



Carbon Finance for Forestry and
Agriculture
December 15, 2005

**BioCF Legal Due
Diligence**

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Key Issue for the BioCF: Securing Title to ERs

- Kyoto Protocol and Marrakesh Accords do not state who owns sequestered carbon.
- Most countries do not have specific legislation governing LULUCF projects.
- Case studies: Albania and Mali

Key Issue for the BioCF: Securing Title to ERs

- It is critical to Identify who has title and to secure clear and long term legal title to ERs.
 - A sponsor can only sell what they own
 - Rights to carbon will be affected by rights to underlying land and forests
 - Existence and long term value of ERs is based on maintaining ongoing storage in trees and other vegetation

How to identify who has title and Secure Long Term Title to ERs

- Due diligence
 - Identifies who has title to what
 - Identifies risks
- ERPA terms and structure
 - Define creation, measurement and transfer of ERs in the absence of HC legislation.
 - Mitigate risks identified by due diligence and permanence risks

BioCF –Annex 7 Carbon Ownership

Annex 7 to Carbon Finance Document

It provides information which enables the Bank to ensure that the ownership of carbon sequestered can be identified and effectively assigned to the Bank

Due diligence: Overview

- **Due diligence: focuses on 2 main issues**
 - Who has rights and interests in the land?
 - Who has any forestry rights and ownership of the timber?

Legal rights and interests in the land

Title to land will affect ability to sell and long term security of ERs

Who has what sort of title and for how long?

- In Albania: The State (less than 1% of private ownership) and Local governments (Communes)
- In Mali: Local communities, Déguessi (a private entrepreneur), and IER (public research institute)

Legal rights and interests in the land

- Do any other parties have rights over the land?

Albanian law prohibits the taking of a mortgage on state and communal forests

In Mali, no interest for a 3rd party

- Indigenous rights/Indigenous claims

In Albania, potential conflict between customary law and state law on ownership of forests and pastures in the North of the country

Legal rights and interests in the land

- **Are there any restrictions on land use or ownership? Or Zoning?**

In both cases, no potential restriction in the capacity of using the land in the manner required by the project.

Forestry and timber rights

Can the trees be owned separate from the land?

- Are there competing forestry or timber rights?
 - (Express) government license/permit? (current and future)
 - (Implied) customary rights? (individual or community)
 - Are there conditions for exercising these rights?

Forestry and timber rights

- Are these rights assignable?
- Are there other competing rights?
 - Mortgages/charges?
- Risk of compulsory acquisition?

Risks: Mali

1. What is the relationship between legal title and customary property laws in Mali? It is unclear here if customary law gives legal title in Mali and if so, how title is evidenced
2. Seizure or repossession- no information provided. Risk may be remote, but still real

Risks: Albania

1. The State has ownership of a large part of forest lands. This represents security for the investor contracting with the Government.
2. The title on private land is ensured by registration, but it can be subject to seizure by the Government.
3. Potential claim by indigenous people

Tentative Comparison between Mali and Albania

Given the information we have, together with a consideration simply of property law issues, Albania is a less risky investment:

Mitigating Risks Identified by Due Diligence

RisK (Land Title, Forest Rights and Permanence) (Dependent on Host Country Laws)

- Risk of competing interest or loss of underlying title to land effecting title to ERs
- Competing rights to forest or timber adversely effect title to ERs
- On Permanence, Underlying vegetation will not be maintained and/or Verification will not occur for the term of the ERPA

Mitigating Risks Identified by Due Diligence

RisK (Land Title, Forest Rights and Permanence) (Dependent on Host Country Laws)

- Restrictive covenants
- Protected areas
- Extension of lease (linked to payments)
- Seek “carve out” from mortgage holders
- Forest management plans
- Host Country Government involvement
- Register interests
- Damages for intentional wrongdoing

Mitigating Risks Identified by Due Diligence: Summary

- Location of projects affects risk
 - Countries with favorable land laws and forestry laws
 - Protected areas
 - Type of underlying title to land
- Certain types of sponsors affect risks
 - Government or government agencies may decrease risk
- Covenants may be needed from parties with competing interests

Mitigating Risks Identified by Due Diligence: Summary

- Record interests (what can be registered?)
- ERPA terms and structure
 - Long term verification, forestry management obligations, damages for intentional wrongdoing
 - Price is a function of risk
- Letter of Approval (limitations of authority of DNA and enforceability)

Safeguard Policies

Which policies have specific treaty/legal issues related to Bio CF Projects:

- Natural habitats
- Involuntary Resettlement
- Indigenous Peoples
- Forests
- Projects in Disputed Areas
- International Waterways

Safeguard Policies

1. Natural habitats (OP/BP 4.04)

Although ERs project has the potential to contribute to economic growth, it can cause negative impacts on ecosystems, and species.

Measures should be taken to mitigate impacts on particularly sensitive ecosystems, such as areas of interest for “CITES” and Ramsar Conventions.

Safeguard Policies

2. **Involuntary Resettlement (OP/BP 4.12)**

ERs project might result in resettlement of peoples living in the project areas. This would imply to determine the level and nature of compensation associated with the impacts on displaced persons.

A resettlement plan/policy framework should define measures for equitable compensation of displaced persons.

Safeguard Policies

3. Indigenous Peoples (OD 4.20)

The project might affect the rights of indigenous peoples that are close to the areas where land or forest acquisition is needed.

Indigenous equitable compensation for land and usage rights lost should be compatible with their land tenure system and their traditional property rights.

Safeguard Policies

4. Forests (OP 4.36)

ERs projects involve forest restoration and plantation activities. The legal and policy framework for forest management should be reviewed, as well as land management framework.

If this review reveals gaps, the project will comprise a component on the strengthen of fiscal, legal and institutional framework for forest management.

Safeguard Policies

5. **Projects in Disputed Areas (OP/BP 7.60)**

This policy is triggered in case the project areas include a disputed area between different countries. In this case, the Bank will support the project if country A agrees the proposed project should go forward without prejudice to the claims of country B.

The project should not prejudice the position of either the Bank or the countries concerned

Safeguard Policies

6. International Waterways (OP/BP 7.50)

To ensure that ERs projects will neither affect the efficient utilization and protection of international waterways, nor adversely affect relations between the Bank and its borrowers and between states



THANK YOU