

# Policy Brief

## Considering Carbon Rights in Ghana:

A Review of Natural Resource Management Governance Structures and Implications for Defining Carbon Assets and Sharing Benefits



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## 1. Introduction

Phase 1 of Ghana's R-PP focuses on analysis, preparation and consultation. The majority of activities under this phase have already been completed, including selection of demonstration activities, stakeholder consultation, confirmation of institutional roles and responsibilities, and finalization of the REDD+ strategy (RoG 2010). But even as Ghana moves into implementation under Phase 2, which includes piloting and testing, certain activities from Phase 1 remain which require additional effort and articulation. Analysis of REDD+ policy, legal and technical requirements is one of these areas.

Critical analysis and writing about the legal and policy environment with respect to the development of carbon assets in Ghana has taken place, but the majority of this work was conducted by civil society organizations and donors<sup>1</sup>. According to a recent national REDD+ finance tracking initiative, more than USD 12.5 million has been invested in REDD+ in Ghana from 2009-2012, but well under 1% has been spent on activities that tangibly address legal and policy issues (NCRC and FC 2013), suggesting that there is an important gap that will need to be addressed before actual implementation can occur.

It has often been implied that the new Forest and Wildlife Policy (F&WP) (RoG 2012) would help to bring clarity on issues of tree tenure and benefit sharing, as well as carbon. Though the policy does cite the need to take strategic policy and legislative action on these issues, it gives no indication of how carbon assets and rights could be allocated, what types of tax structures could be implemented, or how REDD+ benefit sharing regimes would need to be structured in order to support the development of REDD+ projects or programmes. In many respects, the 2012 F&WP represents a strategic "to do" list rather than a definitive guide, and given Ghana's track record with legislative development in the forestry sector, it is unlikely that carbon legislation will move quickly without strong support. Therefore, in the short term, it will be imperative to find policy and legal options that enable REDD+ before a clear legal framework is implemented.

Tree tenure reform is one example of the long time frame that can ensue before concerted action takes place. Though the issue of tree tenure and benefit sharing has been at the centre of stakeholder discussions for over a decade, progress has only recently been made, as evidenced by a recent call for consultants by the Ministry of Lands & Natural Resources (MLNR), coupled with the publication of a draft terms of reference (ToR) to assess the design of tree tenure and benefit sharing arrangements in Ghana (MLNR 2013). It is important to note, however, that the ToR makes no mention of carbon or carbon assets and it is unclear whether this issue will be addressed by the consultants.

By reviewing the available grey literature that focuses on these issues in Ghana, the policy brief aims to provide a succinct synthesis of key questions, options, and associated implications with respect to carbon rights. As a point of comparison, it starts with an overview of existing natural resource legislation and governance structures. It then reviews emerging thinking by policy and legal experts on how carbon might be defined, how benefit sharing could be arranged, and the potential role of the Community

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<sup>1</sup> See Agidee (2011), Asare (2010), Asare, Kyei and Mason (2013), Forest Trends (2010), Osafo (2010), and Osafo and Abrokwa (In Prep).

Resource Management Area (CREMA) mechanism. It then concludes with a set of recommendations, and highlights key issues for carbon and REDD+ going forward.

## **2. Ghana's Natural Resource Governance Structures**

### **2.1 Ghana's Forest & Wildlife Policy**

The implementation of Ghana's 1994 Forest and Wildlife Policy ushered in many important changes in the structure and form of the forestry sector in Ghana, including the sharing of management responsibilities, increased benefit flows to local stakeholders, and increased participation, transparency and accountability within the sector (RoG 2012). The 1994 policy also acknowledged the myriad ecosystem services that Ghana's forests provide, their importance to rural livelihoods, and the need to usher in a more sustainable management of the forest in order to sustain these services. In hindsight, however, it is now clear that despite the shift in language and the reforms that followed its implementation, the 1994 policy had little impact in stopping the degradation of Ghana's forest resource base (RoG 2012).

In the nearly twenty years that have ensued, many new initiatives and issues have emerged in the forestry sector, which called for a revision of the policy. From the standpoint of REDD+ and the development of projects that produce carbon credits or benefits, it appears that there is still a long way to go before the strategies and associated legislation will be worked out. The 2012 policy acknowledges the emerging opportunity to develop climate change adaptation and mitigation measures, and specifically mentions "reducing emissions from deforestation and degradation" but it falls short of providing guidance or direction in terms of what is needed.

In its "Strategic Direction in Response to Climate Change", the policy states:

Climate change is becoming an increasing threat to livelihoods and social and economic development in Ghana. The Government of Ghana (GoG) is fully committed to mitigating these effects, as well as preparing measures to adapt to these changes. The government through the Forestry Commission and a multi-stakeholder Steering Committee comprised of participants from relevant ministries, civil society and the private sector, are working to engage with both national and international actors in preparing Ghana's national strategy in response to climate changes (RoG 2012: 22).

In pursuing this objective, the policy goes on to articulate the following strategic direction and policy strategy (Table 1).

Table 1: GoG strategic direction in response to climate change (Adapted from RoG 2012)

<b>Strategic Direction</b>	<b>Develop capacities in public institutions and civil societies to engage in future international and domestic mechanisms that will respond to climate change.</b>
<b>Policy Strategy</b>	<p>Conscious efforts would be made to respond to the threats and risks posed by climate change. Efforts would be made to:</p> <ul style="list-style-type: none"> <li>a) Enact necessary legislation to guide allocation of carbon rights and related matters.</li> <li>b) Support training and education in forest resource management at district levels in carbon rights allocation</li> <li>c) Create national awareness about the role of forests in climate change (mitigation and adaptation).</li> </ul>

Ironically, the policy claims in its introduction and preamble to represent a paradigm shift that places emphasis on the non-consumptive values of the forest, but it is unclear to what extent the paradigm will actually shift. On the one hand, there is a tremendous opportunity at hand to use relevant experiences and recommendations to affect change through a more specific definition of this strategy and the drafting of legislative instruments. On the other hand, if processes for effecting change are followed from the past then the extent of any “change” will be slow and will largely depend upon the expertise and capacity (or lack thereof) of a consultant, who will put forth recommendations, and then the willingness and pace of the Ministry to push the strategy and the legislation. Either way, enacting a strategy and legislation could take many years. The issue of reforming tree tenure and benefit sharing arrangements has been on the table for well over fifteen years in Ghana, and yet the FC is only now taking steps in this direction. Practically speaking therefore, with respect to REDD+, until this strategy is enacted, there is no other option than to work within the existing legislation.

## 2.2 Existing Natural Resource Management Legislation

The ownership, management rights, and benefit sharing arrangements attached to natural resources in Ghana are not necessarily aligned. A prime example is the manner in which the land and the country’s natural resources have been de-coupled under the Constitution (RoG 1992). As described by Osafo (2010),

[T]he 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 to the land is held by the Stool or Skin of the forest reserves, the rights to the forest resources



and the effective management control are vested in 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.

In an effort to understand the options at hand for REDD+, the rest of this section aims to provide a general overview of how the governance structure for land, forest, and trees has been dealt with to date, based on the existing legal and policy framework. This section is not meant to provide a detailed review of all existing laws, nor is it meant to capture how laws are, or are not, implemented on the ground. As a policy brief, it simply aims to review relevant legislation so as to inform constructive thinking about the REDD+ policy and legal options.

## Land

### Ownership

Legally, there are two types of land in Ghana—Public Land and Private Land. According to the Constitution (Republic of Ghana, 1992). Public Land is vested in the President on behalf of and in trust for the people of Ghana. The majority of Private Land is classified as “Stool” or “Skin” Land, and is vested in the Stool (Chieftancy) on behalf of and in trust for the subjects of the Stool and in accordance with customary law and usage (Republic of Ghana, 1992). On Stool Lands, bundles of rights or multiple usufruct arrangements prevail, such that within Stool lands there can be Family Land which is managed and passed down over generations (Asare 2010).

Nationally, there is no up to date information on the extent and distribution of forests. However, forest reserves (and other protected areas) cover approximately 2.5 million ha (which is considered public land), as compared to public lands in the off-reserve, which constitute approximately 21 million ha (MLNR 2012).

### Management / User Rights

With respect to Public Lands, the GoG, through the Lands Commission, has management, regulatory, and user rights.

Stool lands (Private Land), on the other hand, are managed by the traditional authority who owns them. They are traditionally managed such that multiple management and user arrangements can prevail. For example, under customary tenure arrangements, Stool or Family land can be leased or rented to migrants or fellow community members for specific types of management/use. These contracts are most frequently witness or oral agreements.

According to Ghana’s Constitution, however, the management rights to many of the most valuable natural resources (e.g. Timber, Minerals) are legally de-coupled from the land in which they are found. According to article 268(1), the Constitution vests in Parliament the responsibility of ratifying any arrangement involving the allocation or exploitation of mineral, water or natural resources. This ratification process can be simplified if Parliament designates a commission to approve resource use or extraction (Article 286 (2)). Timber is one resource based on the Parliamentary exemption that is now managed by the Forestry Commission. Along a similar vein, water resource are managed and regulated

by the Water Resources Commission and gold and other minerals are managed by the Minerals Commission.

### **Benefit Sharing**

In the event that natural resources are exploited from Private Land, the government shares a proportion of the revenue with the land owner under a legally backed benefit sharing arrangement.

For example, in the case of timber harvesting on Stool Lands in the Off-Reserve area (which comprise roughly two-thirds of the land in Ghana), the FC takes 50% of stumpage fees for the management of this resource, while the remaining revenue is divided according to a Constitutionally-agreed formula between the Office of the Administrator of Stool Lands (OASL), the Stool, the local Traditional Authority, and the District Assembly (See Figure 1) (Asare, 2010). When timber is harvested from On-Reserve, the FC takes 60%, the OASL takes 10% and the remaining 30% is divided amongst the District Assembly (16.5%), Traditional Council (6%) and Landowner/Stool (7.5%).

## **Naturally Regenerated Trees, Forests, and Timber**

### **Ownership**

Naturally occurring trees are symbolically owned by the traditional authorities on behalf of the people.

Forest Reserves are fully vested in the State through the Forest Ordinance of 1927, and all forest and timber resources are held in trust by the government on behalf of the stool landowners.

### **Management / User Rights**

All rights to economic trees are vested in the President in trust for the Stools concerned (1962 Concessions Act (Act 124:16(4)).

Through an act of Parliament, the Forestry Commission has been designated as the forest management and regulatory body. These rights extend beyond forests to include wildlife and wetlands (Forestry Commission Act (Act 571) 1999).

It is illegal for any person to harvest timber without a timber utilization contract for off-reserve areas and allocation of a concession on-reserve. [Timber Resources Management Act (Act 547) 1997]

Landowners and land users do not have economic rights to naturally regenerated trees, but there is nothing in the law that prohibits them from felling trees in off-reserve areas for non-economic purposes, like clearing land for agriculture (Asare 2010).

### **Benefit Sharing**

On Stool Lands where resources are managed and extracted by the requisite commission (e.g. Forestry Commission, Minerals Commission) benefit sharing arrangements have been put in place between the GoG and the land owner (Stool). Figure 1 and Figure 2 shows the benefit sharing arrangements for Timber.

According to customary tenure arrangements on Stool and Family land, lease-hold or caretaker arrangements are negotiated between the resource user and the land owner.

## **Commercial Plantations & Planted Trees**

### **Ownership**

Timber rights cannot be granted on land with a private forest plantation or on land with timber grown or owned by an individual or group of individuals (TRMA (Act 617) 2002). This means that when trees are planted, the person or entity responsible has the legal rights to the planted trees (Asare 2010).

### **Management / User Rights**

The management rights to commercial plantations or planted trees rest with the tree owner.

### **Benefit Sharing**

Plantations can be developed in degraded areas of forest reserves, or in the off-reserve landscapes, and are primarily private sector endeavors. With commercial plantations, the private sector is asked to bear the cost of replanting the degraded areas; therefore, FC allows the company to retain 90% of the revenue, while the Stool receives 6%, communities 2%, and the FC 2%. [See Figure 3]

The role of benefit sharing is more pronounced with respect to the Modified Taungya System (MTS), which integrate communities into the establishment and management of plantations<sup>2</sup> in order to generate benefits. Under an MTS that is implemented by the government, 40% of harvesting revenues goes to the farmers and farmer groups that planted and managed the trees. These farmers also receive additional social and economic benefits from their participation, including land for planting food crops. The other 40% goes to the FC, while 20% goes to the Traditional Authority, and 5% to the local community. [See Figure 4]

## **CREMA**

### **Ownership**

The Community Resource Management Area (CREMA) does not alter or address ownership of natural resources. It is a tenure mechanism that grants natural resource governance and management rights to communities.

### **Management/User Rights**

The CREMA mechanism gives communities the right to manage and benefit economically from their natural resources (within the accepted CREMA boundaries) and in line with the CREMA's constitution and associated by-laws.

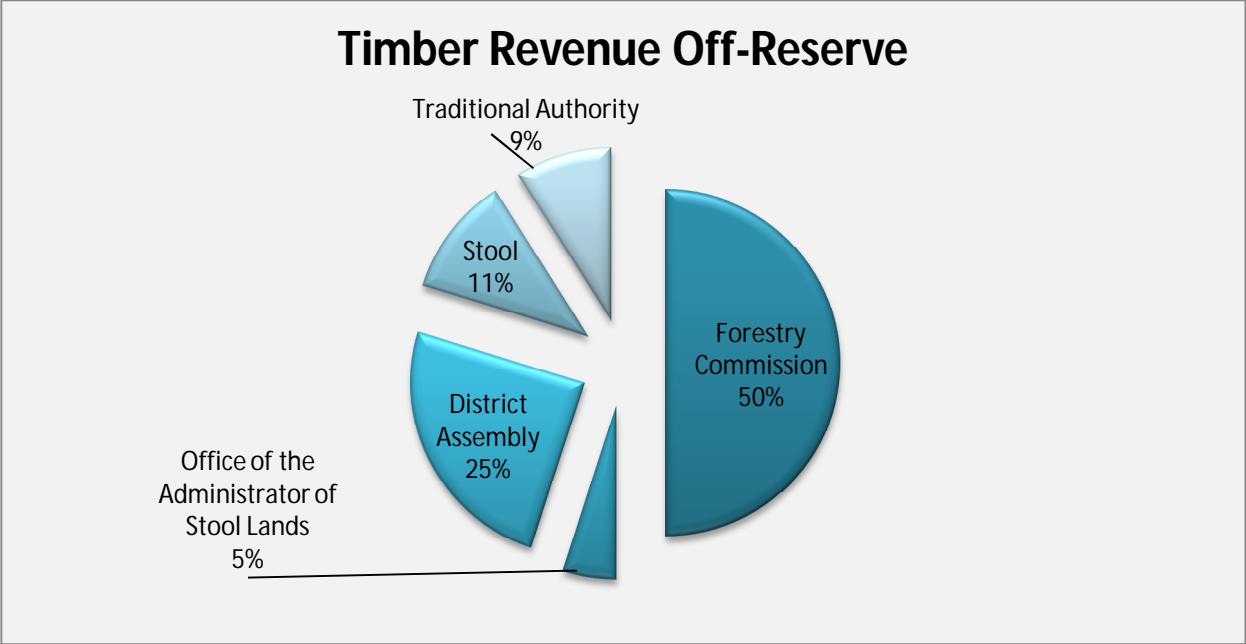
### **Benefit Sharing**

CREMA communities determine their own benefit-sharing arrangements that are responsive to the CREMA stakeholders' values, perceptions of equity and needs. In the future, however, national benefit sharing legislation or tax laws may have implications for the CREMA benefit-sharing formula (Asare et al. 2013).

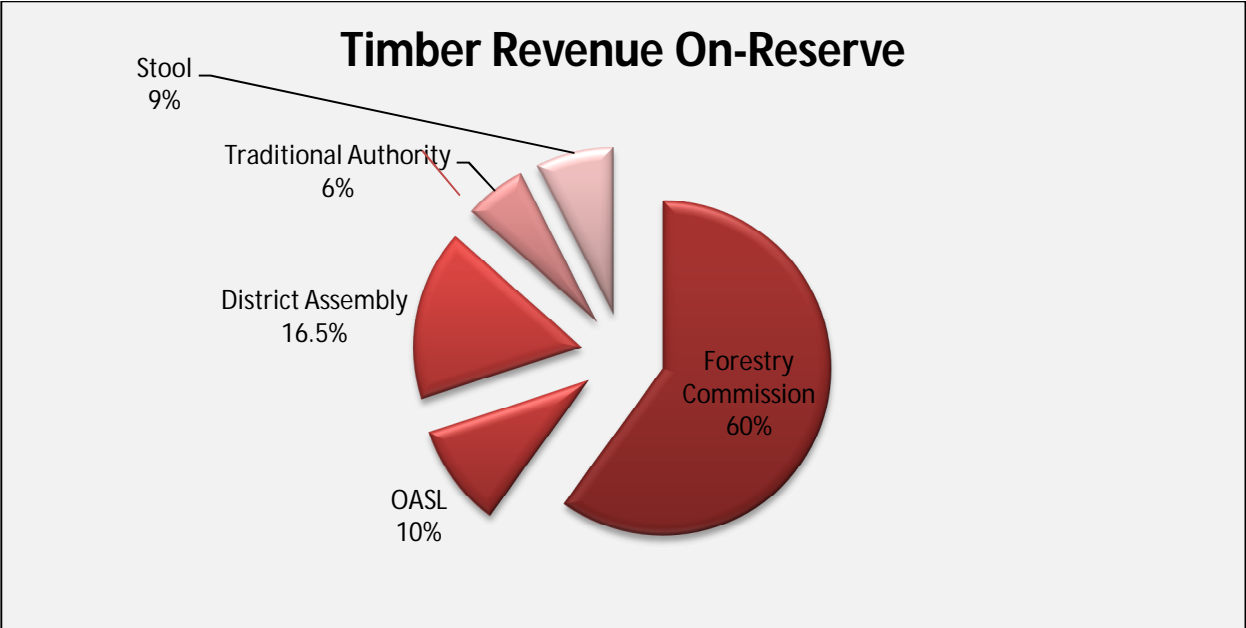
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<sup>2</sup> See Ledger et al. (2010) for a more detailed explanation of the Modified Taungya System in Ghana.





**Figure 1: Distribution of Timber Revenues (Stumpage Fees) Off-Reserve<sup>3</sup>.**



**Figure 2: Distribution of Timber Revenues (Stumpage Fees) On-Reserve.**

<sup>3</sup> In Fig 1 and 2, the FC typically articulates the distribution of stumpage fees differently. It refers to the 50% or 60% that it receives, and then, in effect, starts from 100% again to explain the other beneficiaries' portions of the remaining 50% or 50%.

## Commercial Plantation Using MTS

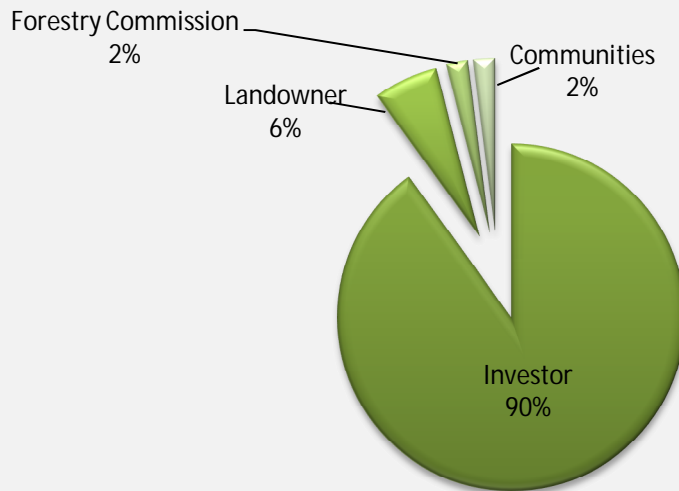


Figure 4: Distribution of Timber Revenues in Commercial Plantation

## Modified Taungya System

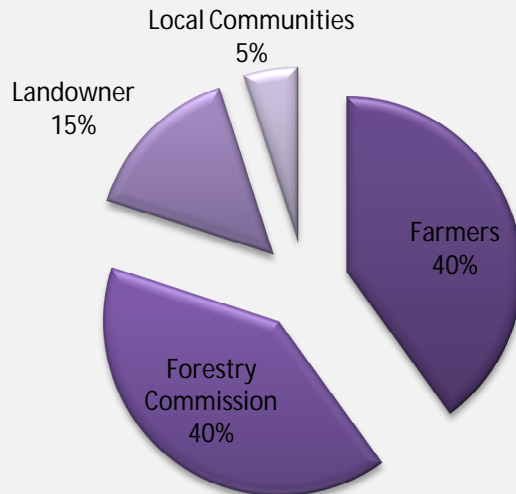


Figure 4: Distribution of Timber Revenues in Modified Taungya System (MTS)

### 3. Emerging Thinking on Carbon and REDD+ Benefit Sharing

Carbon is a naturally occurring element that flows between the atmosphere as carbon dioxide (CO<sub>2</sub>) and the terrestrial ecosystem, where it is stored in the forest biomass or in the soil as carbon. Because CO<sub>2</sub> contributes to climate change, conserving existing terrestrial carbon stocks or promoting the sequestration of CO<sub>2</sub> into terrestrial ecosystems are considered to be important ecosystem services. As such, carbon storage and sequestration through forests and trees represent major mitigation options under REDD+ (Agidee 2011).

At present, there is no legislation in Ghana which pertains directly to carbon, meaning that ownership rights or exploitation rights cannot be stated with any level of certainty (Osafo 2010; Osafo and Abrokwa In Prep 2012). It is therefore instructive to look at the existing legislation and precedents in order to discern possible options. The emerging thinking on how carbon might be defined and how benefits could be shared derives from two working papers developed with support from Norad and through the collaborative work of Nature Conservation Research Centre (NCRC) and Forest Trends. The first paper, by Yinka Agidee (2011) of The Rock and Partners law firm reviews Ghana's natural resource legal framework and the CREMA mechanism. The second working paper (which is currently undergoing final revisions) was written by Yaw Osafo and Edward K. Abrokwa (In Prep). It outlines possible legal definitions of carbon, tax implications of future REDD+ transactions and mechanisms for benefit sharing.

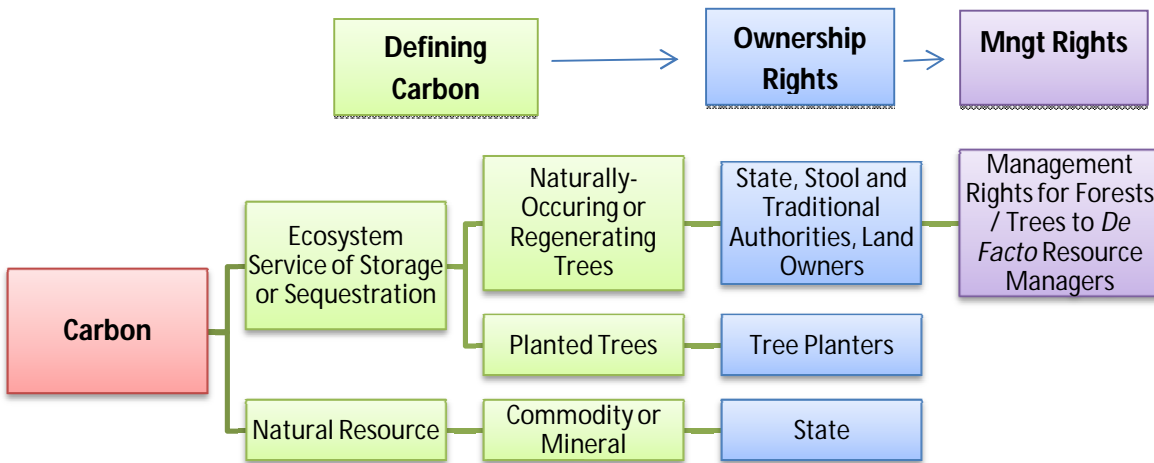
#### 3.1 Options for Defining Carbon and Carbon Rights

As of 2013, Ghana has no legal provisions in place which define carbon or characterize carbon ownership. Clarifying carbon and the rights attached to carbon-based assets is critically important to the implementation of REDD+. Without legal and regulatory clarity, significant risk will surround any type of REDD+ activity or transaction.

According to Osafo and Abrokwa (In Prep), there are potentially two ways that carbon can be characterized:

1. **Ecosystem Service of Storage or Sequestration:** Defining carbon as an ecosystem service would mean valuing the carbon that is stored in the forest and tree biomass (storage), or the carbon that trees sequester from the atmosphere through the process of photosynthesis (sequestration).
2. **Natural Resource:** Defining carbon as a natural resource would mean treating it like other commodities (e.g. timber or minerals) and then applying all of the attending rules on ownership and benefit-sharing.

Figure 5 depicts the possible definitions and how this would translate into ownership and secondary management rights.



**Figure 5: Possible carbon definitions and related ownership rights and management rights.**(Adapted from Osafo and Abrokwa In Prep.

### 3.1.1 Ecosystem Service—storage and sequestration

Though it would represent the first such characterization of its type in Ghana, the State could opt to characterize carbon as an ecosystem service of storage or sequestration. Under this possible definition of carbon, the State could bundle the right to the carbon with the rights to the tree and allocate it to either the land owner or to the tree owner, depending on whether it was naturally occurring or planted. In the context of Ghanaian customary law, land is understood to include both naturally occurring things on the land, and intangible things like the right to collect snails and other NTFPs (Ollenu 1960 in Osafo and Abrokwa In Prep). Within this structure, the State could then allocate the right to the carbon (including but not limited to a carbon credit) to the land owner, who traditionally also hold customary title to the trees (e.g. the Stool, the family, or the individual who owns the land) (Osafo and Abrokwa In Prep; Agidee 2011).

If the carbon from planted trees is classified as an ecosystem service of sequestration (or storage in the long term), Osafo and Abrokwa (In Prep) argue that the right to the carbon could be bundled with the rights to the planted tree classified as a property right of “profit” (Abaidoo 2005)<sup>4</sup>. Such rights are chargeable on the land and can be registered. As such, carbon would be considered as property and be capable of being owned and ownership transferred, ensuring that the interests of the carbon “owner” via the planted trees is protected and enforced against future land ownership.

<sup>4</sup>Section 139 of the Land Title Registration Law (PNDCL 152) defines it as the right to go on the land of another person to take a particular type of object from that land, whether the object is part of the soil or a product of the soil. Section 85 of the Land Title Registration Law goes further in permitting “profits in gross”. Profits in gross means property rights that are attached to a piece of land, which can be held independently of the ownership of land or by persons that are not neighbours of the landowners<sup>4</sup> (Osafo and Abrokwa In Prep).

Because the economic rights to naturally occurring trees are vested in the State, it is possible for the State to vest the legal title to the carbon credit in itself on the basis that it has the superior title to the commercial or economic exploitation of the tree. In such an instance, revenue from the sale of the carbon credits could be shared using the existing benefit sharing formula for revenue derived from Stool lands (Osafo and Abrokwa In Prep). However, the State will need to consider the long-term viability of such an arrangement in the context of REDD+ in light of the often times decoupled relationship between the *de facto* decision makers and the legal owners and resource managers. The existing benefit sharing arrangements exclude these *de facto* decision makers—farmers, migrant farmers, and forest dependent communities- despite their critical role in selecting, nurturing, and in many instances deciding the fate of forest trees in the farming system. A Social Responsibility Agreement (SRA) mechanism was implemented to help compensate farmers and farming communities for losses due to logging in the off-reserve landscape, but it has not been implemented successfully (Asare 2010), and suggests major deficiencies in the benefits-delivery mechanism (Osafo and Abrokwa In Prep).

The State could opt to vest carbon rights associated with the ecosystem service of sequestration / storage in the *de facto* manager(s)/users who exploit the forest on a daily basis, and for all intents and purposes would be responsible for the preservation of the trees or forest, enabling a REDD+ avoided deforestation or avoided degradation play. Under such an arrangement, the State could allocate these rights, but reserve for itself a portion of any revenue from a carbon transaction in the form of a tax, levy, or similar fee (Osafo and Abrokwa In Prep). A similar arrangement is already practiced with respect to the harvesting of planted trees in which the tree owners are entitled to keep 90% of the revenue earned from harvesting while the State receives 2% (TRMA 2002).

Alternately, the State could vest the rights to the carbon in itself, but devolve the management or exploitation rights to a CREMA, as it does for wildlife. This would allow the CREMA to sustainably manage the carbon, finance activities that support this management, and receive financial benefits (Osafo and Abrokwa In Prep).

### **3.1.2 Natural Resource**

According to Osafo and Abrokwa (In Prep), the second option is for the State to define carbon as a natural resource, given its naturally occurring nature, and treat it as a commodity that is independent and separate from the tree or the land, in the way that it treats timber. This type of classification would mean that the State would be vested with the rights to the carbon in trust for the nation. In this scenario, both timber and carbon resources would have physical links to trees, and thus the State would have to determine how to differentiate between the two.

As noted above, this type of classification would raise questions about how to realistically incentivize the informal resource managers in support of REDD+ activities, which would need to bring about significant changes in the business as usual scenario (BAU). Further, the intangible nature of carbon and its dependence on REDD+ activities and transactions to gain value (as a carbon credit or similar asset)

creates doubts as to whether it can be considered a commodity in the same way that the law treats or defines natural resources (Osafo and Abrokwa In Prep).

The State would also need to consider whether it would want to carry and be liable for the non-permanence risk associated with forest-related carbon transactions. If the State retains the right to carbon as a natural resource, then in the event that forest resources engaged in a REDD+ initiative are destroyed in a fire or otherwise lost (non-permanence), the State would bear the legal responsibility to meet any existing contractual obligations to the buyer of the carbon asset. This legal clarity would be important for ensuring secure transactions that could attract investors, secure financing for REDDplus projects and demand for the credits produced.

### **3.2 The CREMA Option**

The CREMA mechanism is an innovative landscape-level planning and management tool that gives communities the right to manage their natural resources for economic and livelihood benefits (CRMU 2004). Originally developed by Ghana's Wildlife Division, together with its civil society partners, as a community-based platform for wildlife management, it has evolved to include other types of natural resources, products, and economic revenue streams, including NTFPs, and eco-tourism. In all, the CREMA process has taken almost 20 years of evolution to move from an intellectual concept to an approved pilot initiative focused on wildlife to the existing CREMA mechanism which is clearly articulated within Ghana's R-PP. Today 26 CREMAs are officially approved or in various stages of the development process in the country (Asare et al. 2013). The average CREMA covers about 25,000 hectares, but CREMAs can range from approximately a few thousand hectares up to a few hundred thousand hectares (Asare et al. 2013). Each CREMA has a Constitution and by-laws that guide and regulate activities within the CREMA area. It is managed by an Executive Committee or Management Board (both have been used and serve the same function), and CREMA revenue is shared between the members, with typically 5%-10% going to the Executive Committee and the remainder allocated to the communities for development purposes (Asare et al. 2013).

Early thinkers on REDD+ in Ghana raised the question as to whether CREMAs could help to fill many of the challenges to developing early REDD+ projects in Ghana, including the legal gaps with respect to carbon ownership and exploitation rights. This is because CREMAs represent the first significant transfer of natural resource management authority and right to benefit economically to community-based organizations (Agidee 2011). Asare, Kyei and Mason (2013) make a strong argument for CREMA's applicability to REDD+. They state:

From a practical mitigation standpoint, the CREMA has the potential to help solve many of the key challenges for REDD+ in Africa, including definition of boundaries, smallholder aggregation, free prior and informed consent (FPIC), ensuring permanence, preventing leakage, clarifying land tenure and carbon rights, as well as enabling equitable benefit sharing arrangements.



With respect to REDD+ and carbon rights, the argument has been that because the CREMA devolves management authority and economic rights to the CREMA communities (as represented by a Management Board), the carbon rights are, by default, transferred to the CREMA too. This management authority is transferred to a fully functional CREMA in the form of a certificate of devolution that is signed by the Minister.

A legal assessment by Agidee (2011), however, argues that the extent to which the CREMA mechanism can clarify carbon rights is still limited. There is no legislation that provides specifically for the establishment of CREMAs in Ghana. Instead, CREMAs came out of the general terms of the 1994 F&WP and the 2000 Collaborative Wildlife Management Policy of the Wildlife Division. Therefore, in the absence of a formal legal framework, a definitive answer is impossible; though the Government claims that legislation on CREMAs is pending before Parliament (Agidee 2011).

Because CREMA do not derive their structure from the Constitution or from any law, as a legal entity CREMAs are not directly recognized to the same extent that a company or an association incorporated under Ghanaian law might be Agidee (2011) argue that:

Fundamentally, the legal personality of an entity such as a CREMA cannot be derived solely from a government policy (the Collaborative Wildlife Policy of 2000) and a Certificate of Devolution (COD) issued via ministerial consent, without explicit legislative authority. Consequently, the legal validity of a CREMA as a vehicle for rights and benefits of individual members is open to challenge. While individual members remain able to exercise rights and perform obligations relating to the management and enjoyment of natural resources, unless the CREMA is not additionally registered as a legal entity (such as a company), the collective cannot sue to enforce rights or be sued on obligations to members or third parties (Agidee 2011, p. 25).

But CREMAs can fit into existing corporate forms, and nothing prevents them from registering as legal corporate entities. Thus, CREMAs could register under Ghanaian law as (Agidee 2011):

1. Cooperative,
2. Community-based organizations,
3. Companies limited by guarantee or limited or unlimited companies

While these options helps to resolve the current legal gap with respect to CREMAs, at least until CREMA legislation is passed, it does not fully clarify how a CREMA can help to clarify carbon rights. Agidee (2011), however argues that if a CREMA is properly registered, then the relevant documentation of the right to sell carbon credits (in the absence of national carbon legislation) would be the constitution (in which the REDD+ goal of the CREMA is clearly defined and the rights and obligations of individual members clearly stated) and a contractual document used for a REDD+ project. Nonetheless, whatever is agreed between the contractual partners in the REDD+ project and transaction will be subject to the future passage of legislation governing carbon rights and benefits (Agidee 2011).

### 3.3 Recommendations and Critical Issues for REDD+ and Carbon Going Forward

In the short to medium term, the question of carbon's definition and the legal rights to manage and transact carbon remain significant risks for the development of REDD+ projects or programmes. For example:

- ❖ Without legal clarification, there could be conflicts with respect to managing trees and forests for carbon or for timber as one is non-extractive and the other is extractive.
- ❖ If there is no legislation on carbon and no benefit sharing formula approved under the law, then the right to sell carbon credits or receive REDD+ benefits will depend upon what is agreed to by the various parties involved. These agreements could be subject to lawsuits or could be undermined or even nullified by any future legal decision on carbon in Ghana.
- ❖ The complexities of Ghana's land and tree tenure arrangements and the lack of carbon rights make Ghana a risky country for REDD+ from an investor's standpoint.

If Ghana is serious about REDD+, then a serious effort should be made to thoroughly explore the legal options and to move forward legislation in a reasonable time frame. Though the government (and Forestry Commission in particular) may be eager to think of carbon as a natural resource, it should weigh the liability (non-permanence of carbon and challenges in demonstrating emissions reductions/enhancements against a projected reference level) it may bear associated with such a definition, as well as its capacity to "manage" carbon storage or sequestration.

It should also consider that contrary to the natural resource of timber, owning carbon does not necessarily mean that one can make a REDD+ project work and thereby benefit from a REDD+ carbon transaction. REDD+ can only succeed when the drivers are truly reduced and the benefits shared in such a manner as to sustain the activities that reduce the main drivers. There is strong consensus amongst experts engaged in REDD+ in Ghana that the existing timber benefit sharing arrangements would be highly problematic for REDD+. There will be no incentives for local people to keep forests standing unless the benefits from REDD+ are equitably shared between the State and key stakeholders. This is because none of the benefits go to individual land users or land owners (in the case of family land) who nurture or retain trees on their farms (in the case of the off-reserve) or make decisions about the fate of trees and forest patches in their agricultural practices.

From this standpoint, it may be more attractive to attach a modest tax to REDD+ transactions and allow benefits to be distributed amongst the private sector or civil society to push forward actions that target the *de facto* resource users. Alternately, if the law provides guidelines for clear and equitable benefit sharing the issue of ownership of carbon may lose its central importance. Either way, when one considers that money generated from a REDD+ project will need to be used to support project implementation over the life of the project, in addition to furnishing benefits, if anything less than 60% of the carbon revenue is allocated to benefit sharing that reaches the real stakeholders, then there is a very high probability that the project will fail to results in emissions reductions or removals (*Personal communication—John Mason*). Commercial plantations and the MTS are good examples of government recognizing where the bulk of the revenue / benefits need to flow to encourage and enable private sector engagement in rehabilitating degraded forest reserves.

Until there is such legal clarity, the CREMA mechanism appears to provide the most secure structure for initiating carbon projects, and the most realistic and equitable pathway for negotiating benefit sharing arrangements. However, to make this work in the short term, proponents must either register as a cooperative, a CBO, or as a company in order to protect their legal interests. In the medium term, the government and civil society organizations should make it a priority to push the pending CREMA legislation through Parliament.

While it is encouraging that the MLNR has initiated a Terms of Reference (ToR) to advise revisions to the tree tenure and benefit sharing framework, this work should not move forward without dually considering carbon rights and carbon benefits. Concerted action on tree tenure that does not address carbon will leave a major policy and legal gap that could take another decade to resolve. As articulated in the FIP with respect to tree tenure and benefit sharing, it could be very instructive to implement “policy pilots” that explore and test carbon definitions and benefit sharing arrangements. From a practical standpoint, policy pilots should be focused upon the most feasible national REDD+ pilots as this could help to bridge funding and capacity gaps, amongst other benefits. Such an initiative would also help to provide significantly more depth and direction to Ghana’s F&WP and to create a platform for a real paradigm change.

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