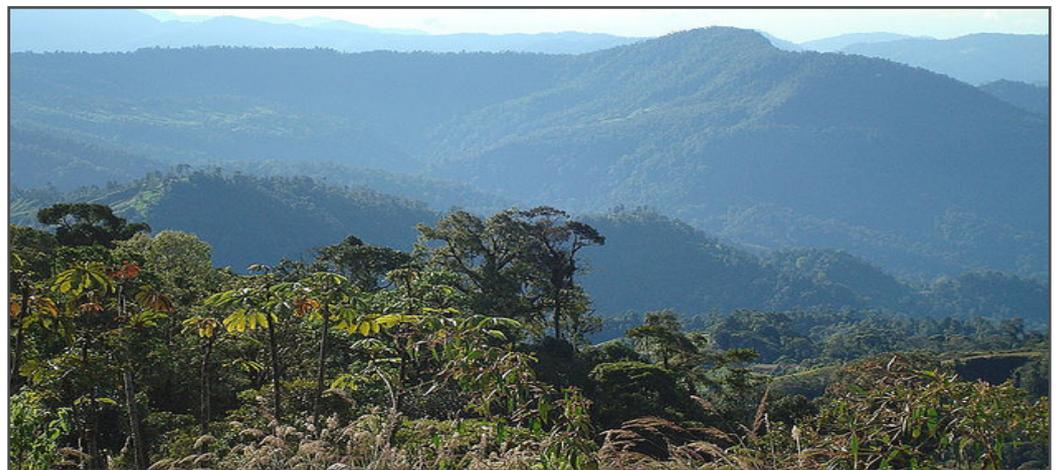


## THE EVOLUTION OF COSTA RICA'S CARBON RIGHTS



Terrazu Mountains,  
Costa Rica

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### KEY POINTS

- Costa Rica has a clear and coherent relationship between land, forest, environmental services (ES) and carbon rights in State and private land. However, indigenous communities require the recognition of forest rights in respect to management and alienation of forest products.
- Costa Rica has a strong and functional institutional and legal framework that supports land, forest and carbon rights. Forest law should develop in a way that is compatible with forest rights in relation to ES and carbon rights. This means that forest rights for timber should be returned to forest owners as in the case of ES and carbon rights.
- REDD+ can be an opportunity for adjusting, consolidating and improving forest and carbon governance. The Costa Rica Readiness Preparation Proposal (R-PP) suggests clear reforms for a new generation of PES which will become global, and will require measurable products and policy impacts.
- Land, forest and carbon rights development, and legal and institutional reform are processes that take time; therefore, a REDD+ mechanism cannot expect to create accelerated changes for their implementation.
- Costa Rican indigenous communities should have the right to access not only PES, but also commercial forest harvesting of timber to achieve sustainable development based on natural resources.

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## INTRODUCTION

Costa Rica has had a legal and institutional framework for the recognition of forest ecosystem services rights, including carbon for more than 13 years. The 1996 forest law is the main instrument that provides the legal basis for the functioning of a national system of payment of environmental services (Casas & Martinez 2008; Costenbader 2009, FCPF R-PP Costa Rica, 2010). However, the complex operation of mechanism for collecting and allocating financial resources among beneficiaries and providers of ecosystem services at the national level requires a much more complex framework. This should be made up by the Constitution, Public Service Regulatory Authority Law, the general Law of Environment, Biodiversity Law, Water Law among others (Karousakis, 2007, Casas & Martinez, 2008). The objective of this paper is to outline the concept of 'carbon rights' in the context of Costa Rica, analyse the implications of carbon rights in respect to forest and land rights; and discuss the risks and opportunities of carbon rights development not only in the national context, but also for the REDD+ mechanism.

The development of carbon as a property right requires that carbon becomes divisible and that the internalization costs are manageable (Demsetz, 1967). The UNFCCC and the Kyoto Protocol (KP) set the basis for creating carbon rights, internalizing externalities and allowing negotiations between polluters and mitigating agents, based on the "polluter pays" principle. The KP not only legitimates the right of industrialized Annex 1 nations to contaminate when they compensate for their emissions, but it also creates carbon credits as a tangible unit for compensation.

What is the carbon entitlement of a property right? The effort to make carbon a divisible commodity, a carbon credit, required the definition of certain conditions:

- A carbon credit must be additional compared to a spatial and temporal baseline.
- A carbon credit should be the product of a productive effort, and it should be permanent.

This paper will present the interrelation of land, forest and carbon rights in Costa Rica, with emphasis on the implications for rural and indigenous communities, and the potential for taking advantage of REDD projects.

## FOREST LAND TENURE RIGHTS

Costa Rica has a relatively simple land tenure regime compared with other countries of the Latin American region. This initial strategy for fighting deforestation has produced four forest land categories which can be classified according to socio-economic and legal conditions:

- i. National Parks, Biological, National and Forest reserves;
- ii. Protected Wilderness Areas with mixed State and private land tenure;
- iii. Indigenous reserves, and
- iv. Private property (FCPF R-PP Costa Rica, 2010).

In the case of National Parks, Biological, National and Forest reserves in State owned land under permanent protection, much of these lands have not been paid to their original private owners and are administered by the National Park Directorate of Conservation Area System (SINAC). These forest lands usually suffer from poor institutional performance due to financial, technical and human resource weaknesses. This, in turn, results in problems in the surveillance of the natural integrity of protected territories, which are increasingly threatened by squatters, illegal logging, hunters, and miners.

In privately owned land on protected wilderness areas, landowners usually have restrictions on their land because they have to dispute the recognition of their rights with the State. Their lack of formal title can also limit their legal access to use of forest resources. When private owners do hold a title, there are usually other restrictions to, for example, the approval of a forest management plan or harvesting permits as the State can demand additional requirements such as environmental impact study amongst others.

Indigenous Reserve lands in Costa Rica actually belong to 24 indigenous communities covering a total of 334 447 ha (6.5 percent of the national territory). Indigenous Law N° 6172 signed in 1977 gave land rights for the first time to indigenous peoples, ratifying that indigenous reserves are inalienable, not transferable and exclusive to indigenous communities that inhabit them. Indigenous reserves are owned by the indigenous communities and titled to formal organizations, the Indigenous Development Associations (ADII's). However, of the total land, 131 559 ha (39.3 percent) has ended up in the hands of non-indigenous peoples (Forest Coalition, 2009) and regeneration has been minimal because of higher land rents, which is an obstacle to forest permanence. The State failed to protect indigenous communities land rights from squatters that illegally title lands within their territories (FCPF R-PP Costa Rica, 2010).

In forest land under private property there are no restrictions on the use of forest other than the observation of regulations established by the forest law. According to the 1984 Agricultural Census (last census of this type), 69 percent of the land in the country is private property with an estimated 96,000 holdings. Small farms under 10 ha represent 60 percent of the holdings, but only 5 percent of the land. In contrast, 3 percent of farmers control 47 percent of the private land (Watson et al, 1998). Private land owners own land, forest and trees. The State, however,

in the case of natural forest and remnant trees from forest, holds the patrimonial rights on public goods contained in natural forest ecosystems (genetic resources, ecosystem services, and functions), which is the reason for regulating their management and use through the forest law (FCPF R-PP Costa Rica, 2010).

## FOREST RIGHTS

Forest rights regarding access, management, exclusion, and alienation of forest resources have been modified by the 1996 forest law in order to protect the integrity of forest ecosystems, and fight deforestation and forest degradation:

1. Elimination of the right of access, management, and alienation of forest resources in national parks, biological reserves, mangroves, protected areas, wildlife refuges and forest reserves owned by the State (art 1). Indigenous reserves have restrictions to access commercial forest management and remain outside the scope of the forest law. The scope of the forest law is to regulate privately owned lands including those in protected wilderness areas with mixed ownership.
2. Elimination of the right of land use change for forested land based on the principle of the protection of public goods like biodiversity and ecological functions of forest ecosystems (art. 19).
3. Elimination of access and management of forests in defined protected areas for water and slope that limits management rights in this areas (art 33 and 34).
4. Conditioning of management rights to forest resources. The forest owner requires a management plan or harvesting permit for forest trees and remnant trees from forests in pasture or agricultural land (art. 20 and 27). The management plan must be prepared and executed by a forestry professional (art 21), which denies the forest owner the right to implement their forest management knowledge.
5. Conditioning of alienation rights of forest resources by limiting the way markets can be accessed. Forest law requires that the forest owner obtains a harvesting and transportation permit for timber to access markets (art 31, 55 and 56), whilst Forest State Administration can set a forest species ban (art 6.e) and also does not allow selling round wood in the international market (art.26).

Indigenous communities can only make use of forest resources for domestic consumption, and Decree No.



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26,511 (1997) prevents them from commercializing their forest products. In addition, their indigenous law No. 6172 from 1977 bans deforestation and establishes that control should be carried out by appointed indigenous rangers.

## ECOSYSTEM SERVICES RIGHT

### FORMATION:

The 1996 forest law provides the legal basis for the functioning of a national system of Payment of Environmental Services (PES) (Casas & Martinez 2008; Costenbader 2009, FCPF R-PP Costa Rica, 2010). However, the PES mechanism for collecting and allocating financial resources among beneficiaries and providers of ES at the national level requires a complex legal framework. This should be made up by the constitution, public service regulatory authority law, the general Law of environment, biodiversity law and water law (Karousakis, 2007, Casas & Martinez, 2008).

The Costa Rican Constitution protects the rights to a healthy and ecologically balanced environment, to the protection of the environment, and natural scenery (art. 50, art.89, art. 46). Public Service Regulatory Authority law 7593 (1996) establishes that social equity, environmental sustainability, energy conservation, and economic efficiency should be central criteria for establishing fees and rates for public services. This authority can authorize fees based on the costs of services provided, considering the dimension of the programmes approved by SINAC and the public service regulatory authority (art 35-38). Water law 276 (1946) obliges concessionaries to pay the necessary taxes for the conservation of water resources. The Biological Diversity Convention 7416 (ratified in 1994), and the biodiversity law 7788 (1998) promote economic

incentives and environmental services retribution for those who conserve biodiversity (art. 10). The biodiversity law creates a range of financial sources of income and an incentive package which also includes the payment of environmental services (PES) (art 100).

The general law of the environment 7754 (1995) defines the environment as a common patrimony and specifies that the State and all citizens have the duty to conserve it and use it sustainably. Article 48 specifies that the State is responsible for conserving forest resources and delegates all that relates to production, harvesting, industrialization and promotion of the sustainable use of forest resources to forest law.

The forest law 7575 (1996) provides the legal basis for PES, and starts by defining them as services provided by natural forests and forest plantations to protect and improve the environment. The forest law explicitly recognises four environmental services: scenic beauty for recreation and ecotourism, mitigation of greenhouse emissions through carbon fixation and storage, biodiversity conservation, and protection of soil and water (art. 3(k); Karousakis, 2007). Most importantly, the forest law recognizes the right of forest owners to receive compensation from society for the provision of ES. The concept of PES is based on the assumption that forest ecosystems will be better managed, protected and restored if the private landowners are compensated for the ES that their managed forests provide to society (art. 22; Felicani, 2010, Casas & Martinez, 2008). Moreover, PES can also be interpreted as a compensation for the loss of private rights that forest owners experience for choosing the best land use, the best management practices, and the best markets for their products.

Forest law also created the National Forestry Fund (FONAFIFO), for administrating and allocating fiscal funds paid by those in society who benefited from the provision of ES. Article 69 of the forest law 7575 (1996) and Decree 25721 (1996) establishes that a third of fuel tax should be assigned to FONAFIFO for funding PES program. Other source of funding for FONAFIFO originate from the water tax, 40 percent of the forest tax (art.38-45) and international funds and donations for promoting forestry investments (art 46-51). FONAFIFO has even moved ahead and it has acted as a broker among public-private and private-private stakeholders for allocating PES at local level. After a history of heavy regulation on forestry, PES is the first initiative that moves away from this tradition and instead recognizes landowners' rights for the provision of ES services.

In Costa Rica, ADIIs hold legal ownership of the indigenous reserves. Experience shows that whilst indigenous territories have clear boundaries, they do not always hold individual titles but have a unique decree of creation where boundaries and perimeters

are clearly defined. The presidents of individual ADIIs hold PES contracts with FONAFIFO, which exempts indigenous territories from complying with some ownership regulations. Once the contract is signed by FONAFIFO and the ADII, the ADII is legally responsible for implementing the protection activities for the areas under conservation throughout the duration of the PES contract. FONAFIFO does not regulate on how payments are distributed inside the indigenous communities (Karousakis, 2007, FCPF R-PP Costa Rica, 2010).

## PES IMPACTS

FONAFIFO claims that the impact of the PES program has been rolled out to 625,000Has (12 percent of the country) between 1997 and 2008 and has benefited approximately 8,500 families with increasing participation of women as family heads due to the prioritisation by FONAFIFO of these groups of beneficiaries. Investment in rural areas has amounted \$200 million, most of this directed to small and medium landowners with an average project size of 30has for reforestation and 85ha for forest protection. 80 percent of this fund has been allocated in rural areas with a low development index as stated in FONAFIFO's PES social policies (FCPF R-PP Costa Rica, 2010).

However, Costa Rica's land tenure system and forest law have conjured to reduce the impact of the PES program. For example, in private land on protected wilderness areas, forest owners cannot access PES if they do not hold a land title because that type of land is usually in dispute with the State. In private land, natural forest under management has suffered because FONAFIFO has focused its PES for full protection of forest with no allowance for any kind of forestry management. PES has also come with a package of legal constraints and higher costs on administrative and productive activities such as plantation forestry and Sustainable Forest Management (SFM) of natural forests, which make them less attractive and competitive (FCPF R-PP Costa Rica, 2010).

However, since 2008, a legal provision made it possible to access PES for forest conservation for those who do not have legal land title, but can prove peaceful and continued tenure for 10 years before 2008, provide FONAFIFO with a legalized cadastral map and a legal document by other neighbors accepting the land holding. Under this option, however, it is not possible to access PES or harvesting permits (Ecomercados Credit Contract Approval Law N°7388-CR BIRF N°8640 (2008)).

In the case of indigenous communities, the legal framework is based on laws that regularize access to forest products. Indigenous communities are restrained by a number of regulations to extract income and other

benefits from their forest (Global Forest Coalition, 2009). In the case of PES, however, FONAFIFO claimed that it has implemented 62,346 Has (about 10 percent of PES area) located in 20 indigenous communities by 2009 (FCPF R-PP Costa Rica, 2010).

Indigenous Law indicates that only indigenous people can build houses, cut trees, and exploit timber resources or plant crops for their benefit within the reserve boundaries. In reality, however, there are forestry projects that attempt to extract major rents from these lands. C-228-99 sentence from Attorney General's Office states that indigenous peoples can exploit these natural resources but cannot take advantage of the commercialization of timber products outside of their reserves. Only use of forest products for their needs and customs is allowed and this puts indigenous people at a disadvantage as they are not able to raise income from forests for the development of their communities. As a result of this situation, forest management projects in indigenous territories became unattractive and ended up losing the commitment of their beneficiaries (i.e. United Nations reforestation program in Cabecar Tayni Territory).

## MORE SPECIFICALLY ON CARBON RIGHTS

Costa Rica's legal system does not explicitly address carbon property rights. However, referring to the country's civil code on property rights, it can be deduced that the carbon stored in trees, plants or biomass in general belongs to the owner of such tree, plant or biomass. Thus, the legal tenant of the land owns the tree that grows on the land and the carbon stored in that tree. The legal land tenant can therefore negotiate the right to sell or manage the tree and carbon stored in it and, in return, realise the resulting benefits (Felicani 2010; Costenbader 2009). The constitutional court (Resolution N° 546-90) has ruled that the asset produced by such forests and plantations, which materialises as an economic factor that adds value to a specific ES provided (whether by mitigation of GHG, water protection, biodiversity protection, or ecosystem protection), is an actual right derived from the ownership of the forest and, therefore, assignable by its owner. This means that the legal tenant of the land is also the owner of the carbon (FCPF R-PP Costa Rica, 2010).

Art 65 of the forest law regulation explicitly states that forest owners who receive PES should transfer their carbon rights to FONAFIFO, which signs a contract with individual land property owners responsible for managing carbon sequestration. The property owner gives the government the right to sell carbon; the government may then bundle the sequestered carbon from many forest owners into attractive packages for

international transactions with other private or public agents. Property owners must show proof of identity, ownership, and payment of tax with their application, and must provide a management plan aimed at maximizing carbon sequestration.

As part of the procedure for carbon rights negotiation between the landowner and the State, FONAFIFO checks eligibility requirements through databases in other government departments, thus streamlining the process. Groups of property owners can apply collectively and jointly manage their land for carbon sequestration. If any pre-existing usufruct on the property rights exists, that piece of land cannot be included as part of the deal. By signing these contracts, the government implicitly recognizes that the carbon belongs to the private owner. Therefore, contracts between the State and private land owners, including indigenous territories, transfer carbon rights bought by FONAFIFO as State property, since they were acquired with public funds. FONAFIFO will then try to sell them in different markets at a value higher than the amount invested.

Private landowners are also free to negotiate their own deals with foreign investors. The government does not maintain exclusive rights to market carbon and foreigners are also able to own land in Costa Rica and sell their carbon (Felicani 2010, Takacs. 2009).

Indigenous territories have participated widely in the PES program, which has provided significant revenues for their livelihood strategy.

## OPPORTUNITIES AND RISKS IN THE CONTEXT OF REDD+

Costa Rica has recently approved a readiness proposal plan (R-PP) by the FCPF in June 2010. The Costa Rican R-PP has made some provisions for improving the recognition and protection of carbon rights.



Notice announcing PES in Costa Rica. Copyright: Cecilia Luttrell

Any person, whether natural or legal, owing carbon has the right to participate in national and international transactions related to emission reductions. It should be however noted that if the State is one of the parties, such transactions are regulated by Public Law. If both parties are private, the transaction belongs to the private sphere.

In the case of carbon, whether the transaction is national or international, there is a lack of commercial regulations and this may facilitate fraudulent sales of carbon rights in an eventual REDD+ implementation in the country. To avoid this, Costa Rica's REDD+ strategy suggests the creation of a National Geographic Registry of Carbon Rights and other Environmental Services. This registry will exclude overlaps in property deeds and will quantify how much of the improvement of stocks and how much of the reduction of emissions determined by the MRV system can be claimed by the initiatives implemented. Likewise, it is necessary that the Government regulates other initiatives not subject to FONAFIFO's administration in order to avoid the fraudulent sale of carbon rights (FCPF R-PP Costa Rica, 2010).

The way to improve the impact of the PES program requires not only targeting forests that are truly at risk of deforestation, but also ensuring that landowners do not receive more than the minimum amount necessary to convince them to conserve their forests in relation to the immediate opportunity costs of land use, and avoid to simply pay a fixed amount for PES or carbon credits in every location. This system, in the context of the national approach, can prevent the risk of leakage. Moreover, a new generation of PES will have to be paid based on good performance in the delivery of carbon sequestration and storage as well as for other measurable indicators of ES (FCPF R-PP Costa Rica, 2010).

With the development of emission-reducing transactions through the improvement of carbon stocks and avoided deforestation, actors will be prompted to commit themselves to the REDD+ implementation framework with a solid independent monitoring, reporting and verification (MRV) mechanism based on a spatial and temporal reference scenario. The MRV scheme would require three series of data: a) a map of forest cover updated at the time of measuring the emission reductions, b) biomass intensity of forest types as per the map of forest cover and c) the fraction of carbon per biomass unit (CF). Two options have been identified for monitoring changes in carbon stocks (carbon stock change method): 1) Continuing forest inventory of fixed parcels and area, and 2) Continuing forest inventory of variable area. The reference scenario to be decided for Costa Rica should be national (FCPF R-PP Costa Rica, 2010). In reference to land tenure, the Costa Rican R-PP proposal excludes forest land owners with no clear

tenure rights from REDD+ implementation. For instance, the chronic problem of squatters titling land irregularly within indigenous territories will be solved by supporting the initiative for official registration and regularization of special lands. Legalizing land tenure that will give access to incentives is considered one of the most important mechanisms to avoid deforestation. In protected wilderness areas, the REDD+ strategy suggests authorising SFM in private forest lands and facilitating access to different modalities of positive incentive such as PES, credits and marketing support. Finally, the strategy also suggests for the land in national parks and forest reserves (R-PP Costa Rica, 2010).

## CONCLUSIONS

In Costa Rica ES and carbon rights have a coherent relation with land rights, but less so with forest rights, especially in indigenous communities. This has allowed the functioning of a national PES system for over a decade. Land, forest (goods and services) and carbon property rights regimes are complex and closely interrelated, and they have been evolving positively in Costa Rica as a product of negotiation and setting clear rules. Rule-making should not eliminate the natural process of rights formation through negotiation and REDD+ can be an opportunity for adjusting, consolidating and improving forest and carbon governance. However, rights development and Legal and institutional reform, are processes that take time; therefore, REDD+ mechanisms cannot be expected to create accelerated changes for their implementation. Forest law in relation to forest rights should develop in a way that is compatible with environmental services and carbon rights. This means that forest rights for goods and services, including carbon, should be recognized and returned to land owners to enhance the protection of forest values. Moreover, Costa Rica's indigenous communities should have the right to access not only PES, but also commercial forest harvesting of timber in order to achieve a sustainable development based on natural resources. Costa Rica R-PP suggests clear reforms for a new generation of PES which will become global and will require measurable products and policy impacts.

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