beneficiaries, in accordance with the programs and actions of sustainable development."

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published version of the REDD Bill makes material progress in the protection of indigenous peoples and traditional communities by announcing the creation of a dedicated dispute settlement procedure for REDD activities. This re-affirms traditional communities' rights to participation in accordance with international agreements ratified by Brazil, and introduces specific provisions to deal with areas occupied by traditional communities and indigenous peoples which are not yet formally recognized by the federal government as such.

Overall, the proposed REDD Bill is a step forward in the regulation of carbon forest activities in Brazil. It allows for some harmonization among federal, state and municipal levels[10] and establishes the groundwork for further regulation of key aspects associated with the development and operation of REDD projects or programs. Note that the REDD Bill is, at the time of writing, under debate at the environment and sustainable development commission and still has to undergo assessment by other relevant commissions and wider consultation with civil society and the private sector.

Conclusions

REDD specific regulations are being designed in several states in Brazil. There is increasing support for promoting a regulatory system that acknowledges and rewards REDD actions not only at the national, but also at the subnational and jurisdictional levels. While state and municipal level legislative initiatives provide some assurance and guidance for

[10] Apart from the state of Amazonas, which has already established procedures for supporting REDD+ activities in public lands, other states such as Mato Grosso, Acre and Para are also considering enacting specific legal frameworks for REDD+.

local project developers and traditional communities participating in REDD activities, the introduction of a specific federal legislation, as currently being discussed in the REDD Bill, would set the general legal framework and bring clarity to several aspects related REDD. These include issues such as eligible areas and actors, benefit-sharing arrangements, responsibilities of project proponents, re-affirmation of the rights of indigenous peoples and traditional communities, legal treatment of REDD activities in the event of transfer of land and land tenure disputes, and allocation of carbon credits and rights to REDD payments. A common federal guidance on these issues is key to the promotion of an environment conducive to the implementation of REDD and would help filling the legal vacuum in relation to who may exploit the benefits associated with GHG reductions and removals achieved through REDD.

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