CASE STUDY

Networking for equity in forest climate policy

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A REVIEW OF TREE TENURE AND LAND RIGHTS IN GHANA AND THEIR IMPLICATIONS FOR CARBON RIGHTS IN A NATIONAL REDD+ SCHEME

Community in Sunyani planting trees

KEY POINTS

For Ghana's national REDD+ scheme to be viable, the rights to carbon or the emission credits generated must be clearly delineated, and be accompanied by equitable and efficient benefit sharing systems.

There are a number of approaches that the State can use to determine whom to vest the right to carbon in. If defined as a natural resource, the state would be vested with the rights. If recognised as an ecosystem service, then the right to the benefits would be vested in the owner of the trees. In the latter case, the beneficiaries will differ depending on whether the trees are naturally occurring or planted.

The main opportunities in REDD+ in Ghana are in the afforestation and reforestation of forestlands and degraded lands. It is possible that REDD+ could provide additional resources to build on existing systems that promote tree planting on degraded land, such as the National Forest Plantation Development Plan (NFPDP), by providing additional incentives in reserve and off-reserve areas.

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INTRODUCTION

REDD+ offers monetary incentives that can complement Ghana's efforts to conserve what remains of its forest estate and further expand forests. State managed forest reserves, covering an area of 1.6 million ha, have been depleted and to a large extent degraded: less than 2 percent of forest reserves are said to be in excellent condition, and no less than half have been described as 'mostly degraded or in worse condition' (Treue, 2001 pg 39, Bamfo, 2010).

Outside the reserves, what are known as the "off-reserve forests" occupy an area of 4.5m ha and are made up of scattered trees on agricultural fields, secondary forests regenerating from agricultural farming, riparian forest strips along streams, sacred groves and some closed-canopy forests, making them unprofitable to manage (Kotey et al., 1998; Abebrese, 2002). In Ghana, degradation is presumed to contribute more to forest carbon stock reduction than deforestation (Hansen et al., 2009). As REDD has expanded to include other activities, such as the sustainable management of forests and the enhancement of forest carbon stocks ("REDD+"), Ghana has a real opportunity to benefit, given the potential for the enhancement of forest carbon stocks through afforestation and reforestation activities. To take advantage of this, Ghana has been participating in the World Bank's Forest Carbon Partnership Facility (FCPF) that aims to assist developing countries in building capacity for REDD+. So far, Ghana's Readiness Preparation Proposal (R-PP) has been approved. It is currently in the process of demonstrating how it would comply with the World Bank's social and environmental safeguards before the grant agreement, which funds the implementation of Ghana's R-PP and national REDD+ strategy, is signed (Bamfo, 2010).

In Ghana the main drivers of deforestation are agricultural expansion, illegal logging and fuel wood collection. Since the 1990s, a number of statutes, regulations, and development plans, originating in the Forest and Wildlife Policy 1994 (FWP), have been introduced in an attempt to reverse the effects of decades of unsustainable forest management policies and practices. The primary objective of most of these reforms is to safeguard the State's timber resources. Some of the other objectives, like the enhancement of [degraded] forest estates, conservation of biodiversity, and rural community participation are compatible with those of REDD+. If Ghana is to benefit from REDD+, key stakeholders, for example the farmers and forest dependent communities who contribute to a significant proportion of the deforestation rate, must be suitably incentivized, for example through ensuring their share in the benefits generated by REDD+. Although rural community participation has been sought, the necessary changes to tree tenure that would incentivize these stakeholders have not been made yet.

RIGHTS TO LAND

While Ghanaian law is yet to determine the rights to carbon, issues of land and tree tenure, particularly between the State and the landowners, are clearly dealt with. Article 257(1) and (2) of the 1992 Constitution vests all public lands in the President on behalf of, and in trust for the nation. This includes all land acquired by the State before 1993 and after, which includes all the forest reserves that were demarcated for that purpose. There is a fundamental difference between the State-managed forest reserves and the off-reserve forests. Although the allodial title[1] to the land is held by the Stool or Skin[2] of the forest reserves, the rights to the forest resources and the effective management control are vested in the State. This means rights of entry and exploitation are restricted and subject to the permission of the State. In the off-reserves on the other hand, rights, interests, and entitlements in land and trees (except for commercial rights to the tree) are founded on the customary system of land tenure and administration. This means aside from the commercial rights to the tree, which are held by the State, all other rights and interests are generally held by the landowner, whether it is the Stool, families or communities. There is however a long history of derived rights being granted in the forest areas of southern Ghana, particularly for agriculture. For example, tenancies and share-cropping arrangements are common and involve more than half of the resident rural population. Land is often leased to tenant farmers whether stool or non-stool subjects. The rights that tenants enjoy depend on the terms of the lease they agreed to with the landlord. Normally this entails sharing the produce with landlord by an agreed ratio.

RIGHT TO NATURALLY-OCCURRING RESOURCES

The customary and statutory laws of Ghana are configured in such a way that ownership of land does not necessarily translate into ownership of the naturally-occurring resources the land holds. Ghanaian customary law and administration support the plurality of rights, interests and entitlements in land and forest resources. Non-public land can be owned by families, communities or groups with multiple-use rights vested in the members that can co-exist at the same time and on the same parcel of land (Tsikata et al, 2008). In the Krokosua Hills forest for example, fringe communities continue to retain their right to harvest non-timber forest products (NTFP) for subsistence purposes, while the rights to timber are still vested in the State (Asare, 2010).

Similarly the Ghanaian Constitution, like most other African country Constitutions, vests the rights to minerals and natural resources in the State irrespective

of whether it is on private or public land[3]. Article 268(1) of the Ghanaian Constitution vests in Parliament the responsibility of ratifying any agreement that involves the granting of rights to or concessions for the exploitation of minerals and natural resources. It also gives Parliament the authority to exempt a class of transactions from this provision (Article 268(2)) and to delegate the authority to approve such transactions without referring to Parliament to the relevant State bodies, known as "Commissions" (Article 269(2)). In the case of forestry, Article 269(1) of the Constitution provides for the creation of the Forestry Commission, which was established by the Forestry Commission Act, 1999 (ACT 571). Under Act 571, amended by the Timber Resources Management (Amendment) Act, 2002 (Act 617) this transaction approval function was delegated to the Forestry Commission, which has overall responsibility for the management and utilisation of forestry resources. The explicit reference to the vesting of the rights to trees or timber in the President is in Section 16 of the Concessions Act of 1962.

DISTINCTION BETWEEN NATURALLY-OCCURRING TREES AND PLANTED TREES

Ghana's laws now make a distinction between the rights to naturally-occurring trees and those that are planted. The rights to the commercial exploitation of naturally-occurring trees have always been vested in the State[4] and it remains a statutory offence to harvest in the reserves or off-reserves without the State's consent[5]. The law on rights to planted trees on the other hand, has been amended in order to encourage afforestation, reforestation and private plantations. The amended section 4(3) of the Timber Resource Management (Amendment) Act, 2002 (Act 617) now prohibits the granting of timber rights on private forest plantations and land with trees grown or owned by private persons.

This distinction is also reflected in the way the revenue from the exploitation of natural resources is shared between the beneficiaries. Revenue from the harvesting of naturally-occurring trees is shared between the State and the beneficiaries listed in Article 267(6) of the Ghanaian Constitution and according to the formula in Article 267(6). Currently, sixty percent of the revenue from the harvesting of timber in the forest-reserves is retained by the State with the remaining forty percent distributed among the beneficiaries listed in Article 267(6) (Birikorang, 2009). Under Article 267(6), the Stools and the Traditional Authorities[6], whom the Constitution and customary law regard as the customary landowners and administrators of Stool lands, are entitled to twenty percent and twenty-five percent of the revenue

Charcoal truck in Ghana. Copyright: Flickr Acameronhoff

that is set-aside for the beneficiaries, respectively. The remainder is shared between the Office of the Administrator of Stool Lands (OASL) and the District Assemblies. In the off-reserves, the revenue is split fifty-fifty between the State and the above beneficiaries. This arrangement is in a memorandum of understanding (MOU) that has been respected by all parties (Birikorang, 2009).

The problem with this benefit-sharing arrangement is that the Constitution excludes key stakeholders, such as the farmers and forest-dependent communities whose buy-in is critical in any effort to reduce the rates of degradation. The law does not recognise them as beneficiaries, nor are they entitled to revenue from harvesting. In the case of the farmers in the off-reserves, the Stool is required to consult them when concessions are being given over the trees on their farms, yet this rarely happens. Many prefer to illegally remove the trees before the logging companies harvest and damage their farms in the process, without paying adequate compensation (Bamfo, 2010). Legal requirements in the form of contract known as a "Social Responsibility Agreement" (SRA) have been introduced by the State. These agreements mandate logging companies to commit no more than 5 percent of the revenue from the timber harvested to provide social amenities (normally in the form of schools, clinics and other facilities) for the communities where the concession was given[7]. The SRA has however failed to incentivize the farmers and local communities from illegally removing trees. This is because most of the logging companies do not fulfil their contractual obligations to provide these amenities. In other cases where the companies give the funds to the Stools for that purpose, the funds are misused by the Stool and not actually spent on the communities (Ayine, 2008, Bamfo, 2010). The district offices of the Forestry Commission, in charge of monitoring and ensuring these obligations are met, have also failed to fulfil their duties. This suggests that the failure of the SRA to stop farmers from illegally removing trees is not due to a lack of incentives per se.

Owners or planters of planted trees on the other hand have a significantly better deal than the key stakeholders in naturally-occurring forests (farmers and forest dependent communities) or the Constitutional beneficiaries (Traditional Authorities, Stools, OASL and District Assemblies). They are entitled to keep 90 percent of the revenue earned from harvesting with the remaining 10 percent going to the State. It is also worth highlighting that while women and children are increasingly being recognized as a vulnerable group, this has not yet translated into special treatment or prioritization with regards to ownership rights or benefits to revenue from harvesting unless they planted the trees themselves (Bamfo, 2010).

DEFINING CARBON

There are a number of approaches that the State can use in determining whom to vest the right to carbon in. First, the State could choose to define carbon as a natural resource given its naturally occurring nature; thus it would decouple carbon from its host, in this case trees, and thereby treat it as a separate commodity. In this case, constitutionally, the State would be vested with the rights to carbon. Alternatively the State could recognise the ecosystem services provided by the trees acting as sinks as being responsible for the carbon credits generated and vest the right to the benefits in the owners of the trees. Using the latter approach, the implications on whom the benefits from the carbon will accrue to will then depend on a whether the trees are naturally-occurring or planted.

In situations where the rights to carbon or carbon credits would be vested in the State and shared according to the Constitutional formula, it is doubtful that incidents of degradation will decrease without tree tenure reform or the equitable allocation of benefits to key stakeholders. While it is unlikely that Article 267(6) of the Constitution will be amended to make these key stakeholders beneficiaries, the State could find ways to incentivize them without necessarily engaging in wholesale legal and policy reforms. Using naturally-occurring trees as an example, the State could simply negotiate an increase in the charge for timber management services, as provided for in Section 26(1) of the Timber Resource Management Regulations 1998, and allocate a proportion of the revenue to farmers and forest-dependent communities. Benefits could be distributed to those that are able to reduce incidents of degradation in their locality. This template could also be used for the revenue from carbon credits in instances where the farmers and the forest-dependent communities do not have interests or rights in the benefits.

PROVIDING INCENTIVES FOR ENHANCEMENT OF FOREST CARBON STOCKS

Providing incentives to private entities to participate in afforestation and reforestation projects in degraded forest land by awarding rights to the planted trees and carbon is a vital requirement, given the fact that Ghana could gain much from the "+" part of REDD. The Timber Resource Management (Amendment) Act, 2002 partly does this by assigning the rights of tenure to the planters, but only in regard to the tree, not the carbon. As stated above, the State has not yet decided on whom the rights to carbon will be vested in. Aside from the change in law on rights to planted trees, the State has also implemented a programme known as the National Forest Plantation Development Plan (NFPDP) that aims to develop a sustainable forest resource base. The NFPDP was launched by the President of Ghana in January 2010 with an ambitious target of reforesting an area of 30,000 ha per annum. Although the primary motive is to satisfy demand for industrial timber, it could also help restore forest cover over the degraded parts of the forest reserves and contribute significantly to the expansion and enhancement of Ghana's carbon sinks.

The NFPDP uses a number of strategies including the Modified Taungya System (MTS) to achieve its goals. Under the MTS, farmers are allocated shares of land in degraded parts of forest reserves and are given seedlings to reforest the area. They are also permitted to interplant the tree crops with food crops and farm during the first three years to earn an income. Once harvested, the State and the farmers get 40 percent of the revenue each, while the remaining 20 percent is shared between the landowner and the local community. This formula has been approved by the government but has yet to be transposed into law. Under the MTS, the indigenous and exotic species that are planted have a rotation cycle of 20 to 30-plus years. This means aside from the first 3 years in which they are allowed to interplant, the farmers have to wait for several decades before they can receive revenue from the harvesting of the timber. Therefore, it is not surprising that the success of the MTS has been low. Investigations have revealed that farmers are destroying tree saplings in order to stay longer on the land and to continue cultivating food crops in order to generate income. Farmers explained that they could not afford to wait for 20-plus years to receive financial benefits (Bamfo, 2010). It is hoped that annual revenue from REDD+ would provide additional incentives to support schemes like these.

Another strategy in use permits the Forestry Commission to allocate proportions of the degraded reserves to private entities to reforest. In return, they would get 90 percent of the revenue from harvesting

and the remaining 10 percent would be shared between the State (2 percent), the landowner (6 percent) and the local community (2 percent) (Ghana Forestry Commission, 2008).

In the off-reserves, private entities and farmers that opt to reforest their land or develop plantations are registered with the Plantations Department (PD) of Forest Services Division (FSD) and provided with assistance. Those participating in these schemes are also registered with the Forestry Commission. So far 3,317 individuals and groups have been registered in the off-reserves while 304 private plantation developers have been registered in the reserves (Ghana Forestry Commission, 2008). While it is too early to determine whether the NFPDP is going to be a success, funds for the programme are not regarded as sustainable, and, as such, efforts are ongoing to mainstream REDD+ into the programme to access carbon financing. Local government bodies such as the District Assemblies that are able to access funds from the Constitutionally established District Assemblies Common Fund[8] have also been given an annual target of 300 ha to afforest and reforest to help implement the programme (Bamfo, 2010).

Though the NFPDP is focused on ensuring a well-endowed forest resource base for harvesting, the way it incentivizes local farmers and private entities to participate could also offer a template for dealing with the issue of rights to carbon. This is because it strikes a good balance between respecting the customary rights of land owners and the statutory rights of the State, and furthermore provides incentives to those without whose buy-in REDD+ cannot succeed.

CONCLUSION

For Ghana's national REDD+ scheme to be viable, the rights to carbon or the emission credits generated must be clearly delineated, the benefits fairly and equitably allocated among all key stakeholders and the benefit-delivery mechanism efficiently run. The current Ghanaian legal framework, which is guided by the Constitution and customary law, partly does this. While both Ghanaian customary law and the Constitution are clear on tree tenure, the rights or interests of the key stakeholders in naturally-occurring trees in Stool lands are not recognised. The law now acknowledges the influence these stakeholders have in reducing incidents of degradation and thus attempts to incentivize them through the SRA, for example. But the SRA has failed to do so, primarily because benefits are not sufficiently provided and the body that is supposed to ensure compliance is not fulfilling its duties. If Ghana's efforts to reduce its emissions from degradation in naturally-occurring forests are to be successful, this must be corrected. The interests of stakeholders in the carbon revenue must be recognised and legally enforced. Benefits that accrue to them must be sufficiently enticing, regardless of whom the rights to carbon or the credits will be vested in.

The real promise of REDD+ for Ghana should be in the "+" part of REDD. With much of Ghana's forest now deforested and degraded, the attention should rightly be focused on the afforestation and reforestation of forestlands and degraded forests. The national inventory of greenhouse gas (GHG) emissions in 2000 revealed that 85 percent of total CO2 emissions from anthropogenic sources came from changes in forests and woody biomass stocks. Studies have also concluded that the greatest potential for reducing the nation's GHG emissions and expanding its carbon sinks lies in the forestry and land-use change sectors (Ghana National Communication, 2000). The current legal framework for tree tenure for planted trees should be seen as offering a good template for formulating rules and regulations on rights to carbon which can incentivize afforestation and reforestation of forestlands and degraded parts of the forests.

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ENDNOTES

1. The Allodial title is in essence a title to a property, normally land, where the ownership of the land is unencumbered and the owner of the land has absolute ownership of the land, i.e. does not derive their title from a superior landlord. Title to land cannot be taken away by law.
2. The word 'Stool' or 'Skin' essentially refers to the monarch or sovereign of a particular community. In the Southern part of Ghana where the Chiefs sit on stools, the term 'Stool' is used to symbolize the Chieftaincy while in the North of Ghana where the Chiefs sit on animal skin, the term 'Skin' is used. Stool lands are defined in Section 18 of the

Office of the Administrator of Stool Lands Act, 1994 as ".....any land or interest in, or right over, any land controlled by a stool or skin, the head of a particular community or the captain of a company, for the benefit of the subjects of that stool or the members of that community or company".

3. Implementing legislation covering the exploitation of natural resources like minerals or timber such as the Minerals and Mining Law, 1986 (PNDCL 153) as amended by the Minerals and Mining (Amendment) Act, 1994 (ACT 475) and the 1962 Concessions Act (Act 124) also affirm this.
4. Section 16(4), 1962 Concessions Act (Act 124)
5. Timber Resources Management (Amendment) Act, 2002 (Act 617)
6. Traditional Authorities can be described as the governing body that helps the Chief govern his traditional area. It is normally composed of the Chief, his elders and in some ethnic groups, the Queen mother.
7. Section 13(1)(b), Timber Resource Management Regulation, 1998
8. Article 252 of the 1992 Constitution

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