



World Bank Due Diligence: Securing Title to ERs from LULUCF Projects

**BioCarbon Fund Training
Seminar**

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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 (and will not) have specific legislation governing LULUCF projects.
- Identifying who has title and securing clear and long term legal title to ERs is critical because:
 - A sponsor can only sell what they own
 - Rights to carbon will be effected 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
- Letter of Approval?

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

- Competing rights may affect the Sponsor's ability to transfer ERs
- Land law in many CDM countries is often complex and unclear
- Title to land will affect ability to sell and long term security of ERs
 - Who has what sort of title and for how long?
 - Freehold? Leasehold? Rights of occupation/use?
 - Do any other parties have rights over the land?
 - 3rd parties with interests/security over the land?
 - Indigenous rights/native title
 - Are there any restrictions on land use or ownership?
 - Zoning, assignability?
 - Risk of compulsory acquisition?

Forestry and timber rights

- Competing rights may affect the Sponsor's ability to transfer ERs
- 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?
 - Are these rights assignable?
 - Are there other competing rights?
 - Mortgages/charges?
 - Risk of compulsory acquisition?

Mitigating Risks Identified by Due Diligence

Risk

(Land title)

- Risk of competing interest or loss of underlying title to land effecting title to ERs

Possible Mitigation

(Dependent on HC Laws)

- Restrictive covenants
- Protected areas
- Extension of lease (linked to payments)
- Agreement from all interested parties (if rights of occupation, indigenous rights)
- Seek “carve out” from mortgage holders
- Register interests
- HC Government involvement
- LoA?
- Damages for intentional wrongdoing

Mitigating Risks Identified by Due Diligence

Risk

(Forest rights)

- Competing rights to forest or timber adversely effect title to ERs

Possible Mitigation

(Dependent on HC Laws)

- Restrictive covenants
- Protected areas
- Agreement with holders of timber rights (express and implied)
- Seek “carve out” from mortgage holders
- HC Government involvement
- Register interests
- LoA?
- Damages for intentional wrongdoing

Mitigating Risks Identified by Due Diligence

Risk

(Permanence)

- Underlying vegetation will not be maintained and/or Verification will not occur for the term of the ERPA

Possible Mitigation

(Dependent on HC Laws)

- Restrictive covenants
- Protected areas
- HC Government involvement
- “Hold back”
- Pooling
- Forest management plans
- Ongoing verification
- 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 or “carve outs” may be needed from parties with competing interests
- Record interests (what can be registered?)
- ERPA terms and structure
 - Hold backs, pooling, 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)



Questions??