

# Legal, regulation and policy considerations for nature-based carbon projects

Photo credit: Khatia Basilashvili

## Introduction

Although the Voluntary Carbon Market (VCM) has been operating for over two decades, the legal and regulatory frameworks for projects to operate within it are still developing (and in some countries non-existent). The national policy context can be particularly unclear with respect to nature-based carbon credits, which can be challenging for projects. Nevertheless, in many cases around the world, this has not prevented those with a more entrepreneurial approach from developing and delivering carbon credits to the market, with varying degrees of success. As the role of nature restoration and conservation in the VCM continues to grow, understanding the associated law, regulation and policy will be increasingly important for projects.

Carbon credits and the VCM are structured around principles of market economics, where assets (carbon credits in this case) are sold and bought. To work effectively, this system requires a robust legal and regulatory framework. Therefore, national governments have a critical role in establishing the policy, legislative, institutional, and technical frameworks to enable these initiatives to work. An enabling environment is crucial for resources to flow efficiently to projects that ultimately result in positive impacts for people, biodiversity and climate.

Law, regulation and policy have multiple roles across the VCM, but ultimately should ensure high integrity and enable the market to function. Project proponents need to be able to develop and sell credits. Project participants and IP and LCs should have an equitable share in benefits. Traders need to be able to buy and sell with confidence within the markets, and end buyers/users to claim appropriately

## Key Messages

- European landscape restoration projects have the potential to bring carbon credits to the market, which benefit nature, people and the climate.
- To develop a carbon project, proponents must understand the legal requirements for their national jurisdiction and local context.
- Projects must have legal license to operate and implement their NbS interventions.
- Projects must develop benefit sharing mechanisms which are equitable and include all stakeholders affected by the project.
- Carbon rights and ownership must be established early in project development.
- Projects should seek legal counsel before signing any purchase agreement to ensure terms are fair.

for the use of the carbon credit. A robust regulatory and legal framework enables this complex web of actors to interact efficiently (Figure 1).

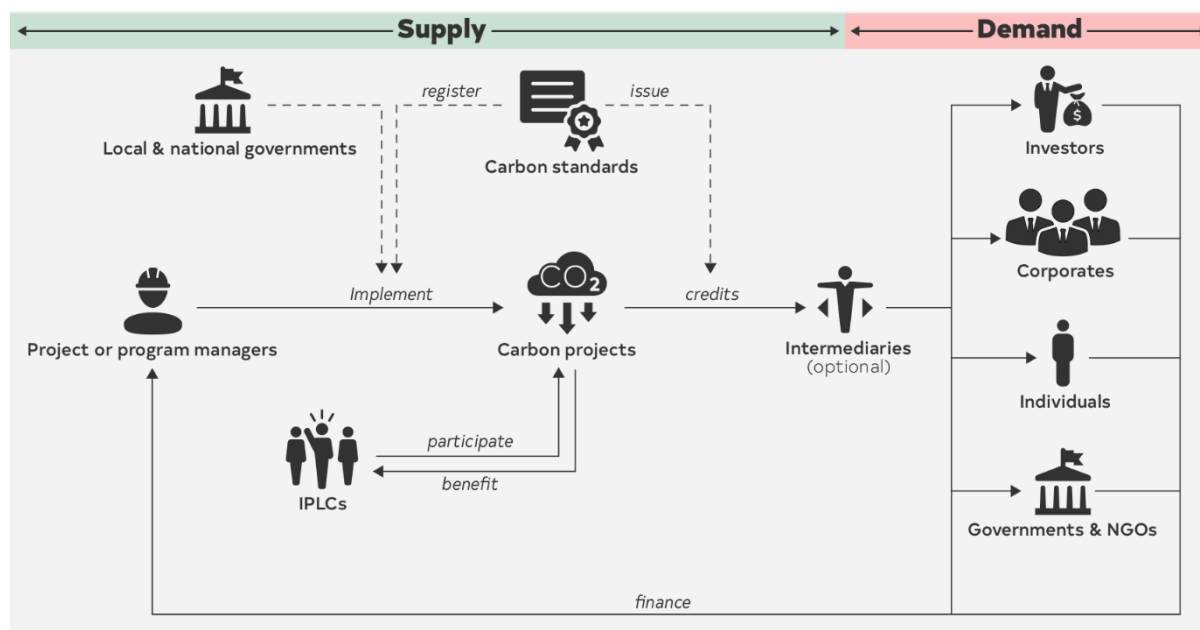


Figure 1. Interactions between carbon market players. From [Streck et al. \(2021\)](#)

The VCM processes can be broken down into three broad stages, each of which should comply with specific legal and policy requirements. When combined, these should enable the verification and transfer of carbon credits that represent the climate benefit of project activities, through emission reductions or removals.

VCM broad stages:

1. Project developers and implementers establish projects that can create and legally transfer (sell) carbon credits;
2. The different carbon standards and their registries oversee registration, validation, verification, issuance and retirement of carbon credits;
3. Buyers purchase carbon credits and claim the climate benefits generated by project activities in accordance with their objectives and net zero targets, which drive the demand and finance for the VCM

For the purposes of this guidance document the focus is on the first category and the legal and policy issues that are most relevant for project developers to consider when developing and implementing nature-based carbon projects to sell credits into the VCM.

## Legal and policy considerations for projects

Project proponents need to understand the detailed legal requirements for developing a carbon project in their respective country and local context. This includes ensuring they meet existing legal requirements and identifying gaps, or areas that policy does not yet address. Relevant requirements include laws that relate to the rights over the carbon (carbon rights), issues of taxation, benefit and revenue sharing rules, how financial transactions can be initiated, and whether and how the carbon

credits feed into a national accounting system, such as the host country's National Determined Contribution (NDC).

It is important to note that validation and verification with carbon standards requires that any project activities are being undertaken legally and in accordance with the relevant national regulations (if they exist).

## Rights of ownership and use

It is the responsibility of the project proponent to ascertain if they can legally develop, implement and ultimately sell carbon credits from a given project. Rights of ownership and use of the project site must be clearly understood and defined. In the European context, benefit sharing requirements are less clear and with privately owned land there is scope for local communities to be excluded from the benefits of restoration. Due to the varying nature of such laws across different countries, different approaches to defining use and ownership rights will be dependent on local context. Many projects already implementing restoration activities will have the license to operate via leasing, concession agreements or ownership, and the detail of these should be researched and understood before pursuing the development of a carbon project.

Projects must not displace Indigenous Peoples and local communities (IP and LCs) from their lands. Where these groups are present in a project, or affected by the project interventions, they must be consulted. Any stakeholder consultations should ensure the full, effective and gender-responsive participation of all actors affected by the project. If the project is taking place in lands traditionally occupied by IP and LCs, free, prior and informed consent must be obtained before any interventions are implemented. Projects must ensure there are mechanisms in place to allow grievances to be raised by all stakeholders throughout the project lifetime.



Photo credit: Fauna & Flora

## Key legal, policy and regulation considerations for projects to consider:

### Policy and regulation

- Who holds the legal ownership and use rights to the land/seascape where the project will be delivered?
- Are the carbon rights understood and clearly defined?
- Are there legal structures in place to enable the administration of selling carbon credits?
- Do other projects already exist in the country that are selling credits?
- Are the claims being made by those buying the credits understood?
- Are safeguards to protect IP and LCs in place and understood?
- In the absence of specific safeguards, are there cross-cutting legal measures in place regarding the rights of IP and LCs, including their right to be consulted in specific circumstances?

### Social safeguards

- Have all stakeholder groups (including IP and LCs, women and men) been identified and consulted?
- Where relevant, has free, prior and informed consent for the project been obtained?
- Is an equitable benefit sharing mechanism in place?

### Legal and contracting

- Does the project have adequate legal support to help with drawing up contracts and purchase agreements?
- Is there clarity and agreement of roles and responsibilities and the liability of the project to deliver, as per a purchase agreement and contract?

Projects must also ensure that all groups have equitable participation in benefit sharing from the project. The project should aim at not perpetuating any gender inequalities (women are typically less likely to hold land tenure rights and be present in decision-making) or excludes any other community members based on land titles being required to benefit from the project.

## Carbon rights

The legal rights to the benefits and the associated carbon credits, generated from the project activities that reduce GHG emissions and/or sequester carbon dioxide, are referred to as carbon rights<sup>1</sup>. Carbon rights are generally based on either the ownership of the asset (e.g., project site), or the control of the project activity that leads to the emission reductions or removals. The main stakeholders likely to hold the carbon rights are the landowners, government, and/or those delivering the project.

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<sup>1</sup> Streck, C. (2020). Who Owns REDD+? Carbon Markets, Carbon Rights and Entitlements to REDD+ Finance.

Before the carbon benefits are generated from the project activities, it is vital to establish who holds the right to sell or transfer those benefits in the form of carbon credits. Because many countries do not have regulations or legal frameworks that either define or assign carbon rights, they will often need to be linked to more established laws such as ownership and use rights which can form the basis for understanding carbon rights. Projects should engage with their host country governments early in the project development to understand the relevant domestic laws that apply to their carbon project, particularly around ownership of, and rights to carbon credits.

In addition to managing the risk for the project and those involved with delivery, investors and donors may also require that there are clear and uncontested carbon rights for the project and its carbon credits.

Table 1: Examples of the links between land rights and carbon rights (adapted from Guidance to Applying Nature-based Solutions in the Large-Scale Mining Sector 2021)

Land ownership and use	Carbon rights	Ability to engage in carbon credit projects
<b>Land is owned by the government.</b>	Carbon rights follow the right to the land and are owned by the state, but the right to generate ERR*s can be transferred to private entities.	Carbon rights can be transferred to private and public entities via concession or license.
<b>State or diverse land ownership with weak private land titles.</b>	Carbon rights (e.g., Madagascar) <sup>2</sup> or rights to ecosystem services (e.g., Ecuador) <sup>3</sup> are centralized and managed at the level of the national government.	Private projects or transactions involving ERRs are not permitted: all revenues belong to the government by law. Revenues go to the government who then decides how they can be then distributed.
<b>Diverse land ownership with community and private titles.</b>	Carbon rights are regulated, and special rules apply.	Private entities may be free to participate in voluntary carbon market projects subject to restrictions.
<b>Diverse land ownership with strong community and private titles.</b>	No special regulation. Carbon rights pertain to landholders.	Private entities may be free to participate in voluntary carbon market projects within the limits of the law

\*Emission Reductions and Removals

The ‘Understanding Voluntary Carbon Markets’ project reviewed active and developing carbon standards in Europe. There was a lack of explicit guidance on ensuring gender equality and the rights of IP and LCs over a project’s lifetime (as of May 2023). Where there is a lack of guidance on social safeguards and incorporating gender responsiveness and IP and LC considerations from the chosen carbon standard, other guidance documents e.g., global carbon standards such as Climate, Community and Biodiversity (CCB)) should be reviewed.

<sup>2</sup> [Exploring the policy and institutional context of a Payment for Ecosystem Services \(PES\) scheme for mangroves in southwestern Madagascar \(blueventures.org\)](https://blueventures.org/)

<sup>3</sup> [EN\\_Status-of-Forest-Carbon-Rights\\_RRI\\_Mar-2018.pdf \(rightsandresources.org\)](https://rightsandresources.org/)

There is a range of different approaches to determine carbon rights, which can lead to multiple parties with a potential claim to those rights. It is important for projects to set up strong and transparent legal contracts with any partners who could lay claim to the carbon rights. These could be landowners, community groups, land managers, project developers, carbon brokers, or the end buyers. There is also an increasing interest from governments to determine sovereign carbon rights as these are seen as a sovereign asset that also has increasing interactions and implications with Article 6 of the Paris Agreement and the host countries NDCs. For example, the government of Zimbabwe this year announced that it will start taking up to 30% of all revenue from carbon projects.<sup>4</sup>

As the market continues to develop, project proponents must remain up to date with changes and developments in relevant policy and practice. Additional legal support may be required to do so.

## Legal contracts and purchase agreements

As projects venture into the carbon markets, there is an increasing need to understand the commercial aspects of the sales process, where legal expertise is required. Beyond the regulation and policy context, legal counsel should be sought during the development and negotiation of any purchase agreements.

The most widely used form of purchase agreement for carbon credits is called an Emission Reduction Purchase Agreement (ERPA). This is a legally binding document that allows one party to sell and another to buy carbon credits. It is used between projects that have developed the credits and those wishing to buy them.

An ERPA is designed to identify and agree roles and responsibilities, obligations, rights to the project and associated risk. It lays out the commercial terms of the project, which includes credit price, credit volume and delivery schedule and timing of payments<sup>5</sup>. This part of the process can present significant risk to the project proponents and those involved, with commercial implications, ongoing liability and ensuring a fair price and viable project delivery, all of which need to be considered and agreed.

An ERPA is normally issued from the buyer (often by actors who have significant legal resources and capacity) and the agreement could therefore favour the buyer (a regular occurrence in the past). It is strongly advised that projects should seek legal support during the development, negotiation and final agreement of an ERPA. Projects should never agree terms or sign any legal agreements until they have sought proper legal counsel.

Until recently there has been a lack of clarity and no standardised approach as to what is within an ERPA, making it difficult for projects to learn and understand from previous commercial agreements. However, [IETA \(International Emission Trading Association\)](#) have recently published a [standardised ERPA template \(February 2023\)](#), which provides an excellent resource for projects to access during the design, negotiation and agreement of an ERPA and to enable the successful selling of carbon credits.

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<sup>4</sup> <https://www.reuters.com/sustainability/sustainable-finance-reporting/zimbabwe-take-30-carbon-credit-revenue-2023-08-18/>

<sup>5</sup> For more information please refer to the practitioners guidance and costing tool produced as part of the 'Understanding Voluntary Carbon Markets' project. These can be found here <https://www.endangeredlandscapes.org/project/understanding-voluntary-carbon-markets/>

## Conclusion

The legal and policy environment, national laws determining property and tenure rights, and the wording of a specific agreement for carbon credit purchase can all impact the financial feasibility of a carbon project. Restoration initiatives exploring the possibility of selling carbon credits must be aware of potential risks and minimise them whenever possible. Understanding the national government position in terms of carbon markets and a basic understanding of what constitutes an enabling environment will help project managers navigate the legal and policy aspects of the VCM. It can be helpful to follow news on national carbon finance policies through media outlets focused on the sector, discuss with other projects, or hire consultants.

### Further reading

[Standardised ERPA template \(IETA\)](#)

### Glossary

**Carbon credit:** The currency of carbon markets. One carbon credit represents one tonne of CO<sub>2</sub> equivalent which has avoided entering or has been sequestered from the atmosphere (SRUC n.d.). Carbon standards often have specific names for their carbon credits, such as the UK Woodland Carbon Codes 'Woodland Carbon Unit' (Woodland Carbon Code n.d.).

**Carbon standard:** Set of rules, procedures, and methodologies according to which carbon credits are generated and issued. These can vary across standards and therefore the equivalence of carbon credits between standards cannot be guaranteed (SRUC n.d.).

**Seller:** A person or group(s) who will receive the financial benefits from the sale of the carbon credits. These can be the landowner, an NGO, project developers or intermediaries selling carbon credits.

**Buyer:** Private actors such as companies, corporations, NGOs and foundations purchasing carbon credits. They may choose to 'retire' these credits to claim them as offsets against their emissions, or they may sell them on to another buyer.

**Nationally Determined Contributions (NDC):** The contributions to climate change mitigation which a jurisdiction intends to achieve. NDCs outline and communicate the planned climate actions (UNFCCC n.d.).

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