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GUATEMALA RESOURCE TENURE AND SUSTAINABLE LANDSCAPES ASSESSMENT

TENURE AND GLOBAL CLIMATE CHANGE (TGCC)

SEPTEMBER 2014

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ACRONYMS AND ABBREVIATIONS

	English	Spanish
ACOFOP	Association of Community Forestry Organizations of Petén	Asociación de Comunidades Forestales de Petén
ANOFCG	Alliance of Guatemalan Forest Community Organizations	Alianza Nacional de Organizaciones Forestales Comunitarias de Guatemala
ASOREMA	National Association of Natural Resource and Environmental NGOs	Asociación Nacional de Organizaciones No Gubernamentales de los Recursos Naturales y el Medio Ambiente
BOSCOM	Communal and Municipal Forestry Strengthening Project	Proyecto de Fortalecimiento Forestal Municipal y Comunal
CECON-USAC	Center for Conservationist Studies, University of San Carlos	Centro de Estudios Conservacionistas - Universidad de San Carlos
CNCC	National Climate Change Council	Consejo Nacional de Cambio Climático
CNCG	Climate Nature and Communities in Guatemala	Clima, Naturaleza y Comunidades en Guatemala
CONAP	National Council for Protected Areas	Consejo Nacional de Areas Protegidas
CONIC	National Indigenous and Campesino Coordination Body	Coordinadora Nacional Indígena y Campesina
CPO	Council of Western Peoples	Consejo de los Pueblos del Occidente
CUC	Campesino Unity Committee	Comité de Unidad Campesina
ER-PIN	Emissions Reduction Project Idea Note	Nota de Idea de Proyecto para Reducción de Emisiones
FCPF	Forest Carbon Partnership Fund	Fondo Cooperativo para el Carbono de los Bosques
FDN	Nature Defenders Foundation	Fundación Defensores de la Naturaleza
FTN	Northern Transversal Strip	Franja Transversal del Norte
FONCC	National Climate Change Fund	Fondo Nacional de Cambio Climático
FUNDAECO	Foundation for Eco-Development and Conservation	Fundación para el Ecodesarrollo y la Conservación
FUNDALAC-HUA	Lachúa Foundation	Fundación Lachua
GBBCC	Forests, Biodiversity and Climate Change Group	Grupo de Bosques, Biodiversidad y Cambio Climático
GCI	Inter-institutional Coordination Group	Grupo de Coordinación Interinstitucional
GEF	Global Environmental Fund	Fondo para el Medio Ambiente Mundial
GMF	Forestry Mapping Group	Grupo de Mapeo Forestal

GTPC	Communal Land Advocates Group	Grupo Promotora de Tierras Communales
IDAEH	Institute of Anthropology and History	Instituto de Antropología e Historia
IDB	Inter-American Development Bank	Banco Interamericano de Desarrollo
INAB	National Forestry Institute	Insituto Nacional de Bosquea
IUCN	International Union for the Conservation of Nature	Union Internacional para la Conservación de la Naturaleza
KfW	German Development Bank	Banco Alemán de Desarrollo
LEDS	Low Emission Development Strategy	Estrategia de Desarrollo de Bajas Emisiones
LMCC	Climate Change Framework Law	Ley Marcro de Cambio Climatico
MAGA	Ministry of Agriculture and Livestock	Ministerio de Agricultura, Ganadería y Alimentación
MARN	Ministry of Environment and Natural Resources	Ministerio de Ambiente y Recursos Naturales
MEM	Ministry of Energy and Mines	Ministerio de Energía y Minas
MICCG	Guatemalan Indigenous Roundtable on Climate Change	Mesa Indígena de Cambio Climático de Guatemala
MNCC	National Roundtable on Climate Change	Mesa Nacional de Cambio Climático
OCRET	Office of Control of State Land Reserves	Oficina de Control de Áreas de Reserva del Estado
OFM	Municipal Forestry Office	Oficina Forestal Municipal
OMA	Municipal Agrarian Offices	Oficinas Agrarias Municipales
PGN	Attorney General's Office	Procuraduría General de la Nación
PINFOR	Forestry Incentive Program	Programa de Incentivos Forestales
PINPEP	Forestry Incentives for Smallscale Possessors of Forest or Agroforestry Land	Incentivos Forestales para Poseedores de Pequeñas Extensiones de Tierra de Vocación Forestal o Agroforestal
POM	Municipal Zoning Map	Plan de Ordenamiento Municipal
R-PP	Readiness Preparation Proposal	Propuesta de Preparación
RA	Rainforest Alliance	
RBM	Mayan Biosphere Reserve	Reserva de la Biosfera Maya;
SAA	Land Affairs Secretariat	Secretaria de Asuntos Agrarias de la Presidencia de la República
SEGEPLAN	Presidential Secretary for Planning and Programing	Secretaría de Planificación y Programación de la Presidencia de la República
TBN	Northern Lowlands	Tierras Bajas del Norte
TFL	Northern Transversal Strip	Franja Transversal del Norte
Ut'z Che	Guatemalan Forest Community Association	Asociación de Forestería Comunitaria de Guatemala
VCS	Verified Carbon Standard	Estándar Verificado de Carbono
VCS-JNR	Jurisdictional and Nested REDD+	REDD+ Jurisdiccional y Anidado
ZAM	Buffer Area (of a Protected Area)	Zona de Amortaguimiento
ZUM	Multiple Use Area (of a Protected Area)	Zona de Usos Múltiples

1.0 GENERAL REDD+ OVERVIEW AND STAKEHOLDER ANALYSIS

1.1 OVERVIEW

As the global community seeks to address climate change through mitigation and adaptation measures across landscapes in developing countries, the importance of resource tenure has been increasingly recognized. Methodologies and guidance documents on reducing emissions from deforestation and forest degradation (REDD+) from the World Bank's Carbon Fund Methodological Framework to the Verified Carbon Standard now include requirements on undertaking resource tenure assessments and demonstrating that underlying resource tenure concerns will not undermine implementation. Despite this recognition and because resource tenure is such a socially and politically charged issue, many countries are still challenged to:

- Identify the range of ways that tenure security impact the success of mitigation and adaptation activities;
- Assess the legal and social frameworks that underlie tenure security; and
- Identify and implement incremental steps to improve tenure security as it relates to successful implementation of climate change programming.

The following analysis applies a land and resource tenure assessment framework to evaluate four elements of successful land-use based climate change mitigation activities. The assessment focuses on how tenure relates to: 1) identifying relevant stakeholders; 2) understanding and adapting land and forest policy incentive mechanisms; 3) clarifying rights to benefit through the application of "carbon rights;" and 4) engaging stakeholders through free, prior and informed consent (FPIC).

The analysis was undertaken for the USAID Central America Regional Climate Change Program (RCCP), and complementary analyses were undertaken in Honduras, and Panama. The analysis applies analytical tools developed by USAID through the Property Rights and Resource Governance (PRRG) and Tenure and Global Climate Change (TGCC) programs to guide each of these areas of inquiry. It is designed for use by policy makers, donors, and project implementers in Guatemala to better understand how tenure constraints factor into the success of the current REDD+ plans.

1.2 THE REDD+ PROCESS IN GUATEMALA AND REDD+ INSTITUTIONS

Guatemala ratified the UN Framework Convention on Climate Change (UNFCCC) in 1995[1] and the Kyoto Protocol in 1999[2]. In 1999 Guatemala began work on its first National Communication to the UNFCCC, which it submitted[3] in 2002. In 2003, the country founded its Climate Change Program.

Under the government of President Alvaro Colom (2008-2012), Guatemala began to take increasing interest in climate change. In 2009, the Ministry of Environment and Natural Resources (MARN) published Guatemala's first National Climate Change Policy[4], proposed a draft Climate Change Framework Law (LMCC), and submitted a REDD+ Project Idea Note to the World Bank Forest Carbon Partnership Facility (FCPF), which authorized a US$200,000 grant to support preparation of the REDD+ Readiness Preparation Proposal (R-PP); these funds were not transferred at the time.

Guatemala submitted its R-PP in March 2012, shortly after President Otto Perez Molina (2012-present) was voted in. The FCPF approved a further US$3.6m grant to support implementation of the R-PP. Guatemala selected the Inter-American Development Bank (IDB) as its delivery partner and in May 2014, signed an agreement with IDB to allow the funds to be transferred into the national budget. Guatemala is a UN-REDD partner country but does not have a UN-REDD national program, having missed its window to apply for funds in 2011.

Guatemala has established climate change offices within the key institutions: MARN; the Ministry of Agriculture and Livestock (MAGA); the National Forestry Institute (INAB); and, the National Council for Protected Areas (CONAP). They formed the Inter-institutional Coordination Group (GCI) in 2011, which meets at both the political and technical levels and drives the REDD+ process forward in conjunction with a number of key partner organizations including large national and international NGOs

The LMCC was finally passed into law in September 2013. It specifically deals with projects creating emissions reductions from avoided deforestation and links rights to emissions reductions credits to land ownership. The LMCC ratifies MARN as the institution overseeing climate change policy in Guatemala and mandates the creation of two new instances, the National Climate Change Council (CNCC) to lead inter-ministerial action and the National Climate Change Fund (FONCC) to fund activities. A large proportion (80%) of the FONCC's resources must be directed towards adaptation. It also instructs MARN to set up a national registry for emission reduction projects within 18 months and clarifies that emissions reductions will belong to the owner or legal possessor of the land on which the project takes place.

Guatemala has carried out several early dialogue workshops on REDD+ in the context of the preparation of the R-PP. However, large-scale consultations and outreach have not taken place (and will not until further FCPF funds are released). This means that despite the best intentions of the organizations working on REDD+, it has not yet entered the national debate. Despite this limited dialogue, there is a wide range of national and civil society institutions engaged in the REDD+ process in Guatemala (Figure 1).
The R-PP sets out seven potential REDD+ strategies, emphasizing the use of the existing incentive schemes as the base for a future national REDD+ program. INAB administers Guatemala's two large-scale forestry incentive programs, each of which is relevant to tenure and climate change. PINFOR, the larger and longer running of the two programs, benefits registered landowners and by law will come to an end in 2017. INAB has prepared a draft law to replace it with a new program, *Probosque*. PINPEP entered full operation in 2010 and provides benefits to unregistered owners ("Possessors") of small areas of land. Between PINFOR and PINPEP, Guatemala has demonstrated that it has the capacity to distribute REDD+ benefits at different scales with national coverage. These programs are considered in greater detail below in Section 2.2.6.

[1] Decree 15 of 1995

[2] Decree 23 of 1999

[3] http://unfccc.int/essential_background/library/items/3599.php?rec=j&priref=3434#beg

[4] http://www.marn.gob.gt/documentos/novedades/politica_cc.pdf

Guatemala has also been in discussions with the Voluntary Carbon Standard to implement Jurisdictional and Nested REDD+ (VCS-JNR).

The International Union for the Conservation of Nature (IUCN) has supported the development of REDD+ in Guatemala since the preparation of the R-PIN and it seems that Guatemala's work on REDD+ will be majority donor-funded. The FCPF funds and USAID-funded Climate Nature and Communities in Guatemala (CNCG) program will provide the core funding, while other important contributions are planned by the Global Environmental Fund (GEF), the United Nations Development Program (UNDP), and the German Development Bank (KfW).

As of January 2014, Guatemala is working on a Low Emission Development Strategy (LEDS) and is in the early stages of preparing an Emissions Reduction Program (ER Program) Project Idea Note (ER-PIN) to present to the FCPF's Carbon Fund, which will select up to six country programs for initial engagement. Initial drafts of the ER-PIN indicate that Guatemala will look to generate carbon credits through three activities: 1) expansion of the forestry incentive programs; 2) REDD+ Early Initiatives focused on protected areas; and 3) sustainable production and efficient use of firewood.

This paper will therefore focus its analysis of rights and tenure considerations on these three activities. The Climate Change Framework Law will require nine separate enabling regulations (SOBENES 2013), which will provide an excellent opportunity to implement recommendations.

FIGURE 1: KEY REDD+ INSTITUTIONS (MANAGEMENT AND IMPLEMENTATION)

Institution	Role in REDD+
National Committee on Climate Change (CNCC)	The Climate Change Framework Law mandates the establishment of the CNCC to lead on climate change policy nationally. According to (Art. 8) it will be made up of representatives from different sectors including one representing: (f) indigenous organizations; (h) *campesino* organizations; (j) Chamber of Agriculture; (k) the National Association of Municipalities; and (m) the National Association of Natural Resource and Environmental NGOs (ASOREMA). Government is represented by MARN, MAGA, MINEM and CONRED. Neither CONAP, nor INAB are part of the CNCC, which demonstrates the Law's focus on adaptation.
Ministry of Environment and Natural Resources (MARN)	The Climate Change Framework Law ratified MARN's position as the executive body overseeing climate change policy. MARN's Climate Change Unit (Unidad de Cambio Climático; UCC) is Guatemala's focal point before the UNFCCC and FCPF.
National Commission for Protected Areas (CONAP)	Responsible for overseeing the management of the Guatemalan System of Protected Areas (SIGAP), which includes 32% of Guatemala's territory and 52% of its forests. It both coordinates the management of protected areas by third parties and manages them itself (alone or in co-management schemes). Within CONAP, the Climate Change Unit of the General Technical Office is responsible for REDD+.
Ministry of Agriculture and Livestock (MAGA)	Responsible for agricultural policy and soil mapping at national level. Has a climate change unit.
Office of Control of State Land Reserves (OCRET)	Responsible for administering State Land Reserves (areas of land around coastlines, rivers and lakes).
National Forestry Institute (INAB)	Responsible for overseeing the management of Guatemala's forests outside of Protected Areas. Though attached to the Ministry of Livestock and Agriculture (MAGA), it is an autonomous, decentralized agency with its own governing body made up of central government, Municipalities, academia, environmental NGOs and the private sector. It implements the forestry policy instruments (incentives) that are prioritized as a REDD+ strategy.
Inter-institutional Coordination Group (GCI)	Made up of the key State institutions with responsibility for the sustainable management of renewable natural resources: MARN, MAGA, CONAP, and INAB. It

	meets at both the political and technical levels and is the primary government forum on REDD+.
International Union for the Conservation of Nature (IUCN)	Through its Central American regional program and its office in Guatemala, IUCN supports the REDD+ process, particularly in the processes of dialogue and participation, strengthening platforms for communities and indigenous peoples.
Forestry Mapping Group (GMF)	Made up of State and academic institutions with expertise on remote sensing. It is working on reference levels and measurement, reporting and verification (MRV).
REDD Implementers Group	Made up of national and international (as observers) organizations and community organizations that are developing REDD+ pilot projects.
Presidential Secretary for Planning and Programing (SEGEPLAN)	The national planning body. It is in charge of land use planning at the national level and of supporting municipalities and executive bodies in their incorporation of climate change mitigation and adaptation.
Rainforest Alliance	Leading implementation of the CNCG project and supporting the GuateCarbon project.
Nature Defenders Foundation (FDN)	Large national NGO that co-administers several protected areas and is the project developer of the Sierra la Lacandón REDD+ early initiative.
Foundation for Eco-Development and Conservation (FUNDAECO)	Large national NGO that co-administers several protected areas and is the project developer of the REDD+ Caribbean early initiative.
Association of Community Forestry Organizations of Petén (ACOFOP)	Represents the community concessions in the Mayan Biosphere Reserve. Joint proponent with CONAP for the GuateCarbon REDD+ early initiative.
Lachua Foundation (FUNDALACHUA)	Represents the communities in the Laguna Lachúa ecoregion where a REDD+ early initiative is planned.

1.3 REDD+ REGIONS AND EARLY ACTIVITIES

For the purpose of REDD+, Guatemala's territory has been divided into five subnational areas (Figure 3), each of which has different land tenure characteristics, avoided deforestation strategies and proposed activities (Figure 4). Guatemala will prioritize activities in the Northern Lowlands (TBN), Sarstún Motagua, and Western subnational areas (INAB 2014a), leaving the Eastern-Central and South Coast regions (which have less forest) until later.

The TBN is the largest of these regions, covering approximately 40% of the country, and the one containing the most forest. It is made up of the Northern department of Petén, 60% of which is covered by a declaration of Protected Area status and which includes 48% of Guatemala's forests, and an area bordering Petén to the South which is known as the Northern Transversal Strip (TFN). The TBN contains three of the five REDD+ Early Initiatives currently under development in Guatemala (GuateCarbon, Laguna Lachua, and Sierra la Lacandón).

The GuateCarbon project in particular has been the driver of much of the progress made at the national level. The project area is made up mainly of 12 community-run concessions over 717,000ha of State-owned forest in the Multiple Use Area of the Mayan Biosphere Reserve (RBM). As part of the project, the different stakeholders involved developed the regional reference level for the TBN.

Outside of the TBN, Guatemala's main forest areas are found in the Sierra de las Minas area in the east of the country (in the Sartún-Motagua subnational area) and in the coniferous forests of the Western Highlands (in the Western subnational area). Patterns of forest tenure and the origin of emissions differ dramatically between areas. In the Northern Lowlands, for example, forest is owned primarily by the State but also

privately, and the main source of emissions is land use change for cattle ranching, export crops, and to a lesser degree, subsistence farming. In contrast, in the Western Highlands forest tends to be municipally or communally owned, and forest degradation caused by firewood extraction is thought to be one of the most significant sources of emissions.

INAB led the most recent study of forest cover in 2012, covering the period 2006-2010, according to which, 34.2% of Guatemala's 108,980km² was covered in forest. In 2013 Guatemala had 18,840ha of mangrove, of which 94% are found in the Pacific coast (MARN & UNEP 2013).

FIGURE 2: MAP OF GUATEMALA'S FIVE SUBNATIONAL REFERENCE AREAS (Source: R-PP)

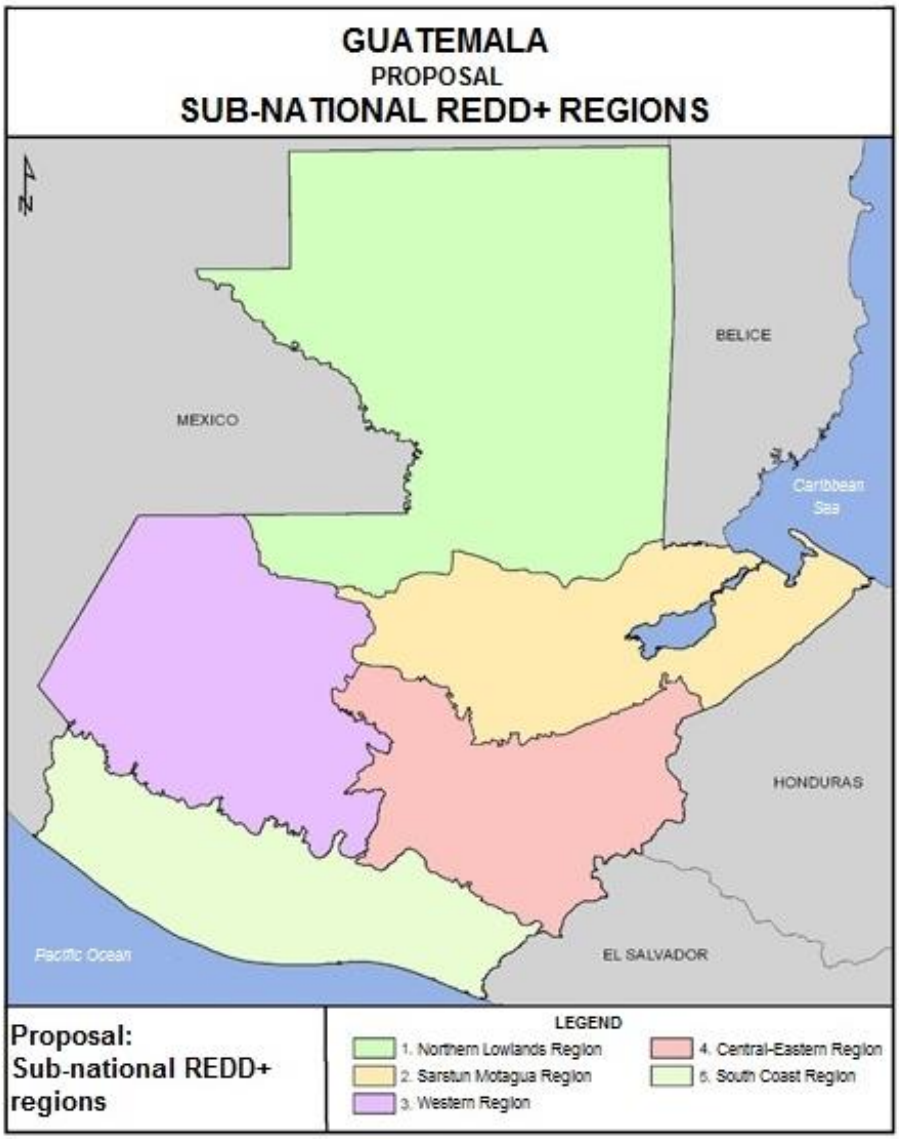

FIGURE 3: REDD REGIONS, PILOTS, GENERAL AND SPECIFIC REDD+ STRATEGIES

Subnational Region	General REDD Strategies (R-PP)	Local REDD+ Strategic Options (R-PP)	REDD+ Early Initiatives
Northern Lowlands (TBN). • High forest cover (mainly in protected areas) and highest deforestation (for land use change to agriculture, cattle and palm). • This is a flat areas made up of Petén and the flat parts of the Northern Transversal Strip (TFN). • Originally almost unpopulated with only small number of native Mayan-Itza. In 2012 Petén alone had a population of 662,7705.	(ii) Strengthening institutional capacities on forest monitoring and protection and control of illegal logging. (iv) Strengthening existing forest incentive programs and creating new ones. (v) Encouraging productive activities compatible with conservation. **Prioritized for ER Program**.	• Voluntary carbon market. • Forestry incentives (PINFOR and PINPEP). • Technical assistance and loan financing for forestry management. • Supply chains. • Community agro-forestry.	GuateCarbon – primarily made up of community concessions in the multiple use zone of the Mayan Biosphere Reserve. Promoted by ACOFOP and CONAP with the support of Rainforest Alliance. Lacandón – Forests for Life in the Sierra la Lacandón National Park. Promoted by FDN and Oro Verde. Lachúa Carbon Project in the Lachua Ecoregion (because RAMSAR site). Made up of core area and part of the buffer area of the Laguna Lachua National Park. Promoted by FUNDALACHUA and IUCN.
Sarstún Motagua • High forest cover (mainly in protected areas and areas receiving forestry incentives). Second highest rate of deforestation for land use change to sugar and cattle. • Mainly mountainous with the flat and fertile Polochic Valley to the West of Lake Izabal.	(ii) Strengthening institutional capacities on forest monitoring and protection and control of illegal logging. (iii) Strengthening land use planning. (iv) Strengthening existing forest incentive programs and creating new ones. **Prioritized for ER Program**	• Forestry incentives (PINFOR and PINPEP). • Private nature reserves. • Community forestry management models. • Municipal forest management. • Land use planning (mainly for oil palm and sugar).	REDD Caribe in six project sites around Lake Izabal and the mouth of the Rio Dulce. Promoted by FUNDAECO and BNP Paribas' Althelia Fund. Sierra de las Minas in the Sierra de las Minas Biosphere Reserve. Promoted by FDN and CONAP.
Western • Medium forest cover (mainly in municipal and communal forests). High forest degradation for firewood. • Most densely populated rural area of Guatemala	(ii) Strengthening institutional capacities on forest monitoring and protection and control of illegal logging. (iii) Strengthening land use planning.	• Land use planning. • Forestry Incentives (PINFOR and PINPEP).	A planned REDD+ pilot in the area of Huehuetenango, funded as part of the Global Environmental Fund (GEF) 5 program "Sustainable Forest Management and Multiple Benefits" administered by UNDP.

[5] MARN – Informe Ambiental del Estado 2012

with the greatest diversity of indigenous peoples.	(iv) Strengthening existing forest incentive programs and creating new ones. **Prioritized for ER Program**		
Central-Eastern • Low forest cover (mainly dry forest with a mix of tenure types including community forests controlled by Xinca indigenous people). • Low population density.	(ii) Strengthening institutional capacities on forest monitoring and protection and control of illegal logging. (iv) Strengthening existing forest incentive programs and creating new ones. (vii) Strategy for the sustainable use of firewood. **Not prioritized for ER Program**	• Management of river basins. • Forestry Incentives (PINFOR and PINPEP). • Payment for environmental services (water). • Establishing biomass forests.	A planned REDD+ pilot in the area of Jalapa, Jutiapa and Santa Rosa, funded as part of the Global Environmental Fund (GEF) 5 program "Sustainable Forest Management and Multiple Benefits" administered by UNDP.
South Coast • Low forest cover but the main extensions of mangroves. • Flat, mainly dedicated to plantation agriculture (banana, sugar and some palm).	(iii) Strengthening land use planning. (iv) Strengthening existing forest incentive programs and creating new ones. **Not prioritized for ER Program**	• Establishing biological corridors. • Incentives in gallery forests.	Potential for a REDD+ project in the mangroves of the Southern (Pacific) coast.

Source: the Author, based on the R-PP and Early Initiative documentation

1.4 STAKEHOLDERS TARGETED BY THE REDD+ PROCESS

The R-PP envisages targeting stakeholders through several different processes: ongoing participation; one-off consultation; one-off consent; and benefit distribution. Each of these processes will target a different set of populations and organizations, using different mechanisms and with different risks of exclusion. The resource rights of stakeholders differ and are used to varying extent to define who is targeted within the REDD+ process. This Section will examine ongoing participation and receipt of benefits while consultation and consent will be looked at together later in this assessment.

1.4.1 Targeted for Participation

Creating space for information sharing and encouraging dialogue are important elements of stakeholder engagement. The R-PP mentions two civil society spaces in which REDD+ is discussed:

- The National Roundtable on Climate Change (MNCC) is an informal civil society space with broad civil participation. Its membership has been self-selecting. It meets on an ad-hoc basis and does not have internal regulations. Nevertheless, it is seen as a legitimate forum by many civil society organization; and
- The Guatemalan Indigenous Roundtable on Climate Change (MICCG) spun off from the MNCC as a space where indigenous organizations can meet to discuss climate change and REDD+. It also operates on an informal ad-hoc basis.

However, according to the R-PP, the main platform for dialogue and consensus building between government and other stakeholders on REDD+ is the Forests, Biodiversity and Climate Change Group (GBBCC), which also has technical oversight over some of the REDD+ work streams such as the Safeguards Committee and the Forestry Mapping Group (GOG 2013).

The GBBCC was first convened by MARN in 2009 for the participatory construction of the R-PP. The intended membership list is comprehensive, including government, national and international NGOs, academia, local community and indigenous organizations, and the private sector. However the GBBCC has not yet established a regular timetable of meetings or institutionalized its membership and rules of operation. The R-PP (p.19) sets out the key stakeholder groups that should participate in the GBBCC and the degree to which these groups participate and their respective rights are analyzed in **Error! Reference source not found.**.

FIGURE 4: GROUPS TARGETED FOR PARTICIPATION IN THE GBBCC AND THEIR RIGHTS (SOURCE R-PP)

Target Group	Rights Over Land/Trees/Carbon	Level of Effective Participation in GBBCC (High, Medium, or Low)
Government	• State is significant owner of protected areas. CONAP administers most of these but is not the "Owner". • OCRET administers State Reserves (including mangroves). • MAGA sets agricultural policy nationally. • Ministry of Energy and Mines issues exploration/extraction licenses for minerals and hydrocarbons.	Medium • Institutions such as MARN, MAGA, INAB and CONAP participate within the GBBCC. • Lacking high-level engagement from MARN and MAGA and wider participation from the Ministries of Mines, Finance, Foreign Affairs, and Planning (SEGEPLAN). • Also need participation from the Attorney General's Office (PGN) and OCRET.
Municipalities	Municipalities own/possess land and forests that used to be communally held.	Low • Limited participation through the National Association of Municipalities (ANAM), which participates on behalf of municipalities. • Little direct participation of municipalities themselves.
International NGOs	No	High
National NGOs	National NGOS like FDN and FUNDAECO both own private protected areas and co-manage national protected areas.	High
Academia	Academic institutions manage some protected areas.	Medium • At a technical level.
Local Communities	Local communities own/possess land and participate in forestry incentive schemes both individually and communally.	Medium • Represented by organizations like the Alliance of Forestry Community Organizations (Alianza Nacional de Organizaciones Forestales Comunitarias de Guatemala; ANOFCG) and the organizations that comprise it, each with representative structures. • Network of PINPEP beneficiaries, which represents "Possessors" of land, has not yet been invited to participate in the GBBCC. • Participation is limited to organizations of smallholders that define themselves in terms of their interest in forestry. • *Campesino* movement organizations do not participate.

Indigenous Communities	Indigenous communities own/possess land and forest and have customary rights over land and forest owned by others (particularly municipalities and State).	Low • Indigenous organizations like Sotz'il, Ak'Tenamit and Utz' Che participate and the Network of Indigenous Authorities and Organizations participate in the GBBCC. • No officially recognized national or regional representative structure for indigenous peoples. • Council of the Western Peoples (CPO) does not take part.
Private Sector	Private sector is a large landowner and its trade associations (particularly agriculture, palm, sugar, livestock, coffee) represent important interests, both economically and in terms of land use.	Low • R-PP does mention the importance of the private sector, • However only two private sectors organizations currently participate (Agexport and Grupo Occidente).

Source: Evaluation of participation based on review of R-PP (GoG 2013) and stakeholder interviews.

Assuming that the GBBCC were made fully operational, **Error! Reference source not found.** shows that the major gaps in participation relate to government, private sector, indigenous peoples, and to a lesser extent local communities. The first two could be resolved fairly simply with the required political will but the issue of effective indigenous participation and engagement of local communities is much more complicated.

Indigenous participation in the GBBCC

The historic regions of influence of Guatemala's indigenous peoples are well known but there is no legal figure of indigenous territory or reserve, and no State process of identifying indigenous communities or authorities. While there are many indigenous NGOs, there is no regional or national systems of representation for indigenous communities and the nearest organization to that, the Council of Western Peoples (CPO), which includes representation from many of the Mayan linguistic groups in the Western Highlands, does not participate in the GBCC.

The Network of Indigenous Authorities and Organizations has operated since 2010 on a voluntary basis to attempt to form a national network of indigenous authorities. It has managed to identify 378 indigenous authorities in 64 municipalities spread among 24 Departments (A.M. Mejia 2014, pers. comm., 6 February), but is severely hampered by a lack of resources. Meanwhile, as one indigenous leader put it in a meeting on the ER-PIN, "we are speaking in the name of an indigenous population that doesn't even know that we exist"[6].

It should be highlighted that the weakness in indigenous representation is structural and general in nature, rather than relating to forests or REDD+ in particular. Within the REDD+ process, government has worked to articulate with the indigenous NGOs that do exist, several of which participate in the GBBCC. It is surely thanks to that work that, unlike in many other Central American countries, Guatemala has been able to advance with the FCPF without opposition to the process.

Local communities

The Alliance of Forestry Community Organizations (ANOFCG) is representative of 11 associations that in turn represent 593 community organizations (50,0000 families) managing over 427,000 ha of communal land and forest. It meets regularly and is a legitimate system for representing the interests of self-identified community forestry organizations.

The Network of Organized Communities Benefitting from PINPEP (*Red de Comunidades Organizadas Beneficiarios del PINPEP*), which represents 264 communities, has not been invited to participate in the GBBCC, but has taken part in consultation meetings, for example on the ER-PIN.

While these groups provide potentially strong representation, families that are not involved in forestry, but for example nevertheless rely on forests for firewood, will not necessarily be represented in the GBBCC.

Campesino movement organizations like the National Indigenous and Campesino Coordination (CONIC) and the Committee of Campesino Unity (CUC) only weakly engage with the GBBCC. These organizations represent large numbers of people and have been critical of REDD+ and of the expansion of Protected Areas.

Centralization and lack of outreach

At a more general level however, the centralized role of the GBBCC limits effective stakeholder participation, making it particularly difficult for municipalities and local organizations to participate in debating and setting REDD+ policy. The FCPF R-PP funds have still not entered the national budget means that there has still been no national process of outreach and information dissemination at the local level on REDD+.

[6] 6 February 2014, Guatemala City

1.4.2 Targeted Beneficiaries

The draft ER Program contains three strategies that identify specific beneficiaries, in part based on land tenure considerations:

- **Expansion of the forestry incentive programs, PINPEP and PINFOR (to be replaced with *Probosque*).** Under these programs, type of land tenure is a specific eligibility criterion.
- **Sustainable production and efficient use of firewood.** The two benefits streams under this program are the distribution of efficient cookstoves and the expansion of forestry incentives. The tenure and property rights aspects of the second strategy are covered by an analysis of the forestry incentive programs.
- **REDD+ Early Initiatives focused on protected areas.** Early Initiative project proponents must establish agreements with those with a right to own and trade emissions reduction units under the LMCC. In many cases these will focus on agreement with government over protected areas. In the context of REDD+ Early Initiatives, project proponents need the agreement of those with a right to own and negotiate emissions reductions units arising from the project area. They may, however choose to distribute benefits more widely.

The following section will therefore consider the land tenure and property rights dimensions of the three different forestry incentive programs, and of REDD+ Early Initiatives (including the right to own and negotiate) emissions reductions units under the LMCC. Together these are referred to as "REDD+ Benefits". Eligibility to receive REDD+ benefits hinges mainly on the interplay between the following four variables: (i) Category of owner/property rights holder; (ii) Type of tenure; (iii) Overlap, if any, with Protected Areas; and (iv) Operation of LMCC Art. 22 (on carbon rights).

(A) **Category of owner/property rights holder (See Section 0)**

This report categorizes property rights holders in four main groups: (i) State (centralized public ownership); (ii) Municipal (decentralized public ownership); (iii) Private; and (iv) Communal (including indigenous).

This report treats indigenous land jointly with other forms of communal tenure since no legal instrument has yet been passed that create differential rights for indigenous communal property. They remain subject to the same legal regime as other communally held private property (See Section (D)).

FIGURE 5: ELIGIBILITY FOR REDD+ BENEFITS BY CATEGORY OF PROPERTY RIGHTS HOLDER

	PINFOR	PINPEP	Probosque	Right to Own and Negotiate Emission Reduction Units
State	Some government organizations	No	No	Yes
Municipal	Yes, depending on land tenure type			
Private	Yes, depending on land tenure type			
Communal	Yes, depending on land tenure type			

Error! Reference source not found. shows the eligibility of each of these four categories of property rights holders for the different streams of REDD+ benefits. The main barrier to entry for communal (particularly

indigenous) property rights holders is not their eligibility to benefit, but rather the fact that they no longer retain and cannot recover qualifying categories of tenure.

Type of tenure (See Section 0)

Property rights holders can be:

- Owners (*Propietarios*) with registered title to land
- Possessors (*Poseedores*) with equitable (non-registered) title; or
- Occupiers (*Tenedores*) of land belonging to another. This includes rental, un-regularized peaceful occupation and illegal occupation.

Or they may hold use rights over property belonging to another (which may be customary or claimed). **Error! Reference source not found.** shows the eligibility of these different types to receive REDD+ benefits.

FIGURE 6: ELIGIBILTY FOR REDD+ BENEFITS BY TENURE TYPE

	PINFOR Min: 2 ha. Max: 1% of PINFOR budget	**PINPEP Min 0.1 ha. Max 15 ha (unless associated)**	**Probosque Min: 0.5 ha. Max: 3% of Probosque budget**	**Right to Own and Negotiate Emissions Reduction Units**
Owner	Yes	No	Yes	Yes
Possessor	No	Yes	Some: • Cooperatives, indigenous groups or other forms of historic communal or collective tenure of rural property with traditional administration. • Social groups with legal personality that occupy municipal land by virtue of a legal arrangement.	Yes (if "Legal Possessor")
Occupier (including tenants and illegal occupiers)	No	No (though possibility that could be certified as "Possessor" by Owner)	Some: • Tenants of national reserves	No. Owners and Legal Possessors of Early Initiative project area may still decide to include them.
Use rights (including usufruct, concessions, customary and illegal extraction)	No	No	No	

For Guatemala to achieve reductions in deforestation under its ER Program it will need to both increase the coverage of its forestry incentive schemes and increase enforcement at the landscape level. These measures will impact different tenure categories differently.

From Figure 6 it can be seen that the tenure types that are most eligible for forestry incentives are Owners and Possessors (Some legal Occupiers may also be eligible if they can be certified as "Possessor", see discussion at Section 2.1.3(C)).

However increased enforcement would impact all forest users including illegal Occupiers (of which there are many in Protected Areas), those with customary use rights (such as indigenous communities over municipal forests), and those with claimed use rights (from families collecting firewood to illegal timber extraction).

This means that not all those impacted by REDD+ will be directly eligible for REDD+ benefit streams. Efforts should be made to identify those other impacted stakeholders (including through inviting them to participate in the GBBCC) and compensate them where appropriate. This could be done potentially from any surpluses of emissions reductions units at the subnational level.

(B) Overlap with Protected Areas

There is a large and increasing population living inside Protected Areas, both legally and illegally. Three factors determine the type of tenure that a rights holder has in this situation and their eligibility for benefits:

- Which zoning category the property is in;
- Whether the property predates the declaration of Protected Area status; and
- The approach taken by CONAP to human settlements.

Protected Area zoning is confusing, resulting from a combination of the 1989 Protected Areas Law and its Regulation with the law declaring each given Protected Area and the internal zoning set out in the relevant management Master Plan. Each of these often uses different categories, which may contradict each other (see Section 2.3.1(B) for a full discussion). FIGURE 7**: ELIGIBILITY OF HUMAN SETTLEMENTS IN PROTECTED AREAS** uses a simplified classification (derived from CONAP's human settlements policies) of: Strict Protection, Restricted Use, and Sustainable Use/Buffer Areas.

The legal framework on private property that predated the declaration of a Protected Area is contradictory. On the one hand the Protected Area Law states that the Owner fully retains their rights. On the other, the same Law states that they must manage their property in accordance with the rules of the Protected Area while the 1999 Land Fund Law prohibits the titling of land in Protected Areas. Many communities and properties inside Protected Areas therefore continue in a kind of legal limbo.

CONAP uses contracts - Cooperation Agreements – with preexisting communities to regulate their behavior and has made signing one of these agreements a condition for participating in REDD+ Early Initiative benefits.

FIGURE 7: ELIGIBILITY OF HUMAN SETTLEMENTS IN PROTECTED AREAS TO PARTICIPATE IN REDD BENEFITS

Protected Area Zoning	**Old Settlement - Title predates declaration. Title holder is "Owner"**	**Old Settlement without registered title (NB CONAP gives preferential treatment to Possessors that began to regularize title before the declaration).**	**Recent Settlement - postdates the declaration.**
Strict Protection	As an "Owner" • PINFOR, Probosque • Rights to emissions reduction units	Tenure type not clear. • If Possessor: PINPEP • If "Legal Possessor": Rights to emissions reduction units • If "Occupier" Inclusion in Early Initiative by Cooperation Agreement.	As an "Occupier" • None by right. • Optional inclusion in Early Initiative by Cooperation Agreement
Restricted Use	As an "Owner"	• As above	As above

	• PINFOR, Probosque • Rights to emissions reduction units		
Sustainable Use/Buffer Areas	As an "Owner" • PINFOR, Probosque • Rights to emissions reduction units	• If able to become Owner: PINFOR, Probosque and rights to emissions reduction units • If "Legal Possessor": PINPEP and rights to emission reduction units • If "Possessor": PINPEP	• If able to become Owner: PINFOR, Probosque and Carbon Rights. • If "Legal Possessor": PINPEP and rights to emission reduction units • If "Possessor": PINPEP

* Based on CONAP Human Settlement Policies for Petén and Los Verapaces

The REDD+ Early Initiatives currently under development are centered on Protected Areas in the Northern Lowlands, Western Highlands, and Sarstún Motagua regions. The exact benefit sharing arrangements of each project will depend on the ownership and management regime of the Protected Area but in all cases it looks likely that emissions reduction units will be received and managed by CONAP together with the Protected Area Co-administrator/project proponent and that benefits will be primarily non-monetary, such as strengthening activities to reduce deforestation, productive projects and access to basic services (C. Bonilla 2014, pers. comm., 29 January).

Occupiers and holders of use rights are the least eligible for direct benefits. Being inside a Protected Area means that the only Owners are those with registered title before the declaration. The ability to benefit as a Possessor is highly dependent on recognition as such by CONAP.

However, managing emissions reductions units at the central level and distributing non-financial benefits gives Early Initiatives the flexibility to distribute benefits to non-Owners and Possessors, including illegal occupiers, if needed to reduce deforestation.

(C) Article 22 of the Climate Change Framework Law (See Section 3.2)

Article 22 of the Climate Change Framework Law provides some clarity around carbon rights. It states that rights, ownership, and negotiation of emissions reductions will belong to project owners and that project owners may be the individuals, legal persons, or the State that are the Owners or Legal Possessors of the land or goods in which the project is realized.

The Government has 18 months (from September 2013) to regulate the operation of this article. Among other things the regulation will need to:

- Clarify the link between carbon rights and participation in forestry incentives (for example stating that private land holders transfer their carbon rights to the State in return for incentive payments); and,
- Determine how carbon rights and benefits should be accounted for and distributed at the subnational level where it is not practicable to identify each individual Owner or Possessor of land.

1.5 RECOMMENDATIONS ON REDD+ INSTITUTIONS AND STAKEHOLDER INCLUSION

The recommendations in this section relate to increasing effective participation. Recommendations relating to inclusion by forestry incentives are set out in Section 0 and to ownership of emissions reductions units in Section **Error! Reference source not found.**.

(A) MARN - Prioritize signature of the FCPF Grant Agreement

Guatemala urgently needs to begin broader consultations and early dialogues on REDD+ at the regional and local level. According to the R-PP the bulk of these should take place in 2014 (US$440,000 of a total of US$815,000) but this will not happen without funding in place. MARN should prioritize signature of the grant agreement with FCPF to release funds from IDB to the national budget.

(B) GoG, MARN – Regulate the LMCC

The 2013 LMCC was passed on 5 September and gives MARN one year to issue the Regulations, plans and policies necessary to give it effect (18 months to regulate Art. 22 on carbon markets) (Art. 22, Art. 27).

Forming the CNCC is the most important of all, since it is the high level political body in charge of steering climate change policy including REDD+, and issues like carbon rights will have to be regulated based on its recommendations.

The LMCC (Art. 8) does not include INAB or CONAP in the CNCC, however MARN should consider the appropriateness of including them as observers via the Regulation.

(C) GCI - Institutionalize operation of the GBBCC

If the GBBCC is to fulfill its twin functions as the platform for dialogue on REDD+ and supervising working groups it needs to meet regularly, with internal regulations and clear membership criteria. This recommendation is not contingent on any other process so could be implemented immediately.

(D) GCI, GBBCC - Address deficiencies in participation in the GBBCC

As part of the process of forming the CNCC, relevant Government ministries should be encouraged to send representatives to the GBBCC. Private sector associations are unlikely to engage unless they perceive a potential profit or a potential threat to its existing activities. Meanwhile, the door should be left open to their participation and they should be kept up to date on progress.

REDD+ will imply greater restrictions on extraction from forests and greater control of Protected Areas. Not only will REDD+ therefore impact the broader campesino sector, the ability of REDD+ to deliver emissions reductions will also depend in part on it. Campesino Movement groups like CONIC and CUC should therefore be encouraged to participate in the GBBCC, especially because of the risk that the antagonism that they are already developing towards REDD+ may otherwise deepen.

The National Network of Organized Communities Benefitting from PINPEP should also be invited to join the GBBCC.

(E) CNCC, MARN, GBBCC – Give particular focus to strengthening indigenous participation

Possible avenues to consider include:

- A government effort to identify traditional indigenous authorities;
- Supporting the Network of Indigenous Authorities and Organizations in its attempts to identify and organize traditional indigenous authorities;
- Engaging with the Organization of Westerns Peoples (CPO) and inviting it to participate in the GBBCC;
- Based in the identification of traditional authorities, working with indigenous organizations to establish regional systems of representation;
- Beginning to work in a participative manner on the Indigenous Law that Guatemala is committed to develop under the 1985 Constitution; and
- Preparing public information materials in indigenous languages, prioritizing those linguistic groups with greatest presence in the sub-national regions prioritized by the ER-PIN.

(F) Academic Institutions - Provide courses at all levels on climate change and REDD+

Knowledge of REDD+ is mainly restricted to a small group of highly qualified and motivated people in Guatemala City. Universities like the San Carlos and Raphael Landivar are playing an important technical role in developing reference levels/MRV but could do more in terms of providing academic and technical training on climate change and REDD+. This could help reduce the impact of changes in administrations by bringing new officials up to speed and help build community capacity for effective participation in early dialogues.

2.0 FOREST AND LAND USE POLICY, LAW, AND REGULATION

The following section explores Guatemalan forestry and land use policy in detail. In particular it seeks to unravel how land tenure, forest, and broader land use policies interact to incentivize resource use behavior and to identify the risks and opportunities facing implementation of REDD+ in Guatemala. Of particular importance in this section is the analysis of the PINEP, PINFOR and Probosque programs, which represent a principal focus of proposed REDD+ implementation.

2.1 LAND TENURE

2.1.1 Overview of Tenure

Guatemala has no overarching land law setting out tenure types and mechanisms for transfer of tenure. The current tenure system results from the accretion of the actions taken and laws passed since the Spanish conquest; the website of the national General Property Register lists no fewer than 89 separate pieces of legislation relevant to land registration.

According to the USAID (2010) Land Tenure Assessment, the following tenure types exist in Guatemala: private, communal, use (*colonato/usufructo*), leasehold, municipal, and State. However the lines between each of these are not clear and depending on which perspective one uses, the same bundles of rights will end up being characterized differently. This report does not aim to produce a definitive typology of tenure in Guatemala, but rather to categorize tenure as pragmatically as possible for the analysis of REDD+ benefits.

With the exception of some small extensions of land within or between properties whose limits were poorly described in the property register, there is no unclaimed land in Guatemala; all land now has a recognized Owner and/or occupier.

The following sections consider different aspects of tenure in relation to REDD+:

- Category of owner/property rights holder (Section 0)
- Type of tenure - Owner, Possessor or Occupier (Section 0)
- Use rights – Easements, *Colonato*, Customary Rights, Concessions (Section 0)
- Transfer of tenure (Section 0)
- Acquiring property through occupation (Section 0)
- Overlap with Protected Areas (Section 0)

2.1.2 Categories of Owner/Property Rights Holder

This Section classifies the kinds of entities that can own land and that may benefit from forestry incentives and carbon rights. The Guatemalan Civil Code essentially recognizes only private property (which may be owned by an individual, company, or group of people) and State property (Art. 456) (which may be owned by

the State or by a Municipality (Art. 457)). However because of their different characteristics and treatment this paper will use four main categories for property rights holders: (a) Private; (b) State; (c) Municipal; and (d) Communal.

(A) Private Property

Art. 460 of the 1973 Civil Code defines "private property" as goods belonging to natural and legal persons with legal title to them.

According to Mauro and Melet (2003), Compared to neighboring countries, Guatemala has an unusually strong protection of the concept of absolute property. For example, the 1965 Constitution removed the requirement that land must fulfill a "social function", which in other countries helps restrict large, unproductive landholdings. The 1985 Constitution protects private property as an inherent human right (Art. 39). Though the Constitution permits expropriation in limited circumstances (including for social benefit and of idle lands) it must always be indemnified (Art. 40) and according to Velasquez (2011), requires a resolution from Congress, making expropriation effectively impossible.

(B) State Property

The State has properties registered in its name and under the Constitution reserves dominion over State Land Reserves. According to Art. 9 of the 1996 Protected Areas Law, where the characteristics of State Land Reserves or registered State property makes this appropriate, the State (OCREN (now OCRET) in the case of State Land Reserves) should administer these for managed conservation. Article 22 of the Climate Change Framework Law is clear that the State owns emissions reduction units from projects on its land.

Subsoil Resources

Under Art. 121 of the Constitution, the State owns all the subsoil in the country, including minerals, hydrocarbons and other organic and inorganic substances (presumably including sequestered carbon).

State Land Reserves

Under Art. 121, the State also owns goods that are of "public dominion". These include State Land Reserves (Art. 122) made up of a strip 3km inland from all coastlines, 200m around lakes, 100m either side of navigable rivers, and 50m around springs and water sources (urban areas and property registered as of 1956 excepted).

Protected Areas

Administration of State land within a Protected Area automatically passes to the administrator of the Protected Area (Protected Area Regulation Art. 9).

Land that does not belong to anyone (*tierra baldia*) is not covered specifically, but no new property rights can be acquired in an area once it has been declared as a Protected Area (Protected Area Law Art. 89). When the land Register and Cadaster Information (RIC) office finds *tierra baldia* inside a Protected Area it will remit it to the National Land Fund (FONTIERRAS) who will register it in the name of the State (RIC Law Art. 63), at which point Protected Area Law Art. 9 would apply.

INAB and CONAP administer State property but, other than exceptional circumstances, do not own it. Since only Owners or Legal Possessors of the relevant land can own emissions reductions units, SOBENES (2013) recommends involving both the Attorney General's Office (PGN) and the Office of State Property of the Finance Ministry in discussions on the ownership and distribution of emissions reductions from State land.

(C) Municipal Property

Municipal land is of importance to REDD+ since much of it is forested and many municipalities access both PINFOR and PINPEP depending on whether their land is registered or not. On the basis that municipal land

also belongs to the State, presumably the Climate Change Framework Law Art. 22 also authorizes municipalities to carry out emissions reductions projects.

Over time, many communal lands were registered to municipalities, either by default with the creation of municipalities or by communities looking for a way to protect their land. At the time of transfer there often was little difference between the municipality and the community. However as time has passed the mixed or "*ladino*" population has increased, as has internal migration. This has weakened traditional forms of authority and often led to divergence between these and municipal administrations

Municipal land is nearly always used by someone, in some cases by the community whose rights predate those of the municipality and in other cases by groups or individuals granted possession by the municipality (Rivera et al 2008). Often this is intended to be permanent and the occupiers are considered locally as owners, even though the land remains titled to the municipality. The management of municipal forests is looked at more closely at Section (B).

(D) Communal Property

With a brief respite during the revolutionary period, communal land tenure in Guatemala was under sustained pressure from the time of the Spanish Conquest until the return to democracy in 1985. That communal property survived at all is primarily due to the importance of land to the Mayan cosmovision and to the Mayan tradition of collective land management (Gauster & Isakson 2007), rather than to any protection it has been given. Customary communal tenure has proven to be resistant to formal transfers in land title, surviving in lands that were registered to municipalities but that were previously *ejidos* or communal (Larson 2008).

The 1985 Constitution contains a formal recognition of indigenous culture and land rights, though not of indigenous legal systems. A number of other laws since then have expanded the recognition of indigenous land rights, including the 1996 Peace Agreements (specifically the Agreement on Indigenous Peoples' Identity and Rights), the 2002 Municipal Code, the 2005 RIC law and the 2009 Regulation of the RIC law on the Recognition and Declaration of Communal Lands.

Nevertheless, these have not given rise to a legal recognition of indigenous territories as a distinct form of tenure with special protections. According to RRI, the regime governing communal land in Guatemala is one of only two regimes in all of Latin America that recognizes the full bundle of indigenous land rights including alienation (RRI 2012). However this is only because "indigenous communities do not have their own legal standing, communal lands are not recognized as a common good and their legalization must be done through other legal constructions of civil law." In contrast to almost all other Latin American countries, indigenous communities are not exempt from taxes or protected against mortgage or prescription (Grunberg 2003, cited in Larson 2008).

Other forms of communal property were created in the revolutionary period of agrarian reform, in the post-revolutionary period of Agrarian Transformation, and the current period of market-based land access programs led by FONTIERRA. During these periods land has been titled in the name of different legal figures like Cooperatives, Peasant Business Associations (*Empresas Campesinas Associativas*), and Collective Agrarian Patrimony (*Patrimonio Agrario Colectivo*). These are primarily different ways of organizing collective agricultural production and sharing in profits but there is overlap with tenure to the extent that land is titled in their name.

For the purposes of this report, the key feature used to identify communal property is whether the right to register the underlying land is held collectively (whether an indigenous community or *campesino* cooperative) or individually. The line, however, is difficult to draw precisely; Collective Agrarian Patrimony for example is often titled jointly in the name of each member of the community.

In 2008 the Communal Land Advocates Group (GPTC), a multi-stakeholder collaboration between government, civil society, and academia, carried out the most comprehensive survey and classification of communal property to date (Cited as Elias et al. (2008)). The survey defined communal land widely, according

to whether or not natural resource management was under community control. The GPTC also prepared a strategy for the regularization of communal lands. Though State institutions like INAB and CONAP participated in its elaboration, it never had sufficient political support to be implemented.

The difference between the property rights classified as communal by the GTPC compared to those classified as communal in this paper (based on the registrable ownership of the underlying land) demonstrates the range of customary communal natural resource rights over property that is legally owned by another. This ambiguity may be a key source of contention going forward with REDD+ incentive schemes.

2.1.3 Type of Tenure

As discussed at Section **Error! Reference source not found.**, one of the four key variables for eligibility for REDD+ benefits is the type of land tenure held. The two key types of qualifying tenure are "Owner" (*Propietario*) and "Possessor" (*Poseedor*), both of which originate in the Civil Code but have been given different glosses by successive legislation.

Possessor in particular is difficult to pin down and the slightly different definitions used by different laws are already causing problems in practice. This section examines the different definitions used for both of these terms as well as two related terms which help frame them: "Private Property" (*Propiedad Privada)* and "Occupier" (*Tenedor)*. The wider criteria for eligibility are considered at Section **Error! Reference source not found.** for forestry incentives and Early Initiatives.

(A) Owner (*Propietario*)

Goods may be under Public Dominion or Private Property (Art. 456). "Dominion" over property is not defined, but includes the right to enjoy and dispose of it (Art. 464), to defend it (Art. 468), to revindicate it (Art 469), and to incorporate the fruits of the goods or elements added to it by accession (Art. 471). Private Property belongs to the natural or legal person with legal title to it (Art. 460) and is defined as the right to enjoy and dispose of a good in accordance with the law (Art. 464). "Owner" is not defined but is used to designate the holder of that right.

Title to land and real rights over it shall be entered into the Property Register (Art. 1125). Taken together with the Art. 460, this leads to the conclusion that the Owner is the individual or legal person in whose name Legal Title is registered in the Property Register.

This is the approach taken by the RIC Law, which defines the Owner as "the person that exercises some or all of the faculties of dominion and has the right to dispose of a property in the Property Register" (Art. 23 u).

(B) Occupier (*Tenedor*)

Unlike "Owner" and "Possessor", "Occupier" does not appear in the Civil Code but makes its appearance in the RIC Law which defines it as "the person, who for whatever reason, has in their power a property, registered in the Property Register or not, but is neither the owner or legitimate possessor of it. They have no rights under this law" (Art. 23 w).

(C) Possessor (*Poseedor*)

The above analysis reveals that the key tenure type to define is Possessor, since an Owner is effectively a Possessor with registered legal title and an Occupier is someone with power over property that is neither the Owner nor the Possessor.

According to the Civil Code, a Possessor is one who exercises over a good all or some of the faculties inherent in dominion (Art. 612). A person is not a Possessor if they are in in possession of the property to carry out instructions of the Owner (Art. 614) or if their presence is tolerated or permitted by the Owner (Art. 615).

The 2005 RIC Law uses a similar formulation: "A Possessor is he who, without being the Owner, exercises over a piece of land all or some of the powers inherent in dominion. Enjoyment of the land in representation of the owner, as the owners delegate or at the discretion or tolerance of the owner does not make one a Possessor" (Art. 23 p).

From this it follows that the main difference between the Owner and a Possessor is not the de facto control that they exercise over the property but rather their de jure status. A Possessor is not the legal Owner precisely because their property is not registered in their name in the Property Register.

Possession

But what is possession? Returning to the Civil Code: Possession implies property unless proven otherwise (Art. 617). Possession can give rise to ownership through adverse possession ("*usucapión*") when it is based on Equitable Title (*Título Justo*), acquired in good faith, and held publically and peacefully for the necessary time (Art. 620). Just title for adverse possession is a title which transfers dominion but which has some characteristic that makes it ineffective to prove alienation (art. 621). These articles need to be seen in their historical context; their intended effect is to make it impossible for a person to become an owner of property through public, uninterrupted occupation alone. They need a written Equitable Title too (sale, deed of gift etc.).

Possession as a criteria of eligibility for REDD benefits

Eligibility under the 2010 PINPEP Law is confined to "Possessors who do not have Legal Title. Possession should be certified by the Mayor of the Municipality in which the property is located" (Art. 7).

The Framework Law on Climate Change adopts yet another slightly different formulation of "Possessor". Under Art. 22, carbon rights will belong to the owners of registered projects who must in turn be Owners or "Legal Possessors" (*Poseedores Legales*) of the land on which the project takes place. This is discussed in Section on carbon rights, below.

Usufructuaries and concessionaires hold rights over another's property and are not generally recognized as "Possessors", including by CONAP. In this regard, OCRET and the PGN have fixed an interesting precedent on mangroves, holding that OCRET may certify tenants of mangroves in State Territorial Reserves as Possessors to enable them to benefit from PINPEP[7]. This would seem to open the door to the State certifying other occupants of State land as Possessors for the same reason, including concessionaires and owners of private property within Protected Areas.

2.1.4 Use Rights

Use rights are held over property belonging to another. These can be formal, such as usufruct, *colonato,* and community concessions, or may be informal. In turn informal tenure can be illegal (such as the occupation of private property) or extralegal such as customary community rights over Municipal land.

Guatemala's Civil Code recognizes usufruct and easements, both of which are registrable interests under Art. 1125 of the Civil Code. Additionally both the 1989 Protected Areas Law and 1996 Forestry Law allow for the creation of concessions on State land.

Usufruct (usofructo)

The Civil Code creates Usufruct as a fairly complete set of rights (including access, management, withdrawal, and exclusion, but excluding alienation) to property belonging to another. It must be granted by contract or final testament (Art. 704) for life or for a determined period of time (Art. 705) not to exceed thirty years (Art. 706). It allows the usufructuary to make full use of the property and to benefit from its fruits (Art. 709), for

[7] OCRET's legal department issued the opinion on 30 November 2012, which was approved by the Attorney General's office on 12 March 2013 (VB 3474 of 2013).

the stipulated time after which they must return it to the usufructor (Art. 713) in the same condition subject to normal wear and tear. The usufructuary can rent the property out or sell its usufruct right to another but these secondary rights will end with the usufruct (Art. 716).

Easements (servidumbres)

The Civil Code regulates the use of easements in detail, requiring easements over one property to be registered in favor of another. Easements are governed first by the relevant legal titles (Art. 799). Continuous, apparent easements may be acquired through continuous use for ten years (Art. 805). However, if use has been interrupted or is not apparent they must be based in legal title (Art. 806).

The Nature Conservancy (TNC) has set a precedent by establishing conservation easements over land it bought for FDN to incorporate as private Protected Areas within the Lacandon National Park (where a REDD+ Early Initiative is planned). TNC carved out 1 ha within each of the properties that it passed to FDN and registered easements preventing land use change in the rest of the property to the single hectare that it retained (O. Rojas 2014, pers. comm., 31 January).

Customary Rights

Customary use rights receive no protection, other than to the extent that they could constitute continuous, apparent easements.

Concessions

Concessions are similar to the usufruct model but include a more limited set of rights (concessionaires for example do not have full exclusion rights and cannot sell their concession contract to another). Large areas of the Mayan Biosphere Reserve were put under community and industrial control through concessions (the GuateCarbon Early Initiative project area). Arts. 26-28 of the 1996 Forestry Law give INAB the faculty to issue forestry concessions over State land only to Guatemalans. Article 19 of the 1989 Protected Areas Law gives CONAP similar authority over Protected Areas, though without the restriction on nationality.

Colonato

Colonato refers to a specific kind of use rights that was given by large property owners to their semi-bonded labor. In return for their work on the property, laborers were given a plot for their dwelling and the right to cultivate a patch of land for subsistence. This form of tenure was particularly common in the large coffee farms of Alta Verapaz. There, following the coffee crash of 2010, many former workers have affirmed ownership rights over these areas in lieu of unpaid wages.

2.1.5 Transfer of Property Rights

The 1973 Civil Code recognizes that tenure rights may be transferred through:

- Sale and purchase (Arts. 1790-1851)
- Exchange (Arts. 1852-1854)
- Rental (Arts. 1880-1941)
- Gift (Arts. 1855-1879)
- Guarantee (Art. 822-859)
- Inheritance (Art. 917-923)

2.1.6 Acquiring Property through Occupation

Formal tenure rights in Guatemala have largely been created from the top down (Mauro & Melet 2003) through historic expropriation of indigenous lands and their subsequent grant or sale in which the defining characteristic of property has been its formalization through registration.

Nevertheless, as mentioned, Art. 620 of the Civil Code allows property to be acquired through adverse possession for ten years. The process for formalizing this title in the property register is known as Supplementary Titling (Art. 633), codified in the Supplementary Titling Laws of 1880 and 1979.

(A) Supplementary Titling

In most jurisdictions the rationale for adverse possession is to legalize property rights through possession. However, in Guatemala under the Supplementary Titling Law, the process effectively begins with registration rather than ending with it.

The holder of Equitable Title to land can register it provisionally. If this provisional registration stands for a period of ten years without being contested, it then becomes final. The process should be subject to a number of checks but in practice it has proven open to abuse and has been used as a way to dispossess indigenous people with customary rights and continuous occupation over the property. Controversy over the Law led to its suspension to be included in the Peace Agreement on Indigenous Rights. Nevertheless between 2000 and 2003 there were 8,852 supplementary title claims (Amnesty 2006).

(B) Regularization

Possessors of land can become Owners through two further mechanisms, which are looked at in Sections 2.4.3 on land reform processes:

- Where the land was State land and either is not in a Protected Area or occupation predated the establishment of the Protected Area, FONTIERRAS can regularize the possession and title the land.
- Where during the process of registration and cadaster, RIC finds that the only irregularity relating to a property is its lack of registration, it can register the property.

2.2 FOREST LAW, POLICY AND REGULATION

2.2.1 Deforestation

The most recent figures for forest cover date from 2012 and show the change in coverage from 2006-2010. In 2010 Guatemala had 3.7 million ha of forest, covering 34.2% of its land area (INAB et al 2012). Deforestation net of afforestation and reforestation (mainly through PINFOR and 30,000 ha of new rubber plantations over the last 15 years (INAB et al 2012)) has decreased from 48,084 ha or 1.15% per year between 2001 and 2006 to 38,597 ha or 1% per year between 2006 and 2010. However this masks a big increase in the rate of gross deforestation, from approximately 100,000 ha or 2.41% per year for 2001-2006 to 132,137 ha or 3.42% per year for 2006-2010.

As FIGURE 8**: ANNUAL DEFORESTATION INSIDE AND OUTSIDE PROTECTED AREAS BETWEEN 2006 AND 2010** shows, the rate of net loss of forest cover inside Protected Areas is almost four times greater than outside of Protected Areas, a result of the combination of weak enforcement inside Protected Areas and the fact that the tenure requirements for forestry incentives make most land inside Protected Areas ineligible. Reforestation and afforestation is therefore concentrated outside of Protected Areas.

FIGURE 8: ANNUAL DEFORESTATION INSIDE AND OUTSIDE PROTECTED AREAS BETWEEN 2006 AND 2010

	Inside Protected Areas	Outside Protected Areas	National

Gross deforestation	49,468 ha 2.2%	83,918 Ha 4.3%	132,137 Ha 3.42%
Net of reforestation and afforestation	33,322 Ha 1.5%	8,127 Ha 0.4%	38,597 Ha 1%

Source (INAB et al 2012).

Guatemala's last National Forest Inventory dates from 2003, according to which 51% of Guatemala's territory is appropriate for forestry. In 2003, forest ownership in Guatemala was 12.6% public (national), 3.1% public (Municipal), 5.4% public (communal), 37.8% private, and 5.3% other (INAB 2004).

2.2.2 Forest Policy

Guatemala's National Forest Policy dates from 1999 and has six stated objectives (Art. 5): (i) strengthen forest conservation both inside and outside of protected areas; (ii) increase the economic value of forests and reduce the expansion of the agricultural frontier; (iii) regenerate forests; (iv) promote agro-forestry schemes and forests as a source of renewable energy; (v) improve the competitiveness of the forest sector; and (vi) encourage public and private investment in the forestry sector.

In practice the most visible forestry interventions are licensing for sustainable use, conservation of Protected Areas, and forestry incentives (PINFOR and PINPEP) for plantations, regeneration, and natural forest management.

In 2011 INAB carried out an evaluation of the National Forest Policy and suggested incorporating new elements: (i) climate change; (ii) the increase in deforestation; (iii) the importance of forests to the rural population, particularly in terms of employment and food security; and (iv) the growing demand for forest products. Work on an updated policy is ongoing.

2.2.3 National Forest Law

The 1996 Forestry Law (with its 2005 Regulation) is the most important piece of forest legislation. It declared reforestation and forest conservation as a national priority and identified six objectives for the law: (i) reduce deforestation of land appropriate for forestry and slow the advance of the agricultural frontier; (ii) promote reforestation; (iii) improve the productivity of forests through sustainable forest management; (iv) encourage private and public investment in forestry; (v) conserve forest ecosystems; and (iv) improve the quality of life of communities through forest products.

The Forestry Law created INAB (Art. 5) as an autonomous body, attached to MAGA, to manage the 48% of Guatemala's forests that are found outside of Protected Areas and mandated INAB to set up an incentive program for reforestation and natural forest management. The Law guarantees INAB's funding from a number of sources and regulates the composition of the board of directors. Together this has helped make INAB a solid institution that is less prone to politicized management than some others in the executive branch.

Art. 46 imposes a general prohibition on change of use from forests of greater than 1 ha without permission from INAB. This must either be accompanied by a technical report stating that the land is not appropriate for forestry or by an agricultural management plan stating that it is appropriate for economically sustainable agriculture (the owner will then have to pay INAB the relevant fee for change of use or reforest an equivalent area). Art. 43 creates a general obligation to restore illicitly cleared forest cover within two years. INAB can also grant concessions over State forests outside of Protected Areas to Guatemalans and should give preference to bids from community organizations.

For all harvesting or sustainable forest management, the owner is required to prepare a Management Plan which is then approved by INAB with a license (Art. 49). Where the owner wishes to prove that the land is

appropriate for forestry (for reforestation) or not (for land use change) they must also provide a detailed soil study to INAB.

The Forestry Law has been heavily criticized by indigenous and community organizations for its technocratic focus on regulating and incentivizing management by individuals and businesses and neglecting the role of communities in collective resource management (Larson & Barrios 2006).

2.2.4 Types of Forest Managers

Different stakeholders manage forests at a variety of scales. Three groups/approaches are particularly important to examine in the context of REDD+: traditional community forests management approaches; municipal decentralized forest management; and forest management by smallholders. Each of these groups will facing different challenging in effectively participating in REDD+ and it is important to understand the challenges that each group faces.

(A) Traditional Community Natural Resource Management

Over 99% of Guatemala's indigenous population (and therefore much of the rural poor) belong to one of the 22 peoples of Mayan decent. Land plays a central role in the Mayan cosmovision and was traditionally managed communally by *calpulli* – community organizations based on lineage that were responsible for raising and paying tribute to the *chinamit* or city-state (Elias et al 2008).

This tradition has persisted in the community management of communal and municipal *ejidos*, particularly in the Western Highlands, and has provided the cultural context for more modern forms of community natural resource management like cooperatives. It is also the origin of the parallel system of community/indigenous authorities (local user committees, Indigenous Mayors, Indigenous Councils) that exist alongside the municipality and the system of Development Councils that by law forms the main mechanism for participation in Guatemala.

(B) Decentralized Forest Management through Municipalities

The Peace Agreements recognized the need to increase participation and decentralize public administration. This was given effect by the 2002 Municipal Code, which gave the (currently) 337 municipalities increased autonomy, including in: a) safeguarding territorial integrity, strengthening economic patrimony, and preserving natural and cultural patrimony, and b) promoting effective, voluntary, and organized participation in resolving local problems (Ferroukhi & Echeverria 2003).

The Constitution guarantees municipalities 10% of the national budget in transfers (the highest percentage in Central America). However, their capacity to raise additional local revenue is limited. This makes the financial participation in the forestry sector established by the Forestry Law interesting to municipalities, as they receive 50% of the value of licenses (Art. 30) issued by INAB for harvesting within their jurisdiction and have the authority to approve harvesting of up to $10m^3$ (Art. 54).

As of the end of 2013, there are 86 municipal forestry incentive projects, 11 implemented through PINFOR and 75 through PINPEP (INAB 2014b). As well as representing a rare opportunity for municipalities to raise revenue locally, these are attractive as the incentives enter as unrestricted funds and because by law the State matches a certain percentage of locally-raised income.

Over time many communal forests have been registered in the name of municipalities. There is a wide spectrum of shared management responsibilities of these *ejidos* with local communities, from complete delegation to communities to complete exclusion of them and everything in between (Ferroukhi & Echeverria 2003). Nevertheless, if the land is titled to the municipality they are under no obligation to involve traditional authorities in its management. The Municipal Council alone can take the decision to enter forest into a forestry incentive scheme or to declare it a Municipal Regional Park, a form of Protected Area, both of which can significantly impact community use rights (Elias 2012).

Over 228 municipalities (S. Santizo 2014, pers. comm., 28 January) have now established Municipal Forestry Offices (OFMs). This model initially emerged as a good practice from German cooperation projects and is promoted by the BOSCOM project within INAB, in coordination with the forestry office of the Association of Municipalities (ANAM). The aim of the OFM model is to increase the technical, administrative, and financial capacity of municipalities to manage their natural resources (Ferroukhi & Echeverria 2003), increasing participation and giving greater responsibilities to municipalities instead of INAB. This provides a potential partner for local level REDD+ engagement.

As Larson and Barrios (2006) observe, however, increasing local government participation in natural resource management does not necessarily benefit marginalized and vulnerable populations and has not done so in Guatemala. Forestry and decentralization policies have not taken historic community land use and management rights into account and have therefore reinforced State and elite power over land and resources to the detriment of customary rights holders. This has created conflict (See Section 0) when municipal administrations have exerted control over forests that formally belong to them but that have traditionally been managed by communities (Ferroukhi & Echeverria 2003).

(C) Smallholders

A number of provisions aim to reduce the administrative burden on families and smallholders: Communities or smallholders can group together to apply for licenses and smallholders can use a simplified management plan format (though it must still be signed off by a forestry expert). The Regulation establishes that though family extraction of up to 15 m^3 per year does not require a full license, the family must nonetheless apply to INAB for a free of charge permission (Art 53)[8]. Municipalities often charge around US$1.3/$m^3$/year to authorize extraction, though the majority – circa 95% - of families do not pay (S. Santizo 2014, pers. comm., 28 January).

These provisions help reduce but do not eliminate the administrative burden; in practice the costs and difficulties associated with legal forest management present a powerful disincentive to smallholders to legalize forest extraction and limit the cost-effectiveness of entering small extensions of land into the forestry incentive schemes.

2.2.5 Conflicts within Municipal/Communal Forests

As described in Section (B), over time communal land and forests have often been titled in the name of the relevant municipality. Formal power over municipal assets lies with the mayor and the Municipal Council and they can make the decision to declare municipal forests as Regional Municipal Parks or enter them in to forestry incentive schemes without consulting traditional authorities. Furthermore, the formal mechanisms for consultation are the Community and Municipal Development Councils (COCODE and COMUDE), not the traditional community assemblies or indigenous councils. Generally speaking there are different degrees of co-administration between the municipal administration and the traditional community authorities but there is no obligation for the municipality to recognize them.

Two examples were identified of communities that have managed to obtain the return of communal lands and in each of those there were very particular circumstances that made it possible:

- Poptun Municipality (Peten). In 2007, after five years of negotiation, the Municipal Council agreed to return indigenous communal lands belonging to the community of Santa Cruz that it had taken over during the period of military dictatorships. The process was supported by the Research and Projects Center for Peace and Development (CEIDEPAZ), the Norwegian foreign ministry and the Land Affairs Secretariat (SAA) (Wessendorf 2008).

[8] Municipal administrations that have signed an agreement with INAB can authorize the extraction of up to 10m3/year/family within the urban area and up to 15m3/year/family in the rest of the municipality.

- El Chilar Community, Palin Municipality (Escuintla). In 2011 the Mayor of the Municipality and the majority of the Municipal council were members of the indigenous community. The indigenous community, supported by the NGOs Ut'z Che, CEIDEPAZ and the Rights and Resources Initiative (RRI), made the most of this favorable circumstance and negotiated with the municipality to buy back part of its traditional communal property (UTZ CHE 2011).

However in general municipal administrations are unwilling to relinquish land and the power and ability to influence voting that it gives them. The case of the communal forests of Totonicapán is illustrative in this regard. There the community structure of the 48 cantons has continually managed the communal forest since before the Spanish conquest and still hold the title deeds given to them by the Spanish Crown. However title was registered in the name of the municipality for safekeeping and the municipality now refuses to transfer it back to the community.

The implementation of REDD+ creates risks that a municipality could enter land into a forestry incentive scheme without community consent, restricting community use rights while retaining the financial benefit. However, if REDD+ governance frameworks recognize this risk, opportunities exist to develop agreements that introduce or solidify community/municipal co-administration, allowing communities to participate in benefits even if they don't hold title.

2.2.6 Forestry Incentives Compared

Given that the three forestry incentive programs, PINFOR, PINPEP and *Probosque*, are likely to be the at the center of an inclusive REDD+ approach to reach potential beneficiaries, the following section examines how resource tenure issues are considered within these programs

(A) Eligibility and Tenure

PINFOR

The 1996 Forestry Law mandated INAB to set up and administer the National Forestry Incentive Program (PINFOR) for a period of 20 years with guaranteed funding of 1% of State income. The program expires in 2016. It is open to Owners (*Propietarios*) of at least 2 ha of land and 80% of the incentives are earmarked for plantations/reforestation and 20% for natural forest management.

PINPEP

The Incentive Program for Small Possessors of Forest or Agro-Forest Land (PINPEP) Law was passed in 2010 with guaranteed funding of between 0.5% and 1% and no legislated end date. It is open to Possessors (*Poseedores*) of small extensions of between 0.1 ha and 15 ha without registered land title but not those who have invaded or usurped land. Organized groups can hold more than 15 ha, provided that any one individual does not hold more than 15 ha. The PINPEP Law Regulation (Art. 9) specifically permits projects inside Protected Areas (subject to approval from CONAP).

The mayor of the municipality in which the property is located should certify Possession in order for a Possessor to access PINPEP. That effectively makes the mayoral certification act as the "Equitable Title" required to prove Possession (see Section (C)) and not all mayors have been prepared to take on this responsibility. In Coban Municipality (Alta Verapaz Department) for example, the mayor refused to certify possession at all in 2013, because he was not prepared to assume personal responsibility for legitimizing possession.

An inconsistency between the PINEP Law and its 2011 Regulation has created another issue around possession. The PINPEP Law refers to the person; they are a Possessor if they do not hold title to a property. The PINPEP Regulation, however, refers to the property; Art. 21 excludes "Properties with legal title entered in the Property Register". This has the effect of making Possessors of registered properties ineligible, particularly an issue in relation to Possessors of registered municipal land and those of properties that were registered many years (often hundreds) of years ago but never occupied by the registered owner.

Probosque

Probosque is a proposed law that would create a new forestry incentive program of the same name to replace PINFOR after its expiration in 2016. All analysis of *Probosque* in this document is based on the 10 September 2013 draft of the law. This may be amended during its passage through Congress and there is no guarantee that the law will be passed at all. Like PINFOR, *Probosque* would have a guaranteed budget of 1% of State income. The minimum area for incentives would be 0.5 ha and no single participant would be able to receive more than 3% of the total incentive amount.

It would be open to: "(a) private land owners, including municipalities; (b) social groups with legal personality that occupy municipal land by virtue of a legal arrangement; (c) tenants of National Reserves; and (d) duly represented cooperatives, indigenous groups, or other forms of communal or collective tenure of rural property, that has belonged to them historically and that they have traditionally administered in a special way" (Art. 8).

Specifically excluded are: (1) usurped or squatted lands without "Equitable Title;" (2) areas of mandatory plantations or reforestation under the Forestry Law; (3) land or forests that have previous benefitted from this or any other forestry incentive; and, (4) forest or natural resource concessions. In general this represents a considerable and welcome expansion in eligibility from PINFOR with its strict requirement for registered legal title (Art. 8).

Criteria (b) is designed to allow communities to propose *Probosque* projects over traditional lands that have been titled in the name of the municipality. It would, however, require written agreement from the municipality and traditional authorities would not be eligible unless they have formalized their organization. The formulation is similar to that of a "Possessor" but the draft law does not make this explicit.

Criteria (b) would apply *inter alia* to State mangroves (administered by OCRET) that have been rented to community organizations.

Criteria (d) is clearly designed to favor indigenous and *campesino* organizations. However it doesn't explicitly link eligibility to a category of tenure and when read together with the exclusions it looks it is hard to see which communities would be eligible under (d) that would not already have been eligible either for PINFOR or PINPEP.

FIGURE 9: OVERVIEW OF ELIGIBILITY AND MODALITIES OF PINFOR, PINPEP, AND *PROBOSQUE*

Program	Eligibility by Tenure Type	Limits on Project Size	Modalities	Limits on Allocation	Budget as % of National Income	INAB Admin Fee
PINFOR	Owners – YES Possessors – NO Occupiers – NO	Min: 2 Ha Max: 1% of PINFOR budget	• Rapid harvest plantations (3 years) • Slow harvest plantations (6 years) • Natural regeneration (6 years) • Plantations for latex (1 year) • Biomass plantations (3 years) • Plantations for seed banks (6 years) • Management of natural forest for production (5 years) • Management of natural forest for protection (10 years)	20% protection 80% plantation	1%	9%
PINPEP	Owners – NO Possessors – YES Occupiers - NO	Min: 0.1 Ha Max: 15 ha (per family if collective project)	• Plantations (6 years) • Agroforestry systems (6 years) • Management of natural forest for production (10 years) • Management of natural forest for protection (10 years)	None	0.5%-1%.	15%
Probosque	Owners – YES Possessors – SOME • Cooperatives, indigenous groups or other forms of historic communal or collective tenure of rural property with traditional administration • Social groups with legal personality that occupy Municipal land by virtue of a legal arrangement Occupiers - SOME • Tenants of National Reserves	Min: 0.5 Ha Max: 3% of *Probosque* budget	• Establishing and maintaining industrial plantations (6 years) • Establishing and maintaining biomass plantations (6 years) • Establishing and maintaining agro-forestry systems (6 years) • Managing natural forest for production (10 years) • Managing natural forest for protection and ecosystem services (10 years) • Restoring degraded forest (10 years)	None	1%	20%

Sources: PINFOR Regulation 2010, PINPEP Regulation 2011, and September 2013 draft of *Probosque*

(B) Benefit Distribution[9]

PINFOR

Between 1998 and the end of 2013, PINFOR supported 8.059 projects for a total of 337,572 ha and US$203 million. It incentivized the reforestation (mainly plantations) of 114,296 ha and the management of 219,412 ha of natural forest (89.5% protection). Subsidies have totaled approximately US$203 million.

PINFOR has large numbers of small low value projects and a small number of large high value ones that receive much of the incentives. Individual projects below 2 ha make up 19.8% of the total number of projects and receive 3.43% of the resources. At the other end of the scale, business projects above 90 ha make up 2.63% of the projects, have an average size of 219 ha and receive 11.5% of the resources. This is coherent with the program's aim of covering the greatest possible area at the least cost.

PINPEP

Between 2007 and the end of 2013, PINPEP has supported a total of 8,154 projects for a total of 29,243 ha and US$21.4million. Individuals make up the bulk of participants at all size ranges and receive the bulk of the incentives (92% of all projects, 82% of all incentives). In contrast with PINFOR, the restricted size range of PINPEP projects means that there is a strong correlation between the number of projects financed and the total value of incentives within each size range.

In 2012, PINPEP financed the management of 7,733 ha in 2,006 different projects with US$5.27million, whereas PINFOR financed the management of 15,501 ha in 405 projects (albeit some presented by cooperatives made up of many smaller land holders) with US$13.87million. This makes PINPEP particularly interesting as a potential mechanism for distributing benefits under future national REDD+ schemes (REDD DESK 2013).

Probosque

The draft law would create a new Forestry Fund (FONABOSQUE) to manage program funds, including "income from administering compensation for ecosystem services," implying that it would be able to trade in emissions reductions

(C) Gaps in Coverage by Property Rights Holder

Currently

Currently the combination of PINPEP and PINFOR mean that the following property rights holders cannot benefit from either modality:

- Owners with registered title to less than 2 ha of land (unless they associate);
- Possessors of land registered in the name of another. This particularly affects:
    - Possessors of registered Municipal land, living there long term with Municipal permission; and
    - Possessors of land that was registered a long time ago but never occupied by the original Owner who is now untraceable;
- Possessors of more than 15 ha (unless project represents multiple beneficiaries, none of which individually has more than 15 ha);

[9] All calculations based on INAB 2014b unless stated otherwise. Amounts are approximate and were converted at US$1=Q7.7.

- Occupiers of land including usufructaries, tenants, and concessionaries (though OCRET and PGN in 2012 set a precedent in 2012 in respect to mangroves that the State as Owner can certify an Occupier as a Possessor for purposes of participating in forestry incentives – see section 2.1.3(C)); and

- Customary rights holders.

As can be seen from FIGURE 1 (below), incentives/ha are significantly higher below 5 ha than above, presumably to compensate for the higher proportion of income that will be absorbed by fixed costs for smaller projects. However PINPEP does not include a similar increase for areas below 2 ha or even below 0.5 ha. This has a regressive effect in terms of the amount the smallest participants will receive. A smallholder with 0.1 ha will receive just US$37 per year for natural forest protection and a forestry expert will charge between US$52 and US$91 just to prepare the management plan (J. Asig 2014, pers. comm., 3 February).

Under Probosque and PINPEP

Registered Owners of small areas of land (between 0.5-2.0 ha) are currently ineligible for PINFOR but would be eligible for *Probosque*. Registered Owners of less than 0.5 ha would remain ineligible.

Looking at the distribution of the smaller PINPEP projects gives an indication of how significant this is likely to be. In PINPEP 29% of all projects smaller than 2 ha are smaller than 0.5 ha. On the basis that registered individual plots are unlikely to be smaller on average than unregistered individual plots, this implies that approximately 70% of Owners of registered parcels smaller than 2 ha would be eligible to benefit from the change from PINFOR to *Probosque*[10].

In the context of the ongoing Registration and Cadaster process, the idea is to regularize Possessors into Owners. As smallholder Possessors of between 0.1-0.5 ha receive registered legal title, they would pass from being eligible for PINPEP as Possessors to being ineligible as Owners for either PINPEP or *Probosque*. To the extent that they had already benefitted from PINPEP this is a moot point, since *Probosque* will not be open to those that have already received a forest incentive.

As mentioned above, it looks likely that the specific inclusion of communal and traditional tenure in *Probosque* would only benefit communities that were already eligible for PINPEP.

The real questions around the transition from PINFOR to *Probosque* are not so much around eligibility in tenure terms but rather around who would end up benefiting in practice. In that respect the increase in the maximum size of project from the 1% of total PINFOR budget to 3% is a potential cause for concern, as is the lack of any floor on the proportion of the budget that must be spent on natural forest management.

(D) Balance between Modalities

FIGURE 10: CUMULATIVE DISTRIBUTION OF FUNDS BETWEEN DIFFERENT MODALITIES FOR PINFOR AND PINPEP

	Plantations / Reforestation	Natural Forest Protection	Natural Forest Production	Regeneration (PINFOR) Agroforestry (PINPEP)	Total
PINFOR	77.4% (US$158.3 million)	19.3% (US$39.4 million)	1.7% (US$3.5 million)	1.5% (US$3.1 million)	US$204 million since 1998
PINPEP	9.4% (US$2 million)	78.1% (US$16.7 million)	6.7% (US$1.4 million)	5.8% (US$1.2 million)	US$21.4 million since 2007

Source: INAB 2014b. All amounts are approximate only; converted to US$ at an exchange rate of US$1=Q7.7

[10] Calculations based on INAB 2014b

As seen in FIGURE 10**: CUMULATIVE DISTRIBUTION OF FUNDS BETWEEN DIFFERENT MODALITIES FOR PINFOR AND PINPEP**, PINFOR has overwhelmingly financed plantations; indeed under the Forestry Law 80% of its budget is allocated to them. Since PINFOR has been running longer and with bigger budgets than PINPEP this means that the majority of Guatemala's incentives to date have gone to plantations. PINPEP has equally strongly favored natural forest protection. The category that has received least from both programs is natural forest management for production.

As FIGURE 1 shows, incentives under PINFOR and PINPEP are the same. They are slightly more generous for natural forest production than protection but this is not enough to offset the additional work that preparing a management plan requires, particularly from the perspective of forest expert that will advise the participant in the field. This has the effect of creating a systemic bias towards natural forest protection over management. Given the level of unsustainable extraction from forests, both for timber and for firewood and taking into account the National Firewood Strategy, this is arguably the opposite tendency to the one that Guatemala should be promoting.

FIGURE 1: INCENTIVES OFFERED BY PINFOR AND PINPEP FOR NATURAL FOREST MANAGEMENT

	US$ per hectare per year			
	Natural Forest Protection		Natural Forest Production	
	PINFOR	PINPEP	PINFOR	PINPEP
Below 5 ha.	375	375	401	401
5-15 ha	96	96	112	112
15-45	65	N/A	10	10
45 upwards	58	N/A	58	58

Source: http://www.inab.gob.gt/ Amounts converted to US$ at US$1=Q7.7

INAB counts beneficiaries for each of its program, but appears to use different methodologies: PINFOR projects of between 2 ha and 5 ha where the participant is classified as "individual" are stated to benefit an average of 12.3 beneficiaries each, while PINPEP projects of the same size and beneficiary category are only stated to benefit 6.3 people per project (INAB 2014b).

(E) Risk of Reversals

Plantation incentives end after six years, long before the plantation reaches a productive age. Receipt of an incentive for plantations does not create an obligation to maintain the plantation in the future. Furthermore, properties that have received an incentive are ineligible to benefit again from PINFOR, PINPEP or *Probosque*. This creates a dangerous window of around 10-15 years where Owners/Possessors of plantations could be tempted by alternative land uses.

The PGN emitted a legal opinion (1 June 2012) according to which INAB cannot issue harvesting licenses over forest that has formerly benefitted from an incentive for natural forest protection. This legal opinion is not widely known about outside of INAB and has the effect of reducing even further the potential for natural forest production. It could disproportionately impact participants towards the smaller end of PINPEP project sizes who will be least able to afford retaining unproductive forests.

(F) Budgets[11]

The laws creating the forestry incentive programs set a minimum financial allocation as a percentage of State income, but this does not mean that they actually receive that amount. Earmarking public spending is a common technique in Guatemala; adding up commitments made in the Constitution and in other legislation,

[11] All calculations based on INAB 2014b unless stated otherwise. Amounts are approximate and were converted at US$1=Q7.7.

a full 90.4% of State income was pre-allocated in 2011 (MINFIN 2011). This leads to a constant pressure on allocated budgets to meet new demands and a tacit acceptance in Congress that not all legislated commitments will be met.

In 2013, the general budget was US$8,699million (MINFIN 2013) meaning that the PINFOR budget of US$16.6 million represented 0.19% and the PINPEP budget of US$8.4 million represented 0.1%[12]; i.e. both programs received approximately one-fifth of their legislated minimum budgets.

In November each year, Congress approves the national budget for the following year. For 2013, INAB agreed with the Finance Ministry that funds for the incentives would be received in five installments (3 for PINFOR and 2 for PINPEP) payable as follows: August - PINFOR 1; September – PINPEP 1, October - PINFOR 2, and November PINFOR 3 + PINPEP 2.

Each of the PINPEP installments was to be approximately US$3.2million each, however due to liquidity problems the Finance Ministry proposed reducing the PINPEP 1 payment to just US$1.9million and making up the rest later. This led to PINPEP beneficiaries marching on Congress and demanding that the entirety be transferred immediately (a demand that was conceded).

For 2014, the budget request for PINPEP is for US$15.6 million (almost double the budget in 2014). However Congress is stalemated and has not approved the 2014 national budget. If this stalemate continues, by default PINPEP will receive only the 2013 budget allocation – meaning that many projects approved in 2013 will not receive their first payment.

This is highly relevant to REDD+ for two reasons: Firstly because it shows the level of mistrust that many smallholders still have in the political process. If INAB is unable to meet its 2014 commitments, there is a risk of further public protests to secure payment. Secondly, it demonstrates the difficulty Guatemala has in guaranteeing budget allocations to its incentive programs; allocations far below legislated minimums would have huge consequences in terms of the additionally of a potential ER program.

Issues with budget allocations affect PINFOR too. Where the allocation is insufficient to meet all commitments, the INAB board decides which incentives to pay. There is a feeling among community organizations that the composition of the INAB board leads it to prioritize large landowners over smaller or community projects.

2.2.7 Enforcement and Illegality

INAB is in charge of ensuring compliance with the Forestry Law in the field. The Nature Protection Division (*División de Protección de la Naturaleza* or DIPRONA) is the branch of the Police in charge of protecting natural resources; the Environmental Crimes unit of the Public Ministry is in charge of prosecutions.

Illegality is rife, however, with estimates and studies consistently suggesting that between 90% and 95% of all wood harvesting in Guatemala is carried out illegally, or at least without complying with all the criteria to be legal. The main drivers of the illegal extraction of forest products are high demand, administrative processes which make it difficult to participate in legal forest management, a market in illegal forest products, and low institutional capacity to control and prosecute illegal activities (URL-IARNA 2009).

In Petén there is a shortage of hardwood timber since most of the production from the concessions goes to the export market. However, even when offered locally, little is bought since it costs 50% more than illegal timber. A 2009 study by URL-IARNA shows police and judicial corruption to be a serious issue; a case study on illegal extraction in the Western Highlands describes bribes for everything from small payments at checkpoints to pass legal shipments through to much more significant ones to prevent prosecutions advancing to the next stage.

[12] Calculations based on INAB 2014b and MINFIN 2013

A 2012 study on the use of firewood revealed that only 0.4m tonnes (or 2.5%) of the estimated 15.7m tonnes of wood that are burned each year for energy are covered by extraction permits (Larrañaga & Marco 2012).

Another consequence of the very high rates of illegality/informality in forest harvesting is that official statistics on the forest sector are of questionable utility. For example SIFGUA shows that coffins represent 5% of wood use in Guatemala (INAB 2013), which represents the distorting effect of having a large coffin manufacturer as one of the few legal businesses.

2.3 PROTECTED AREAS MANAGEMENT

The 1989 Protected Areas Law and its 1990 Regulation provide the legislative framework for the protection and management of the Guatemalan System of Protected Areas (SIGAP), which includes 31% of the country's area and 52% of its forest. The Protected Areas Law created CONAP to coordinate the management of the SIGAP; with time CONAP also assumed direct management of some Protected Areas, giving it a hybrid role. Unlike INAB, CONAP has no way of raising its own resources and is chronically underfunded. In 2009 it received just US$5 million to administer the entire SIGAP. The income-producing potential of REDD+ in Protected Areas is therefore particularly interesting to CONAP. CONAP is less well insulated from politics than INAB; for example, its director is a direct Presidential appointee (CONAP 2009).

As can be seen from FIGURE 12**: PROTECTED AREAS ADMINISTRATION BY NUMBER AND EXTENT OF TOTAL PROTECTED AREAS**, the majority of the 321 Protected Areas in the SIGAP are privately managed, but CONAP manages by far the greatest area. Partly because of resource constraints, CONAP has entered into a number of co-management agreements with large NGOs to administer national Protected Areas too. This is the case for example in the Sierra la Lacandón National Park and the Sierra de la Minas Biosphere Reserve (both slated as REDD+ Early Initiatives), which are co-administered by CONAP and FDN. The administrator of each Protected Area must prepared a Master Plan, which will govern the management of the area and must be approved by CONAP. A 2012 document sets out the guidelines to follow when preparing these Master Plans.

FIGURE 12: PROTECTED AREAS ADMINISTRATION BY NUMBER AND EXTENT OF TOTAL PROTECTED AREAS

Administrator	Number of Protected Areas	% of Total Extent of Protected Areas
CONAP	58	73.2
San Carlos University Botanical Gardens (CECON-USAC)	7	3.5
Institute of Anthropology and History (IDAEH)	7	4.6*
INAB	4	
NGO-CONAP co-administration	10	15.6
Private	169	1.8
Municipalities	65	1.3

Source: CONAP 2013
*Data does not permit discriminating further

In practice there is significant human presence in Protected Areas, from traditional indigenous communities to legal landowners and recent encroachment. An estimated 80,000 people live in the Sierra de las Minas Biosphere Reserve for example, where 48% of the total area is dedicated to agriculture (FDN 2010).

CONAP can establish concessions in Protected Areas (as it has done in the area of the Mayan Biosphere Reserve making up the GuateCarbon Early Initiative project area) and may rent extensions of Protected Areas (Regulation Arts. 27 and 45).

2.3.1 Protected Areas Zoning and Private Property

Three key factors determine the legality of private property inside Protected Areas and the therefore the eligibility for REDD+ benefits: (i) whether or not the settlement or private property pre-dates the declaration of Protected Area status; (ii) the category of Protected Area and the internal zoning given to its parts; and (iii) the approach taken by CONAP to the property/human settlement.

The rest of this section looks at the situation of human settlements as a proxy for all private property within Protected Areas; though isolated properties also exist and are subject to the same legal regime.

(A) Private Property Predates Declaration

The declaration of Protected Area status is compatible with pre-existing private property rights, but the wording used in the Protected Areas Law is contradictory: The "Owner will fully retain their rights over the [private property]" but "will have to manage it in accordance with the rules and regulations of the SIGAP" (Art. 10) and "must conform their continued presence within it to the conditions, rules of operation, use and zoning of the area, so as incorporate themselves into its planned management" (Art. 22). Despite the wording of Art. 10 it therefore appears that pre-existing property rights are modified by the declaration of protected area, though exactly how is unclear.

As discussed above at Section (A), the defining characteristic of "private property" is that it have registered legal title. However many of the private landholdings that predate the declaration of Protected Area status are unregistered. In its successive policies on human settlements in protected areas, CONAP differentiates between "Old Settlements", which predate the declaration of the Protected Area (backed up by evidence) and "Recent Settlements", which post-date the declaration or are not proven to be Old Settlements. Examples of the kinds of evidence that would prove age of settlement include population census data or regularization processes began before the declaration. Each Master Plan should give examples of the proof (Art. 6.4, CONAP 2004).

(B) Zoning

There is a confusing overlap between the different management and zoning categories in Protected Areas. The starting point is the classification in the 1989 Protected Areas Law (Art. 8 names 16 different types of Protected Area) and its 1990 Regulation (which classifies them into six categories based on IUCN's management categories).

Each Protected Area (whatever its category) is then internally zoned in its Master Plan (PA Law Art. 18) and all should have a buffer zone (though the law is contradictory as to whether this forms part of the Protected Area (Art .4) or surrounds it (Art. 16)). This means that a given polygon within a Protected Area might be subject to strict protection by virtue of its category, but zoned for sustainable use according to its Master Plan.

The situation is more complicated in relation to the Mayan Biosphere Reserve (RBM), which contains ten Protected Areas within it. The National Parks within the RBM constitute core areas of the RBM and yet are also subject to their own internal zoning. Furthermore, according to the Protected Area law they should each have a buffer zone, yet cannot because they are also categorized as core areas of the RBM and are surrounded by the Multiple Use Area of the RBM.

CONAP currently has three policies on human settlements: a National Policy (cited as CONAP 1999), which is under revision, and two regional policies (the "Regional Human Settlements Policies") for Petén (cited as CONAP 2002) and the Verapaces (cited as CONAP 2004).

The Regional Human Settlements Policies group all the management categories into three types (strict protection, restricted use, and sustainable use/buffer area). As of January 2014, CONAP is working on an additional policy for Izabal.

The most recent document on the subject, the 2012 Guidelines on Preparing Master Plans, identifies nine different management categories and states that human settlements are a key problem and that more information is required. However, it neither adopts the three categories used by the Regional Human Settlements Policies nor addresses how human settlements should be handled in the different management categories that it does use.

The rest of this section uses the categories from the two Regional Human Settlements Policies as a framework to analyze the treatment of human settlements and tenure in different zones of Protected Areas.

Strict Protection Areas

The 1990 Protected Areas Law Regulation categorizes areas like core areas and National Parks for "strict protection", yet the Regional Human Settlements Policies categorize them as "restricted use." This appears to be a pragmatic acknowledgment that with the level of human settlement within National Parks and the core areas, it is unrealistic to include them as a rule of thumb in the strictest category of management. The Regional Human Settlements Policies reserves this only for Protected Biotopes, Monuments, and core areas according to the Relevant Master Plan. However this would appear to contradict the Protected Area Law Regulation.

In practice the legal protection of pre-existing private property represents a serious limitation on CONAP's ability to enforce strict protection. The majority of the Sierra de las Minas Biosphere Reserve core area for example is private property (FDN 2010). Furthermore, CONAP lacks the resources necessary to prevent encroachment into Protected Areas so in order to deter them is loath to regularize settlements, particularly in areas zoned for strict protection. This creates a gulf between the legal situation of human settlements in Protected Areas on paper and the reality on the ground.

Buffer Zones and Sustainable Use Areas

At the other end of the spectrum, the Buffer Zones have the least restrictions on use. A confusion arises here in relation to "Sustainable Use Areas": the Regional Human Settlements Policies group Buffer Zones and Sustainable Use Zones together as the least strict management category. However, the Protected Areas Law Regulation groups Sustainable Use Area and Multiple Use Area together, implying that they are subject to a stricter level of protection.

This confusion is of particular significance because an important part of Petén's forest is within the Multiple Use Area of the RBM and the Land Fund Law (which provides the framework for titling state lands) will not apply in "Protected Areas…. [and] in no case may it be applied in Core Areas or their Multiple Use Areas declared by the Protected Areas Law." (because Art. 45). If Sustainable Use Areas are subject to the same degree of protection as Multiple Use Areas, Art. 45 would have the effect of prohibiting regularization of State land there (and leaving the situation relating to Buffer Zones unclear) even though according to the Human Settlements Policies, Buffer Zones and Sustainable Use Areas should be treated in the same way.

In practice FONTIERRAS always seeks the opinion of CONAP before regularizing title in a Protected Area and CONAP's current policy is to only green light processes in Buffer Areas that had begun before the declaration of Protected Area (J.C. Funes 2014 pers. comm., 27 January).

Restricted Use Areas

Everything else, including multiple use areas, is classified as Restricted Use. Here, the tolerance of Old Settlements, but at the same time the prohibition on titling, creates a situation of legal uncertainty.

(C) Approach Taken by CONAP

According to the 1999 National Human Settlements Policy social incentives should be non-existent for human settlements within Strict Protection Areas and greater outside to encourage resettlement. While the intention is understandable, it is likely to be unconstitutional to provide no social services to legal private property within Protected Areas. It also implies that CONAP would not allow them to access forestry incentives.

The Protected Areas Human Settlements Policy for the Verapaces outlines five potential approaches that CONAP can take to human settlements (Art. 6.5) based on a combination of the zone they are in and how long they have been there. FIGURE 13**: OPTIONS AVAILABLE TO "OLD" AND "RECENT" HUMAN SETTLEMENTS IN PROTECTED AREAS** shows which approaches are applicable to which situation, using the three broad categories identified in the Regional Human Settlements Policies.

FIGURE 13: OPTIONS AVAILABLE TO "OLD" AND "RECENT" HUMAN SETTLEMENTS IN PROTECTED AREAS

Human Settlement Policies Categories	Old Settlements	Recent Settlements
Strict Protection	• Voluntary resettlement • Failing that: Regulation of presence by "Cooperation Agreement"	• Voluntary or negotiated exit without relocation • Legal action for eviction
Restricted Use	• Regulation of presence by "Cooperation Agreement"	• Voluntary or negotiated exit without relocation • Legal action for eviction
Sustainable Use/Buffer Areas	• Regularization of land ownership by FONTIERRAS (land titling) • Set up Management Units (may be community, business, institutional or special)	• Regularization of land ownership by FONTIERRAS (land titling)

Source: Human Settlements Policies (CONAP 1999, CONAP 2002, CONAP 2004)

CONAP uses "Cooperation Agreements" to regulate the permanence of Old Settlements in Protected Areas. These are contracts based on soil and environmental impact studies that zone the property by mutual agreement according to permitted activity.

The Protected Areas Law is self-contradictory on these agreements (at least when read literally): On the one hand the Protected Area Law and its Regulation set out management categories in which no human settlements are allowed. On the other hand pre-existing private property rights are recognized and Art. 24 of the Protected Areas Law requires that they be regulated by contract. This contradiction has led to confusion within CONAP over the legality of Cooperation Agreements and their slow adoption. In the Sierra la Lacandón National Park, for example, of the 11 communities that predated creation of the park only three have signed Cooperation Agreements with CONAP (CONAP and FDN 2012).

FIGURE 14**: MOST SECURE TITLE OBTAINABLE BY SETTLEMENTS IN PROTECTED AREAS** illustrates the effect of the laws discussed above on the different classes of Human Settlement in Protected Areas in terms of the most secure tenure that they can currently attain. The legal uncertainty of Old Settlements without registered title is again apparent. Art. 45 of the Land Fund Law clearly bars them from obtaining registered title, but the Human Settlement Policies make it clear that they will not be evicted like Recent Settlements.

FIGURE 14: MOST SECURE TITLE OBTAINABLE BY SETTLEMENTS IN PROTECTED AREAS

	Old Settlement - Title predates declaration	Other Old Settlements	Recent Settlement
Strict Protection	Owner	Uncertain	None
Restricted Use	Owner		None
Sustainable Use/Buffer Areas	Owner	Owner in Buffer Areas Uncertain in Sustainable Use Areas	Owner

Given that non-titled Old Settlements in Strict Protection and Restricted Use Areas cannot become Owners, it would seem reasonable that they should at least be Possessors – and therefore eligible to participate in PINPEP and with a right to own emissions reductions units (depending on the interpretation of "Legal Possessor").

As we saw in Section (C), in order to be recognized as Possessor, a person needs, inter alia, "Equitable Title." Logically this could take the form of the proof required by CONAP to be recognized as an Old Settlement or arguably, following the precedent set by OCRET with mangroves, could even take the form of the recognition itself.

However, currently CONAP has made participation in Early Initiative benefits conditional on signing a Cooperation Agreement, making the Cooperation Agreement function like Equitable Title. The tenure category of preexisting property in Protected Areas needs to be clarified, including the consequences of not reaching an agreement with CONAP for permanence; does CONAP recognize Possession or does it declare it? Before Protected Areas can effectively be integrated into REDD+ activities these tenure concerns must be unpacked.

The Human Settlements in the Verapaces Policy promotes cadaster and registration in buffer zones as a method of conservation. However, the experience in Petén shows that this in itself is ineffective when not accompanied by a concerted program of rural development, even leading to greater invasions of Protected Areas as newly-titled smallholders sell up and look for new land to occupy (see Section 0).

2.3.2 Conflicts Associated with Human Settlements in Protected Areas

Hundreds of thousands of people live inside Protected Areas in Guatemala covering the full spectrum of rights and legitimacy. As well as those whose rights predate the creation of the Protected Area, there are many new cases of encroachment. Furthermore, the lack of land redistribution and the demand for land has led to opposition among many *campesino* organizations to Protected Areas on the basis that they are a competing land use.

CONAP has the remit of resolving disputes over households within Protected Areas and over conditions to remain (in coordination with FONTIERRAS where it requires regularization). The Protected Area Law and its Regulation do not establish how it should to this and CONAP has developed its own mechanisms. These include Negotiation Roundtables, Management Units, and Cooperation Agreements to govern permanence.

The implementation of REDD+ creates the risk that the participation of a Protected Area in REDD+ could lead to increased control without compensation of illegal occupations that had hitherto been tolerated. Furthermore, a focus on tenure security as a criterion for benefits may mean that important stakeholders with an influence on deforestation are not taken into account.

Nevertheless, REDD+ Early Initiatives could help reduce conflict in Protected Areas if all impacted communities, whether legal or not, perceive a benefit from reducing deforestation. REDD+ may also provide an impetus to clarify tenure conditions and sign outstanding Cooperation Agreements.

2.3.3 Proposed Reforms to Protected Areas Legislation

At the time of writing there are two processes underway to amend the legal framework on Protected Areas.

Draft Regulation on Biodiversity and Protected Areas

CONAP is finalizing a new Regulation with extensive consultations that would replace the current 1990 Regulation of the Protected Areas Law (the September 2013 draft was reviewed for this report).

The regulation preserves the existing system of zoning (Art. 10) with a significant addition of a new "Community or Indigenous Collective Management Areas" management category. This new category is being introduced in response to social pressure and to give effect to Art. 67 of the Constitution. It intended to enable communities with a tradition of natural resource stewardship to register the area as a Protected Area without forfeiting their control. Nevertheless its effect will be limited since the declaration will require the consent of the landowner (along with that of the community) if the land is not already community owned. The regulation would also add "Prohibited Areas" to the category of strict protection.

It makes no major change to the regime governing human settlements (Art. 37) but includes a new provision to strengthen community management of Protected Areas (Art. 74). Though this is not co-administration, it does create new obligations on CONAP to create mechanisms for effective local participation (Art. 81), to recognize traditional knowledge and put policies in place to capture it (Art. 80).

The regulation would open up the potential for foreigners to become concessionaries in Protected Areas (Art. 31), give CONAP explicit mandate to raise finance, including from payments for environmental services (PES) (Art. 72) and oblige CONAP to spend income from a concession in the Protected Area from which it originates (Art. 33).

It would also introduce a new prohibition on non-renewable resource extraction from strict and restricted use categories including those resulting from relevant Master Plan (Art 39).

FIGURE 15: LAW MAKING IN GUATEMALA

The hierarchy of laws in Guatemala is as follows:

- The 1985 Constitution. This takes precedence over all international treaties or laws (Arts. 175 & 204);
- International human rights treaties. Art. 46 of the Constitution says these will take precedence over internal laws; this has been held to exclude the Constitution itself;
- Ordinary Laws (Leyes Ordinarias), passed by Congress;
- Specific Laws (Leyes Especificos), passed by Congress (e.g. the Forestry Law, Decree 7 of 1989); and
- Regulations (Reglamentos), passed by Institution with responsibility for the implementation of a law (e.g. INAB regulates the Forestry Law).

Not everything needs to be explained in each law, where a meaning is unclear, guidance can be sought from superior laws. Where a term is not defined at all, the definition in the Royal Spanish Academy Dictionary (DRAE) is used.

Congress can approve laws by simple majority (half votes plus one) or two thirds majority. When a law (like the 2010 PINPEP Law) is approved by a two thirds majority, a similar or greater majority is required to amend it.

Congress is highly polarized and subject to elite capture (Insight Crime 2011). On the basis that the result of the process might be worse than the starting position, this makes therefore makes many of the stakeholders consulted for this report wary of reopening Congressional debate on servable but improvable legislation like the Forestry Law and Protected Areas Law.

Draft Bill 4717 of 2013

This second initiative is harder to characterize. It is a revision to the Protected Area Law, rather than its regulation, and has already been lodged in Congress despite not having the support of CONAP. Overall the changes it proposes are quite slight, though with potentially significant consequences for the community concessions in the RBM since it would prohibit CONAP from granting new concessions or renewing existing ones unless they "unequivocally demonstrating a 20% increase in quality of life indicators of its members" (Art. 7). It would also ban introducing agricultural monocultures that definitively change an ecosystem under

the "principle or regime of protection" (Art. 9) and would introduce stiffer fines for damaging Protected Areas (Art. 17) and much longer prison sentences for those that invade them (with the longest terms reserved for the intellectual authors of the invasion (Art, 20)).

2.4 LAND USE LAW AND POLICY

The rate of population growth, quadrupling in size since 1960 to a current population of 15 million, has exacerbated the problem of the dichotomy between industrial *latifundio* y family *minifundio*. Large landholdings have remained the same size, whereas successive subdivisions for inheritance have left small impoverished plots that are less and less capable of sustaining families. Population growth means that Guatemala needs to run just in order to stand still in areas like malnutrition, poverty reduction, and land access. REDD+ is increasingly being applied as a framework to consider drivers of land use and land-use change both within and outside forests. This section considers broader land use policies beyond forests, and explicitly considers issues around land reform and land use and resource conflict in the context of REDD+.

2.4.1 Land Use

Guatemala's last agricultural census was carried out in 2003. It explicitly excluded forested land and recorded 830,684 properties covering 37,144km^2 or 34.1% of the country. The census revealed a Gini coefficient for rural property ownership of 0.84; with 67.5% of the properties covered just 8% of the land while the largest 1.9% of properties covered 56.6% of the land (INE 2004). The survey found that 85% of rural properties were individually owned, 11% by business (*sociedad de derecho*), 0.9% by unregistered business (*sociedad de hecho*), 1.8% by cooperatives, 0.1% by the State, 0.6% communally, and 0.6% other. In terms of the rural population surveyed, 52% lived on their own land, 19% rented land, and 29% had no land at all (URL-IARNA 2006).

This concentration of land and availability of cheap labor underpins Guatemala's export agriculture sector, but makes rural stability vulnerable to global price fluctuations. A crash in world coffee prices in 2010, for example, sparked a wave of occupations of coffee farms in Alta Verapaz Department by unpaid workers.

Different areas of the country present a variety of geographical, environmental, and social characteristics that drive land-use patterns. FIGURE 16**: KEY FOREST AND LAND USE CHARACTERISTICS OF THE FIVE SUBNATIONAL REGIONS** summarizes these in relation to the five subnational reference level regions set out in the R-PP[13].

FIGURE 16: KEY FOREST AND LAND USE CHARACTERISTICS OF THE FIVE SUBNATIONAL REGIONS

Region	Dominant Rural Land Use	Remaining Forest	Main Land Use Change Dynamics
South	Plantations (sugar and banana)	Mangroves	Gradual encroachment on mangroves by agri-business.
Central-East	Subsistence agriculture	Some dry forest	Extensive cattle ranching.
West	Subsistence agriculture, vegetables, coffee, cardamom	Municipal and communal forests	Subdivision of *minfundios*. Pressure on communal/municipal forests for resources/space.
Sarstún-Motagua	Coffee plantations. Palm and sugar	Private and State Protected Areas	Claims by workers on coffee farms for the land they work. Consolidation by palm and sugar businesses in flat areas, buying out newly titled smallholders.

[13] Since the focus of the R-PP is on ecoregions, the subnational reference levels bisect many of the administrative Departments. These are therefore not mentioned.

	entering Polochic Valley		Migration up from flat areas and new invasions of Protected Areas.
TBN	Cattle, subsistence agriculture.	State Protected Areas	Legalization by colonists of State land. Overlap with Protected Areas. Consolidation by cattle ranchers/palm growers of newly titled smallholders in south of department. Migration north and new encroachment of Protected Areas.

Pressures for land use and land-use change are focused on the subnational regions of Sarstún Motagua, which includes the Polochic Valley with some of Guatemala's most fertile soils, and the Northern Lowlands (TBN), which includes Petén and the Northern Transversal Strip (FTN). What happens in those two regions has a disproportionate effect on deforestation both because they have the largest extensions of forest and because their populations are relatively new and mobile.

The government promoted colonization in the FTN from the 1960s, as an escape valve for pressure for land reform. Construction of a new road traversing the FTN from Huehuetenango in the west to the Caribbean coast has led to rocketing land prices (increases of up to 1000%) leading to smallholders who were given individual land titles by INTA selling their land and leading to an expansion of cattle and palm cultivation (URL-INTRAPAZ 2009).

Industrial crops are increasing in coverage, as well. In 2012, sugar cane was grown on 235,000 ha (or 7.8% of the cultivatable area of the country). The majority of this is in the South Coast but in recent years it has expanded into the Polochic Valley previously known for its medium-size farms producing corn. In 2012, oil palm was grown on 100,000 ha, up from 58,000 ha in 2008 (Caballeros 2013). Furthermore, according to Alonso et al (2011), 58% of the area suitable for palm and 78% of the area that was sown with palm in 2010 was land in the Northern Lowlands that that had been colonized in the last 60 years.

The national land registration and cadaster program began in Peten with the intention of providing tenure security to the large indigenous population in the area. This opened up the land market, which quickly became dysfunctional with enormous inequalities in wealth and in the size of landholdings (INE 2013; INE 2003). In the absence of effective rural development policies that would help turn their newly-legalized property into a productive asset, approximately 30% of *campesino* smallholders sold their land within the next ten years (Zander & Durr 2011), predominantly to palm oil growers or large-scale cattle ranchers. There has been a particular increase in recent years in cattle ranching associated with drug trafficking (*narco-ganadería*), being used as an investment mechanism for money laundering, and a base for clandestine airstrips (Insight Crime 2011).

Many smallholders had originally obtained their land through occupation in the era of State-sponsored colonization. That era is now over since all land has either been distributed or declared as a protected area. However many do not know that and even if they do, they have few other option other to migrate northwards and occupy new land, often in Protected Areas.

2.4.2 Land Use Planning

Land use planning has not taken place at a national scale. Guatemala's last soil map dates from 1957 and is not comprehensive enough to underpin a rigorous system of national land use planning (G. Suarez 2014, pers. comm., 29 January). Under the Municipal Code (Art. 142) planning is primarily a municipal responsibility. Each municipality should develop its own Municipal Zoning Map (POM) for urban and rural areas based on soil studies. However these are expensive, and though a few Departments, for example Solola in the West, have finished soil studies (G. Suarez 2014 ibid), most Municipalities have focused their POM on urban areas where there is greater potential to raise revenue.

Guatemala's long-term planning document, K'atun 2032, prioritizes land use planning while the Climate Change Framework Law (Art. 12) calls for SEGEPLAN, MAGA, and MARN to support municipalities to zone their territories with a focus on climate change mitigation and adaptation.

2.4.3 Land Reform

Social pressure for agrarian reform was a significant driver both of the 1954 revolution and of the Guatemalan civil war. The 1996 Peace Agreements opted for a program of market-based land redistribution, the main elements of which were land titling and cadaster to define property rights and facilitate their exchange, the establishment of a land fund to loan *campesinos* money to buy land, and training and assistance so that they could pay back the loans.

Two new institutions were established for the this purpose: the Cadaster Information and Registration unit (RIC) to carry out land registration and cadaster and the National Land Fund (FONTIERRAS) to facilitate land access.

(A) FONTIERRAS

FONTIERRAS has three modalities: Access, Regularization, and Rental.

Access (Purchase)

The original intention was that FONTIERRAS would work as a revolving fund. However the land that it helped purchase was often overpriced and/or of a poor quality, and accompanied with insufficient investment in helping new landowners make productive use of the land they bought. This has led to slender returns to a fund that in any case had a low initial capitalization.

FONTIERRAS has had less impact than hoped. According to Gauster & Isackson (2007), during its first eight years of operation it financed the purchase of some 163,200 ha (4.3% of Guatemala's agricultural land in 2003 census) by 17,822 families compared to 625,000 ha to 137,500 families (16.8% of Guatemala's agricultural land according in 1950 census) in the two years of Arbenz's state-led redistributive land reform.

FONTIERRAS has had to pardon large amounts of debt and accumulated interest (SAA 2013) and has made welcome changes to its land access program in recent years, increasing the proportion of the purchase price it contributes as a subsidy and the support it provides to productive activities. However this ends up being more expensive on a per-family basis, impacting further the level of coverage. FONTIERRAS can pay up to market rate for land and limits the area per family. Land purchased may have no more than 30% forest cover on the basis that if it has more, families won't have enough space for subsistence agriculture. Where forest cover is greater, FONTIERRAS seeks to only buy the portions with less forest (Garcia A. 2014. pers. comm., 5 February).

FONTIERRAS continues to register land using the categories established by the Agrarian Transformation Law, either per family as Family Patrimony or collectively as Collective Agricultural Patrimony.

Rental

To cover the demand for land that it can't meet though land purchase, FONTIERRAS has increasingly turned to paying rent for landless rural families. In 2013, for example FONTIERRAS bought land for 688 people with US$1.2 million but subsidized rent for 4,089 people with US$1.6 million (of which US$1.3 million were loans) (calculations based on SAA 2013).

Legalization

The third way that FONTIERRAS provides access to land is by regularizing colonization. In common with the rest of the region, in Guatemala colonization has long been a way for the landless poor to obtain land. In the post-revolutionary period it was official policy, with the Agrarian Transformation Institute (INTA), the

predecessor to FONTIERRAS, giving away plots in the FTN and Peten. That was one way to obtain land; the other was simply to grab (*agarrar)* it and then ask INTA to legalize the possession later.

The phase of colonization is now over but FONTIERRAS continues to process a backlog of claims to legalize properties in what was State land or *tierra baldía*. FONTIERRAS aims to clear the backlog by 2019 (FONTIERRAS 2012).

The same limit on forest cover applies as for access (above). If the land is in the buffer area of a Protected Area, FONTIERRAS gives communal usufruct rights over the bulk of the forest and does not include it in calculations of the sum payable by beneficiaries for regularization (Garcia A. 2014. pers. comm., 5 February).

(B) Cadaster Information and Registration unit (RIC)

Work on the cadaster began several years before the RIC Law was passed. The Legal Technical Unit within MAGA began work in isolated municipalities throughout the country to collect experiences in order to prepare the law and national procedures. Nevertheless, when the first phase of the World Bank-financed Land Administration Project (PAT I) was approved, it was decided to include the whole of Petén in this preliminary phase. Thus cadaster was carried out in Petén before the RIC law or its regulation were approved.

The 2005 RIC Law established the RIC, which operates only in municipalities that are in areas declared as Cadaster Process Zones. So far, the 65 municipalities where RIC is active are clustered in the subnational regions of TBN and Sarstún Motagua and the goal is to finish the process nationally by 2025.

Crucially, despite indigenous and smallholder lobbying to the contrary, the starting point for the RIC is the property register: registered land titles, or in their absence, the right to a land title. This has the effect of legitimizing past expropriations provided they resulted in a title deed. The RIC then follows a number of successive steps: a cadastral survey carried out on the ground by subcontractors, socialization of results, comparison with information from the property register, and the declaration of property.

Where the register and cadastral survey coincide, RIC simply ratifies the property in its declaration. Where the only irregularity found with the property is that it is not registered, RIC registers the property in a process known as Special Titling (Art. 68). Where other irregularities or conflicts are found, FONTIERRAS refers the case to different institutions depending on the circumstances: SAA for private land, CONAP for Protected Areas and OCRET for State Reserves.

Even under the new system, Guatemala does not operate a unified property register. To subdivide a property the owner first visits RIC, which updates to the Cadastral register and issues updated plans reflecting the subdivision for the person to take to the General Property Register.

Communal Land

The 2005 RIC Law contained an obligation to develop a regulation to recognize communal land. The resulting 2009 Specific Regulation on the Recognition and Declaration of Communal Land is the first time that an actual procedure has been put in place in Guatemala to enable communal tenure rights to be secured. By the time the Regulation was passed, RIC had already completed the cadaster in Peten. Commentators such as Zander & Durr (2011) and Ybarra (2008 cited in USAID 2010) have observed that this meant that Q'eqchi communities with a tradition of collective land administration therefore had their property titled individually.

The Specific Regulation establishes a shared procedure for the recognition of communal land belonging to two different kinds of community, Indigenous Communities and *Campesino* Communities, and sets out the criteria for each.

FIGURE 17: REQUIREMENTS UNDER THE RIC SPECIAL REGULATION OF COMMUNAL TENURE

	Current Possession	Special Administration	Historic Ownership
Indigenous Art. 3	Yes. Explicitly with or without title, registered or not	Yes. Based on tradition	Yes
Campesino Art. 2	Yes. Makes no mention of title, implying by comparison that could require title	Yes. Based on mutual interest	No

As can be seen from FIGURE 17**: REQUIREMENTS UNDER THE RIC SPECIAL REGULATION OF COMMUNAL TENURE**, the main difference between the two categories is that Indigenous Communal land requires historic ownership but does not require any kind of written "Equitable Title" (See section (C)). Indigenous communities may self-declare themselves as *Campesino* Communities where this would favor them, without losing any of their other rights (Art. 2).

The Specific Regulation recognizes both the communities' traditional authorities (Art. 7) and the right to consultation under International Labor Organization (ILO) Convention 169 (Art. 15); however the way the two are phrased is contradictory. The request to be recognized as communal land (Art. 8) can be made by the traditional authority but the consultation is not to be carried out in accordance with the community's traditions, but rather by RIC directly with the members of the community. This has the effect of subjecting the community decision to a requirement of de facto unanimity. There is often a generational split here; older members of the community are more committed to communal ownership while younger people are in more favor of individual titling (B. Fulgar 2014, pers. comm., 30 January). The interaction of Arts. 15 and 8 creates a presumption in favor of individual property over collective.

Though the Specific Regulation is an important development, it has not yet translated into an effective recognition of communal tenure; as of the end of 2013 the process was ongoing in 28 communal lands but not a single one had actually received its declaration.

2.4.4 Integrated Rural Development

The unmet demand for land reform re-emerged in the proposal for Integrated Rural Development (*Desarrollo Rural Integral*). The Alliance for Integrated Rural Development (ADRI) began work in 2004, submitting a draft Integrated Rural Development Law to Congress in 2009, which was defeated in Congress in 2013. The current Government has a 2012 "Plan to Activate and Improve the Integral Rural Development Policy," which envisages preparing nine separate policies beginning with an Agricultural Policy, which at the time of writing is in draft form.

However, as Barry (2012) points out, "Integrated Rural Development" is only acceptable as phrase to *campesinos*, the elite, and the State because it means fundamentally different things to each of them. For civil society, it includes land reform and job creation. For the State and the elite it is more about promoting competitiveness and maintaining private property protection. The unfortunate likelihood is that the Integrated Rural Development agenda will be unable to bridge that gulf in expectation and will not reach fruition.

FIGURE 18: KEY POLICIES AIMED AT RURAL POOR

Policy	Summary
Zero Hunger Pact (Pacto Hambre Cero),	Food assistance, technical assistance and conditional cash transfers in areas with worst malnutrition
Family Agricultural Program to Strengthen the Campesino Economy	Agricultural extension
Subsidized Fertilizer Program	Supply of subsidized fertilizer
My Progressive Family	Conditional cash transfers for all poor

PINPEP	Forestry incentive for small landholders
FONTIERRAS	Land access through purchase, rental or legalization

There are a number of other government policies aimed at the rural poor, which are summarized at FIGURE 18: **KEY POLICIES AIMED AT RURAL POOR** . It can be seen that with the exception of FONTIERRAS, these seek to address the consequences of unequal land access rather than the inequality itself.

2.4.5 Conflicts Associated with Land Disputes

The Land Affairs Secretariat (SAA), which is ascribed to the Presidency, is the institution in charge of dealing with disputes over private property. It operates through 19 regional offices.

At December 2013, the SAA has 1,370 land disputes registered by one or more of the affected parties, involving 156,937 families or 1,443,418 people and 295,180 ha (SAA 2013). That means that approximately 20% of Guatemala's rural population is involved in a registered land dispute. Between 60% and 72.5% of those involved are indigenous.[14]

SAA classifies land disputes in four groups (SAA 2013):

- Dispute over rights (71% of total). Two or more people dispute possession of all or part of the same land. Common causes include: multiple Equitable Titles or land registrations; Supplementary Titles issued over registered land; boundary disputes; error in titling land; or an error in the registry.
- Occupation (18.25% of total). Occupation of the property belonging to another. Common causes include: occupation for unpaid wages; occupation of unowned/State land within or between private property; manipulation by third parties; need for land; or land is lying fallow
- Regularization (6.9%). Regularization of possession of unowned/State land by FONTIERRAS
- Territorial limits (3.6% of total). Lack of clarity around municipal, departmental, or national boundaries.

The SAA acts to try and mediate these disputes but given that the majority of disputes are over rights, it is hampered by a lack of funds to help resolve competing claims by helping one side buy the other out.

RIC does not prioritize conflict areas; in fact its subcontractors often leave them until last because they slow their work down. Occupiers of land (particularly in dispute) also often distrust RIC, believing that it will lead to an increase in taxes or their dispossession. Where RIC does identify land disputes (classed as irregular properties) it refers them to SAA, but the workflows of RIC, SAA, and FONTIERRAS are not linked together, slowing dispute resolution.

A positive example of the three institutions working together occur under the Negotiation Roundtables (Mesas de Negociación), which are convened on an ad-hoc basis and deal with accumulated backlogs of cases, for example in Alta Verapaz.

2.5 RECOMMENDATIONS

Population growth, poverty, unequal land distribution and new processes of land concentration for export increase the pressure on rural land, forests, and protected areas and make reducing deforestation harder. Acting to reduce pressure are the process of urbanization and the role of FONTIERRAS in subsidizing land purchase and rental and regularizing possession of State land. At the landscape level, any actions that can affect these factors will have an impact on REDD+.

[14] 27.5% are Ladino or mixed and 12.8% are unknown (possibly indigenous)

This section makes recommendations in three areas: Protected Area management, forestry policy (particularly relating to forestry incentives) and land tenure more generally.

2.5.1 Recommendations on Land Tenure

(A) GoG – Regulate "Possession"

"Possessors" are eligible for PINPEP, "Legal Possessors" can own and negotiate emissions reductions units under the LMCC and the 1998 Mangrove Regulation applies to "Legitimate Possesors." The difference between these formulations, if any, is unclear.

PGN and OCRET agree that OCRET can certify tenants of State Land Reserves as Possessors; whether other institutions can do the same over other categories of land is unknown.

Possession also seems to be the tenure category that best applies in other contexts but is not mentioned explicitly. For example Old Settlements in Protected Areas, which are blocked from registering their property to become "Owners," could be Possessors. Equally the draft Probosque proposal includes certain classes of communal beneficiary but does not specify the kind of tenure they need to have; they would seem to be Posessors.

For all these reasons it would be beneficial for the relevant institutions to come together and agree a common approach to the definition and treatment of "Possession." This could be done via a regulation to the RIC Law, or simply by an inter-institutional agreement that harmonizes vocabulary, standards of proof and rights. *Inter alia*, this could:

- Clarify that Possession is that the Possessor lacks registered title, not that the land is unregistered;
- Clarifying right of CONAP to certify the Possession of Protected Areas;
- Agree on a common vocabulary for land tenure;
- Clarify that "Legal Possessor" means the same as "Possessor;" and
- Agree on standards of proof for Possession and on whether Possession is recognized or declared by the relevant institution.

(B) Indigenous communities, GoG, donors, NGOs - Work with indigenous communities to help them get the most secure tenure possible

Many indigenous communities lack secure land tenure categories like Ownership or Possession that would allow them to defend their rights against third parties and make them eligible for REDD+ benefit streams. Indigenous communities could be supported in the formalization of customary rights and in seeking the return of communal lands that had been titled in the name of municipalities.

(C) RIC – Allow community authorities to set method of consultation to decide type of title

When applying its Regulation for the identification and declaration of communal property, RIC should only ensure the existence of the community and the legitimacy of the community authority. To then seek individual opinions as to whether or not to title communally could be seen as ignoring the right of the community to govern itself and tilts the table against communal title.

(D) MAGA, MARN, CONAP, RIC, SEGEPLAN, Municipalities - Prioritize REDD+ Early Initiative areas and subnational reference regions for RIC, soil studies and land use planning

Lack of an up to date land cadaster makes identifying rights holders harder and increases the likelihood of social conflict when REDD+ is implemented. Likewise the lack of detailed soil maps makes it difficult to proactively manage human settlements and agriculture.

(E) RIC, SAA, FONTIERRAS – Articulate actions more closely

The ad-hoc negotiation roundtables are a good example of these organizations working together to resolve issues relating to tenure. However, more could be done to integrate their day to workflows; for example RIC could prioritize areas of tenure conflict, entering alongside SAA to resolve disputes and with prioritized support from FONTIERRAS for regularization and/or land access.

(F) GOG, FONTIERRAS - Revisit land redistribution

FONTIERRA has had more success recently in terms of land access only by pardoning debts and increasing subsidies, i.e. moving away from loans to grants and reducing coverage. Market based land distribution has not achieved the results hoped for. Guatemala could either make use of the Art. 40 provision in the Constitution for compensated expropriation or could increase funding to FONTIERRA to enable it to distribute more land at the new higher grant/loan ratio.

2.5.2 Recommendations on Forestry Management

(A) INAB - Prioritize forestry incentives based on environmental and social criteria

The value of a hectare of protected natural forest depends on its location and a hectare of new monoculture plantation is not the same as a hectare of avoided natural forest deforestation. Yet the current forestry incentive programs lack geographical criteria to prioritize certain areas over others, while the allocation of 80% of the PINFOR budget to plantations has arguably had the effect at the macro level of subsidizing the conversion of natural forest to plantation.

There are a number of potential criteria that could be used, but the Costa Rican Payment for Ecosystem Services program provides a good starting point:

- Small areas of private forests located in areas with a low social development index;
- Forests located in indigenous territories throughout the country; and
- Forests and farms located within Protected Areas that have not yet been purchased or expropriated by the State.

Forestry incentives could also be targeted at communities that have received land titles from FONTIERRAS through access or regulation in order to help them make productive use of their land and reduce the likelihood that they will sell.

(B) Increase proportion of incentives going to natural forest over plantations

When looking at the trend in land use change over the last 20 years, Guatemala has lost ever more natural forest, partially compensating this with an increase in plantation forest; i.e. it is arguable that the effect of PINFOR has been to subsidize the transformation of natural forest to plantation. Guatemala is in the difficult position in which the majority of its forest incentives flow to commercial plantations while the dominant policy in relation to natural forest is an unsuccessful defense of Protected Areas against *campesinos* with a legitimate social demand for land.

Probosque partially addresses this by removing the requirement that a dedicated percentage (80%) of incentives be used for plantations. However INAB could go further, by creating a similar floor for natural forest production and protection. The planned increase in the maximum project size from 1% to 3% is also hard to understand given that the majority of incentives already go the larger projects. Both of these may well respond to the need to retain private sector support for the passage of Probosque in Congress. However, there needs to exist the confidence that INAB can ensure a reasonable distribution between sizes and modalities if Probosque is approved.

(C) INAB - Incentivize natural forest production for fuelwood needs in addition to protection

Guatemala has a massive firewood deficit, particularly in the Western Highlands, yet the majority of natural forest incentives go to protection. This tendency could be reversed.

One way to do this is to increase the amount payable for natural forest production compared to protection. The gradient should be steepest for the smallest properties to avoid turning forest into an unproductive asset for the people least able to afford it. INAB could trial this in certain regions, monitoring the impact to make sure set at right level to shift balance.

(D) INAB - Increase PINPEP and Probosque incentives for areas below 2 ha

PINPEP and Probosque payments/ha should increase again below 2 ha from an equity and poverty reduction standpoint since both the fixed and opportunity costs of entering land into the incentive programs are highest for the smallest landowners. The effect of incentives on poverty reduction should be monitored since it is a significant co-benefit.

(E) INAB - Unify criteria for Probosque and PINPEP as far as possible

Community organizations pressured to create PINPEP to address the gaps in coverage of PINFOR. However now that PINFOR is to be replaced by Probosque there seems to be no need to treat the same property size differently depending on whether a smallholder is Owner or Possessor.

INAB could consider lowering the threshold for participating in Probosque to 0.1 ha (like PINPEP), thereby ensuring that all smallholders, with or without registered title are eligible for an incentive program.

(F) INAB - Clarify tenure criteria for Probosque

The explicit addition of communal beneficiaries to Probosque is a welcome expansion in eligibility from PINFOR, however INAB could consider making it clearer what kind of tenure and proof of tenure will be acceptable. Will Probosque be eligible to communal "Possessors" or how does eligibility for Probosque differ from "possession" under the RIC law?

(G) INAB - Re-examine the issue of continuity of incentives

It is important to study what has happened to incentivized plantations after the forestry incentives have ended. For PINFOR this is already possible, whilst for PINPEP it could be carried out from 2015. If most plantations are under rolling management then no further action may be required. However, if it is found that many were simply clear-cut before or on maturity INAB could consider providing further incentives for technical assistance to bridge the gap between the end of the subsidy and production.

(H) INAB, PGN - Remove prohibition on natural forest management after receiving incentive for natural forest protection

INAB should also ask the PGN to reconsider its legal opinion that beneficiaries of a subsidy for protection cannot later make productive use of their forest.

(I) INAB - Strengthen INAB at regional level

Forestry incentives represent a significant administrative burden to INAB, particularly PINPEP since it is made up of many low value transactions. INAB receives overheads based on a percentage of funds administered, not on the number of individual projects. This burden is particularly high in regional offices that administer high numbers of PINPEP projects and INAB could consider compensating these by volume.

(J) INAB - Requirement in management plans to identify customary rights and sacred sites

Currently there is no guarantee that forest owners will take customary rights holders into account. INAB could consider requiring all those submitting forestry management plans or applications for forestry incentives to identify and disclose customary rights over the forest in question. This could be accompanied either with an undertaking that such rights will not be affected or by the process that will be followed to obtain the consent of those rights holders.

2.5.3 Recommendations on Protected Areas Management

(A) GoG, MARN - Back CONAP's efforts to modify the Protected Areas regulation.

The draft Biodiversity and Protected Areas Regulation represents a significant advance in protected areas management and could be passed as soon as possible.

(B) GoG – Oppose bill 4717 amending the Protected Areas Law

Bill 4717 was not subject to a process of consultation and does not have the backing of CONAP, the State authority on the subject. The extra conditions it attempts to place on community concessions could also lead to existing concessions in the RBM being cancelled (indeed one interpretation of the bill is that this is precisely what it aims to achieve).

(C) MARN, CONAP - Expand the model of community concessions

The community concessions in the RBM have delivered a reduction in deforestation compared to other parts of the Multiple Use Area of the RBM and are examples at the regional level of community forest management. They were granted between 1994 and 2002 meaning that some only have a few years remaining. To guarantee the viability of the GuateCarbon REDD+ Early Initiative these should be extended for another 25 years as soon as possible.

CONAP could also consider the viability of authorizing further concessions over other State-owned Protected Areas, including in mangroves.

(D) CONAP – Harmonize instruments relevant to Protected Area zoning

The current system of Protected Area zoning is complex and self-contradictory. CONAP could attempt to harmonize the Protected Areas Law, Protected Areas Regulation, Human Settlements Policies and Guidelines on Preparing Protected Areas Master Plans to come up with the simplest categorization possible, which should then be applied universally.

This could state clearly what activities and tenure categories will be available in each zone and what the processes will be for resolving disputes. It should be made available in formats that can be understood by the general population (including translations in relevant indigenous languages), clearly outlining what rights they have and which are conditional on reaching agreement with CONAP. A possible starting point for this are the three categories used by the Regional Human Settlements Policies (see Section (B))

(E) CONAP, FONTIERRAS – Address the issue of Old Settlements in areas of strict protection

In relation to pre-existing private property, the Protected Areas Law contains the basic contradiction that on the one hand the owner fully maintains their property rights irrespective of the management category, but on the other must manage it in accordance with applicable rules and regulations. None of CONAPs policies currently deals clearly with how CONAP intends to resolve that contradiction. What happens for example if the owner is not interested in signing a Cooperation Agreement or if they insist on remaining in an area zoned for strict protection?

The aim should be to give Old Settlements the greatest certainty possible as to their rights and obligations. The current legal limbo is unfair and counterproductive, giving owners little vested interest in following limits set out in the Protected Areas Master Plan. Furthermore, the current distinction between Old Settlements that began their legalization process before or after the declaration of the Protected Area does not seem to have any legal basis.

One possibility would be to amend the FONTIERRAS Law to enable Old Settlements to acquire registered title. Agreed use restrictions could be registered on the title as easements in favor of State property in core area.

If Old Settlements can't be titled then CONAP could certify them as Possessors to enable them to apply for natural forest management incentives (protection or production as circumstance dictate). INAB could prioritize these areas for incentives.

Art. 40 of the Constitution allows expropriation of private property with prior compensation. CONAP could seek legal opinion on the application of this clause, either as a matter of course or as a sanction for non-compliance with SIGAP rules and regulations, the Master Plan or Cooperation Agreement.

(F) CONAP – Create a differentiated route of attention for indigenous populations

Indigenous communities that predated the declaration of a Protected Area are currently treated the same as any other Old Settlement. Art. 67 of the Constitution suggests that they should be dealt with differently.

If the draft Biodiversity and Protected Areas Regulation is passed it would create a new figure of Community or Indigenous Collective Management Areas. To begin with, this presents an alternative to new Private Parks or Regional Municipal Parks. However, they could also represent a way for Municipalities to give effect to the commitment in the Municipal Code (Art. 109) to return control over communal forests to communities.

(G) CONAP – Consider piloting community co-administration of Protected Areas

In Protected Areas with significant presence of Old Settlements, CONAP could consider increasing community participation in the administration of the Protected Area, including co-administration.

(H) GoG, CONAP, National Police - Increase police enforcement in Protected Areas

Eviction of Recent Settlements and new invasions needs to be a credible option. This requires police presence not just at the moment of eviction but in also continually thereafter to prevent the area being occupied again.

(I) GoG - Increase CONAP's budget

The under-resourcing of CONAP affects its capacity to administer Protected Areas effectively, including preventing new invasions and properly managing existing human settlements.

3.0 CARBON RIGHTS

The Guatemalan Congress passed the Climate Change Framework Law (LMCC) in September 2013, making it only the second country in the world after Mexico to pass specific legislation relating to carbon rights. The LMCC clearly links the right to emissions reductions units to ownership of the underlying land and mandates the creation of a national register of emissions reduction projects.

Though the draft LMCC was originally presented in 2009, it was passed very quickly in 2013, and there was therefore less specialist input and debate on the final form law than would have been ideal. As a result the LMCC has some shortcomings, almost universally acknowledged by interviewed stakeholders, particularly in the way that it frames carbon rights. The pending regulation referred to in the last paragraph of Article 22 will present an opportunity to clarify carbon rights, but will not be able to modify or contradict the LMCC itself.

Several existing analyses on rights to own, trade and benefit from the generation and sale of emission reduction units from the land use sector form the background for the analysis and recommendations below:

- Sobenes & Scoffield (2010): Final report, consultancy on forest carbon in the Mayan Biosphere Reserve for Rainforest Alliance, September 2010.
- Rainforest Alliance (2013): Legal analysis of the implications of the LMCC on the REDD+ R-PP for Rainforest Alliance, September 2013
- Ideads (2013): Legal figure and financial mechanism for the GuateCarbon REDD+ project for Rainforest Alliance, October 2013.
- Sobenes (2013) – Analysis of the impact of the LMCC for Rainforest Alliance, October 2013

3.1 NATURE OF CARBON RIGHTS AND ENVIRONMENTAL SERVICES

According to the 2012 Forest Carbon Rights Guidebook "a carbon right is defined as the *right to benefit* from an increase in sequestered carbon and/or a reduction in GHG emissions, with the analysis of this right confined to carbon sequestered in trees owing to the current emphasis of REDD+" (Knox et al 2012).

For Guatemalan pre-LMCC studies such as Sobenes & Scoffield (2010), the starting point for the analysis of carbon rights was the 1973 Civil Code. This was not an easy task: as they point out, the phrase "Payment for Ecosystem Services" was coined by an economist, not a lawyer, and the concept is difficult to incorporate into a civil law system in which services are generally demandable personal obligations to do, not do, or deliver, whilst environmental services are delivered by natural goods or environmental systems. Nevertheless, Sobenes & Scoffield (2010) do attempt to square the concept with the Guatemalan legal system and conclude that under the Civil Code environmental services constitute "natural fruits" of the land and therefore belong to the Owner or legitimate Possessor of the relevant land.

Art. 22 (discussed in detail below in Section 3.2), which regulates "carbon market projects", is the main article of the LMCC dealing with carbon rights. It refers to the "rights, ownership and negotiation of emissions reductions units of carbon or other greenhouse gases" but does not specify the nature of those rights.

Environmental Services as Intangible Functions

The LMCC defines an Environmental Service as "the benefit that society receives from natural goods and ecosystems" (Art. 5 j). This implies that environmental services are less tangible than "property" and are not delivered by legal persons. Art. 15 (d) supports this view, outlining actions that institutions should carry out to "guarantee the maintenance of ecological processes and natural goods and services" (Art. 15 d).

Nevertheless, other provisions of the LMCC suggest two other interpretations, both of which have some support in the literature reviewed:

- Environmental services as property – supported by LMCC Art. 5 h and Sobenes (2013); and
- Environmental services as personal services – supported by LMCC Art. 20, Ideads (2013) and Rainforest Alliance (2013).

Environmental Services as Property

The LMCC defines the Carbon Market as being "made up of the set of activities related to the offer, demand and negotiation of environmental services, with the objective of facilitating the binding or voluntary commitments to reduce emissions of carbon or other GHGs" (Art. 5 h). This implies that environmental services can be bought or sold.

Indeed Sobenes (2013 (p26)) suggests distinguishing between natural environmental services (produced by the land without human intervention) and additional environmental services that are produced by avoided deforestation activities. The first would "belong" to the landowner whilst the second would "belong" to the person carrying out the avoided deforestation activity under general civil law principles.

Environmental Services as Personal Services

Under LMCC Art. 20, CONAP, INAB, MAGA and MARN will "adjust and design … plans and projects for the development and sustainable use and management of forestry resources including promoting environmental services that reduce GHG emissions and the conservation of forest ecosystems." This implies that legal persons can provide environmental services.

Ideads (2013 (p7)) suggests that CONAP contract the concessionaries in the GuateCarbon project to deliver environmental services. Rainforest Alliance 2013 goes one step further, opining that VAT is payable on environmental services by virtue of them counting as services under the VAT Law as "the action or assistance of one person to another for which they receive … or any other kind or payment."

An Alternative Approach

This report suggests that environmental services should not be thought of in either of those terms and that a better approach is to interpret the "for" in "payment for environmental services" as "in respect of" not as "in return for."

In other words, when a payment is made for an environmental service what is being bought and sold is the product of the environmental service rather than the service itself, i.e. the emissions reduction unit (ton of CO_2 sequestered) or the m^3 of water flowing downstream – not the absorption of CO_2 or rainfall or the growing of the tree.

This interpretation is a better fit with the definition of Environmental Service in the LMCC (Art. j) and with the treatment of natural fruits by the Civil Code, which defines natural fruits of the land as "spontaneous products of the land and animals' offspring and other products produced with or without human intervention" (Art. 656). Once again the natural fruits are the products of growth, not the act of growth (or of giving birth) itself.

It also has the added advantage of removing "environmental services" from the discussion of carbon rights, and with it the need to understand complex concepts like "additional ecosystem services" produced by an "avoided deforestation activity" (when the "additional" environmental services may simply be the absence of their business-as-usual reduction and the "avoided deforestation activity" could be nothing more than an agent of deforestation refraining or being restrained from acting).

Under this interpretation:

- Environmental services cannot be owned or traded
    - But the land that produces environmental services may be owned or traded, as may be the products of environmental services (including emissions reductions units).
- Legal persons cannot provide environmental services.
    - But legal persons may be contracted to provide services that affect the quality and quantity of the environmental services produced by a given piece of land. These should be classed as ordinary personal services not as "environmental services."
- As per Art. 22 of the LMCC emissions reduction units will belong to the Owner or Legal Possessor of the land.
    - But the Owner/Legal Possessor may pay third parties for personal services (or compensate them for not carrying out activities), including through a share in the value of emissions reductions units produced.

3.2 CARBON RIGHTS IN GUATEMALAN LEGISLATION

The consensus in Guatemala is that ownership of land includes the trees on that land (FAO 2010). The basis for this seems to be the Civil Code, under which: "land, subsoil, unfelled trees and plants, and fruits while still unharvested" are "immovable goods" (Art. 445) and "owners of a good have the right to its fruits and to the elements incorporated to the good by accession" (Art. 471). Art. 712 also supports this interpretation, holding that "Usufruct extends to the forests and trees on the land but the usufructuary must conserve them…"

Under the Civil Code Art. 459 and Constitution Art. 121, the subsoil, hydrocarbons, and any other organic or non-organic substance in the subsoil are national goods. This would presumably include organic soil carbon.

LMCC Article 22 regulates "Carbon market projects" and is the main article dealing with the nature of carbon rights. The article in full is set out below:

> "Activities and projects that generate emissions reduction or removal certificates may access voluntary and regulated carbon markets and other bilateral or multilateral compensation mechanisms and payment for ecosystem services.
>
> Rights, ownership and negotiation of emissions reductions units of carbon or other greenhouse gases will belong to the owners [*dueños titulares*] of the generating project referred to in the preceding paragraph, for which purposes they [the projects] must be entered in the register created by MARN.
>
> Individuals, legal persons or the State that are the Owners or Legal Possessors of the land or goods in which the project is realized may be the registered owners of projects.
>
> Within 18 months from the entry in force of this law, MARN, taking into account proposals made by the CNCC created by this law, will issue the law necessary for the creation and operation of the Register of GHG Emissions Removals or Reduction Projects, for the procedures of dissemination, promotion, registration, validation, monitoring and verification of projects."

Article 22 does not specify the contents of the bundle of rights over emissions reductions, though implicitly they go beyond ownership and the right to trade them. Rather the LMCC focuses on the question of who holds the bundle of rights.

In its R-PP and draft ER-PIN, Guatemala envisages distributing REDD+ benefits through Early Initiatives and forestry incentives and is planning on rolling out REDD+ using subnational reference areas. That means that ownership of emissions reductions units under Article 22 needs to be considered in three different kinds of area: (i) Early Initiative areas; (ii) areas receiving forestry incentives; and (iii) remaining areas within a subnational reference area that neither form part of an Early Initiative; nor receive forestry incentives.

None of the literature reviewed analyzes Art. 22 in detail. Sobenes (2013 p24) suggests that Art. 22 opens a range of possibilities for the future negotiation of how to define carbon rights in the LMCC. For Rainforest Alliance (2013 p3) the LMCC is very clear that benefits go to projects owners and project owners must be owners or legal possessors of land. However a close reading of Art. 22 raises two further potential issues:

- It seems to condition ownership of emissions reduction units on being the owner of a registered project; and,
- It is uncertain what the difference is, if any, between the "Legal Possessor" of land (under Art. 22) and the "Possessor" of land used by other legislation.

Project Owner

Article 22 clearly intends to link ownership of emissions reductions to Ownership or Possession of land. However it does so in a convoluted way with a focus on projects: emissions reductions belong to owners of registered projects, who must in turn be the Owners or Legal Possessors of the project area. In other words, only project owners have a clear right to own emission reductions units; it does not seem to be enough just to be the Owner or Legal Possessor of the land.

The article seems to have been drafted with the idea that REDD+ projects are presented over individual properties by the owner of that property. Only GuateCarbon comes close (yet does not) meet that condition. Other Early Initiatives, such as REDD+ Caribbean, are made up of a myriad of different properties, which are Owned, Possessed, and Occupied by a mixture of State, private, communal, and municipal rights holders.

In relation to Early Initiatives this clause seems to be open to two possible interpretations:

- Either the project owners must be the Owners or Legal Possessors of the entire project area, in which case every Owner or Legal Possessor of the land making up the Early Initiative project area must also be a co-owner of the project; or
- The project owners must just be Owners or Legal Possessors of some of the project area, in which case the project can have fewer owners.

In either case the question remains over how project owners can acquire ownership of emissions reduction units from rest of the project area that they do not Own or Possess.

In relation to forestry incentives, it would seem to require that each participant in the incentive scheme be recognized as the owner of a registered project – i.e. either

- Each participant is treated as a co-owner of a single registered project (e.g. PINPEP); or
- Each participant is the owner of a separate registered project.

This second option seems the most logical. MARN could even treat the register of forestry incentive projects managed by INAB, as a sub-set of the register of emissions reduction projects that the LMCC obliges it to set up.

In both cases "ownership" of emissions reduction units is probably less important than it first seems. In Early Initiatives what is needed is a legal mechanism that transfers all the emissions reductions earned in the project area into a central pot, to be distributed by agreement between the Owners and Legal Possessors of land in the project area. In the cases of forestry incentives, ownership will be fleeting, since INAB should incorporate a clause into the incentive scheme contracts under which ownership of the emissions reductions passes to INAB in return for the incentive payment. This should also deal with the question of ownership of emissions reductions after the end of incentive payments.

In relation to emissions reductions in remaining areas that do not receive forestry incentives and are outside of Early Initiatives (for example arising as a result of a greater control of deforestation at the landscape level), Art. 22 seems to raise two difficulties:

- That Owners or Legal Possessors of land will not own emissions reductions units since they would not be owners of registered projects; and
- That emissions reductions units might not exist at all because the areas would not form part of a registered project.

A possible solution here is registering the entire National Deforestation Reduction Strategy (ENRD) as an emissions reductions project (as Sobenes [2013 p25] suggests). However this would raise the same issue identified above in relation to Early Initiatives: Given that the project owner should also own the project area, who has the standing to do so?

Legal Possessor vs. Possessor

The two most likely interpretations are either (i) that it makes no difference since legality is already inherent in the definition of Possessor; or (ii) that "Legal Possessor" is wider than Possessor since it includes all forms of possession that are not explicitly illegal. This should be clarified in the Regulation.

Of great relevance here is the precedent set by OCRET in relation to mangroves. Currently OCRET can certify "Possession" of State land that it administers. This could represent, for example, a way for the State to certify the concessionaries in GuateCarbon as Legal Possessors of the concession areas, opening up the possibility for them to own emissions reductions units.

How to proceed

If judged feasible by Guatemalan legal counsel, a way forward could be to regulate Art. 22:

- Removing the requirement for project ownership to own emissions reduction units. It should be enough to be the Owner or Legal Possessor of land within a registered project area; and
- Defining Legal Possessor.

3.3 SEPARABILITY OF CARBON RIGHTS FROM THE LAND

The regulation of Art. 22 will also have to deal with the issue of whether the ownership of carbon rights may be separated from the land to which they relate. As discussed in Section 0, the civil code contains comprehensive provisions around easements and conservation easements have already been trialed by TNC and FDN in the Sierra de la Lacandón. At least in principle, these would allow for the future emissions reductions units arising from a registered property to be sold in advance and an encumbrance noted in the property register that it be managed in a certain way.

However this would have a number of potential drawbacks (Knox et al 2012) including the possibility that the initial sale would take place at an undervalue, the requirement for comprehensive land and carbon registries, and the risk that in the absence of robust enforcement mechanisms future landowners will have little incentive for conservation.

3.4 CARBON CREDITS AND EXPERIENCES FROM OTHER SECTORS

To enable participation in the Clean Development Mechanism (CDM), Guatemala passed the 2003 Law for Incentives for the Development of Renewable Energy Projects and its 2005 regulation, which designated MARN as the authority for CDM. The Renewable Energy Law defines "emissions reductions certificates" saying that they belong to "project owners" (Regulation Art.1). Under the law, project owners seek certification of the quantity of emissions reductions from MARN, which they may later sell (Arts. 22-23).

There are six CDM projects in Guatemala currently listed on the UNFCCC website[15]. These were developed before the LMCC and operate as bilateral agreements directly between a project developer (mainly of hydroelectric schemes) and an Annex 1 country. This means that other than the enabling law mentioned above, participation in CDM has not led Guatemala to develop a framework for carbon trading (R. Castañeda 2014, pers comm. 29 January 2014).

Also predating the LMCC is a Verified Carbon Standard (VCS) and Forest Stewardship Council (FSC) certified Afforestation, Reforestation, and Revegetation (ARR) rubber plantation project, which was developed by Producción, Industrialización, Comercialización y Asesoría de Hule Natural, Sociedad Anónima (PICA). PICA planted rubber trees on land owned or leased privately, using bilateral contracts that assign all carbon rights to PICA (RA 2010). The Project Design Document only refers to land ownership, not to carbon rights ownership (PICA 2010).

Art. 22 of the LMCC mandates that "within 18 months from the entry in force of this law, MARN, taking into account proposals made by the CNCC created by this law, will issue the law necessary for the creation and operation of the Register of GHG Emissions Removals or Reduction Projects, for the procedures of dissemination, promotion, registration, validation, monitoring and verification of projects." Sobenes (2013) suggests that the ENRD itself should be registered, and both Sobenes (2013 p25) and Rainforest Alliance (2013 p6) warn that regulating themes like measurement, reporting and verification (MRV) instead of deferring to external standards could lead to overregulation.

3.5 FLOW DOWN OBLIGATIONS ON PROPERTY RIGHTS AND EMISSION REDUCTIONS

To be able to deliver emissions reductions at the subnational level, Guatemala has several mechanisms to flow down obligations to property rights holders and prevent them from deforesting or degrading forests:

- General prohibition on land use change from forestry for areas of greater than 1 ha without license from INAB (see Section 0).
- Absolute ban on new occupations in Protected Areas and requirement that existing private property is managed in accordance with Master Plan (see Section 0).
- Prohibition on INAB from issuing harvesting licenses over areas that have received an incentive for natural forest protection (see Section (E)).

[15] https://cdm.unfccc.int/Projects/MapApp/index.html

However various factors negatively impact Guatemala's ability to guarantee REDD+ performance and flow down obligations to land rights holders:

- Weak enforcement - approximately 95% of wood extraction is illegal or at least extra-legal (see Section 0).
- Irregular human settlements are rife in Protected Areas, a result both of an inability to control new invasions and of the policy of not giving full tenure rights to old settlements (see Section (C)).
- INAB is better resourced than CONAP but is stretched by the administration of PINPEP which still requires a similar level of project oversight to PINFOR but generates very little by way of administration fees due to the small size of project areas. This is particularly an issue for INAB regional offices with high numbers of PINPEP projects (like Coban).
- Prohibition on renewing forestry incentives. In plantations this leaves a dangerous gap between the incentives ending and the plantation reaching a mature age. With natural forest protection it could create a situation where a landowner ends up deforesting (even if it is illegal), because they do not want, or can't afford, the unproductive asset (see Section (E)).
- Difficulty of guaranteeing national contributions to forestry incentives (see Section (F))

3.6 BENEFIT SHARING FROM EMISSION REDUCTIONS

The regulation of LMCC Art. 22 will establish what kinds of projects are eligible to be registered as emissions reduction projects and therefore be capable of creating emissions reductions units. However MARN will want to avoid a fragmented marketplace, which would make coordinated action at the subnational level difficult, as well as making it much harder to reconcile remissions reductions produced at different scales. It is therefore likely, and advisable, that the regulation will restrict forestry emissions reductions projects to its forestry incentive programs and those projects large enough to independently certify through a voluntary standard (like the REDD+ Early Initiatives).

The evidence shows that in the vast majority of cases local governance arrangements in Guatemala permit a horizontal distribution of benefits under the forestry incentive programs, as well as of associated commitments and responsibilities. However, the distribution of benefits does raise a series of risks, depending on the type of participant.

- Individual smallholders: INAB only deals with the landowner, meaning that depending on family dynamics the wife may often be excluded from decision making or from receiving benefits.
- Municipalities: The mayor and the Municipal Council make the decision over the application and over what they do with the incentives received – they are under no obligation to consult traditional community authorities.
- Communities: INAB necessarily deals only with the representatives chosen by the community. This has the advantage of respecting community autonomy in terms of what they chose to do with the incentives received. However since INAB then pays the funds into the account designated by the representatives, it also has the drawback of opening the door to operators that collect consent from smallholders, present a communal project, and then retain a portion of the incentives paid as a fee. The requirement that the community notarize the act with which they select their representative also adds an additional expense.

The distribution of benefits under REDD+ Early Initiatives will depend to some extent on issues of the ownership of emissions reductions units. However since all projects intend to distribute non-financial benefits, they would best advised to include the full range of stakeholders (making sure to include all those

with an influence on deforestation), irrespective of who "owns" the emissions reductions units. CONAP will clearly need to be one of those with a seat at the table, but should make sure that it has been properly enabled to receive and negotiate emissions reductions units despite not formally being an owner of State-owned Protected Areas.

The R-PP also mentions the importance of the 2002 General Decentralization Law in REDD+ benefit distribution, though it is not obvious which streams of benefits it refers to.

3.7 RECOMMENDATIONS ON CARBON RIGHTS

(A) GoG, MARN - Prioritize the establishment of the CNCC

The LMCC mandates the creation of the CNCC to lead on climate change policy. It will provide an invaluable high-level platform to concert action between different State entities and under the LMCC plays a key role in REDD+ governance (indeed according to Sobenes (2013) without the CNCC Guatemala may be unable to regulate Art. 22 of the LMCC). It should be established as soon as possible.

(B) MARN, CNCC - Simplify the link between land ownership and ownership of emissions reductions units

The LMCC links the right to ownership of emissions reductions units to the ownership of land, but does so in a complicated way, by making it conditional on the ownership of a registered project over that land.

MARN has 18 months to pass a Regulation establishing and regulating the register of emissions reduction projects. It should seek opinion from Guatemalan legal council as to how direct it can make the link between land ownership/possession and the right to own emissions reductions, without contradicting the LMCC.

Ideally the Regulation would make it clear that it is sufficient to be the Owner or Legal Possessor of land within a registered project area. Failing that it would need to clarify how project ownership links to land ownership/possession, practically dealing with the real-world scenario in which many different Owners and/or Possessors will fall within a given project area, not all of whom may even be identifiable.

(C) MARN, CNCC - Define Legal Possessor

The LMCC refers to Legal Possessor – a term that has not previously been used in Guatemalan land legislation. The meaning of "Legal Possessor" should be clarified in the Regulation of the LMCC. The easiest option would simply to say that it means the same as "Possessor" under the RIC Law. An alternative would be to retain it as a distinct concept, perhaps to allow Owners to certify occupiers as "Legal Possessors" who would not normally be "Possessors."

(D) MARN, CNCC - Ensure that important tenure categories are explicitly covered

It is ironic that the ownership of emissions reduction units arising from the GuateCarbon project is almost as unclear after passage of the LMCC as it was before. Ideally, the LMCC should clarify the ownership of emissions reductions units relating to two specific situations: (i) concessions over State land; and (ii) Old Settlements inside Protected Areas without registered title, with and without a Cooperation Agreements with CONAP. This could be done through following through the two preceding recommendations, by regulating the general concept of "Posession" or independently.

The status of emissions reductions that may arise at a landscape level within a subnational region as a result of policies and actions taken to reduce deforestation should also be clarified. At the moment it is unclear whether anyone would be able to own and negotiate these.

(E) MARN, MAGA, CONAP, OCRET, PGN, MINFN - Clarify the issue of which State entity can negotiate emissions reductions units arising from State land

Both CONAP and OCRET administer large extensions of State land without actually owning it. They could work with the Attorney General's Office (PGN) and the Office of State Property of the Finance Ministry to resolve the issue of which institution has the right to negotiate emissions reductions units arising from this land.

One resolution could be that the administering entity receives and negotiates emissions reductions units but has to apply them towards emissions reducing activities in the region in which they arose (similar to the formulation in the CONAP-sponsored proposed Biodiversity and Protected Area Regulation).

(F) MARN, INAB, CNCC - Link participation in forestry incentives to ownership of emissions reductions units

Currently there is no link between forestry incentive payments and the right to own and negotiate emissions reduction units relating to the same land. It would be relatively simple to add a provision to the forestry incentive contracts saying that the Owner/Possessor cedes their rights to the State in return for the incentive payments and this should be considered.

However thought needs to be put in on the duration of these rights and obligations: REDD+ looks at between 20 and 30 years while incentives currently run for six to ten years with no possibility of renewal. Should incentive periods be extended for the full length of the project? Should an Owner of Possessor of land cede their carbon rights in perpetuity if they participate in a forestry incentive program? Or should they cede their carbon rights for a fixed period and if so on what basis?

(G) CNCC – Ensure that customary/claimed rights holders are included in REDD+ benefits.

The LMCC and forestry incentive programs make participation in REDD+ benefits dependent on Owning or Possessing Land, meaning that customary and claimed rights holders are liable to be excluded. A deliberate effort should be made to identify and compensate these, not only from a perspective of equity but also because they often will have the potential to undermine reductions in emissions if they do not also benefit.

Within REDD+ Early Initiatives they could be included the non-financial benefits. At the subnational regional level they could be potentially be compensated using: (i) part of the difference in value between the forestry incentives paid out and the proceeds of sale of the emissions reductions; or (ii) the proceeds of sale (if any) of emissions reductions units arising from reductions in emissions at the landscape level.

4.0 FREE PRIOR AND INFORMED CONSENT (OR CONSULTATION RESULTING IN BROAD COMMUNITY SUPPORT) (FPIC) IN GUATEMALA

There is no universally agreed definition of Free, Prior and Informed Consent and some countries, including the United States, understand it as a process of meaningful consultation[16]. This section examines Free, Prior and Informed Consent (or Consultation) (FPIC) in the Guatemalan national context and in relation to REDD+ particularly.

4.1 CONSULTATION IN GUATEMALA

FPIC is a hugely contentious issue in Guatemala, primarily in the context of mining and hydroelectric dams. Indigenous and *campesino* organizations have seen ILO Convention 169 and national legislation of participation as a scarce legal avenue for the vindication of their rights. Between 2005 and March 2010 these groups organized 59 community consultations, involving more than half a million people, all of which rejected mining projects in their communities (CSA TUCA et al 2010). Government, meanwhile, has seen these consultations as an obstacle to development and has refused to recognize them.

In 2011, the Government of President Alvaro Colom tried to regulate consultation under ILO 169. Indigenous organizations protested that they had not been consulted on the regulation, a view upheld by the Constitutional Court, which struck down the regulation (COPAE 2013). A similar effort by community organizations to get the entire 1997 Mining Law declared void for a lack of consultation[17] was rejected by the Constitutional Court in late 2013.

Social conflict around the implementation of mining projects without due consultation has led to criticism from the Interamerican Commission on Human Rights and repeated visits from the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya. According to Anaya (2011) "the lack of consultation has been a fundamental factor, though not the only one, in the conflictive climate in Guatemala around extractive projects and others in traditional indigenous territories".

16 "The United States recognizes the significance of the Declaration's provisions on free, prior and informed consent, which the United States understands to call for a process of meaningful consultation with tribal leaders, but not necessarily the agreement of those leaders, before the actions addressed in those consultations are taken" (US Department of State, 2010).

17 Expedient No. 1008-2012

The low awareness of REDD+ at the community level means that there is currently no organized resistance to REDD+ from civil society. However if REDD+ should end up associated with the same kind of externally driven development model as mining and hydroelectric dams, opposition will be fierce. Even in the absence of opposition to REDD+, any process of formal consultation will be politically sensitive for all stakeholders because of the precedent it could set for other sectors.

As of early 2014, the Ministry of Work has begun an early dialogue on a new process to attempt to regulate FPIC under ILO 169.

4.2 GUATEMALAN LEGAL FRAMEWORK FOR PARTICIPATION, CONSULTATION AND CONSENT

4.2.1 International Framework

ILO Convention 169

Guatemala is bound by ILO Convention 169, having ratified it through Decree 6 of 1996. Under ILO Convention 169, indigenous and tribal peoples should be consulted on legislative or administrative measures that may affect them directly. Consultations should be undertaken through appropriate procedures, in good faith, through the representative institutions of the people consulted and with the objective of reaching agreement.

UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Guatemala voted in favor of the General Assembly resolution, which creates a non-binding obligation to obtain the free, prior and informed consent of indigenous peoples before adopting legislative or administrative measures that may affect them and before approving projects that affect their lands, territories or other resources.

In the REDD+ Process

Guatemala is both a Forest Carbon Partnership Facility (FCPF) and UN-REDD partner country, though it is only receiving funding from the FCPF. Guatemala's R-PP uses the version 6 format, which gives guidance on the process for FPIC. Because it disburses World Bank funds, the FCPF demands compliance with World Bank safeguards, including World Bank Operational Policy 4.10 on Indigenous Peoples which uses a different definition of FPIC than UNDRIP: Free prior and informed consultation resulting in broad community support. The International Finance Corporation (the private sector financing arm of the World Bank) notes that: "FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree" (performance standard 7).

Nevertheless the FCPF guidance goes on to state: "FCPF countries that have both endorsed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and enacted legislation to implement the principle of free, prior and informed consent (FPIC), should conform to their legislation that concerns FPIC… FCPF Countries that have ratified International Labor Organization (ILO) Convention No. 169 are expected to comply with their obligations under that convention" (FCPF & UN-REDD 2012).

The UN-REDD Program also requires that countries follow UN-REDD Program Guidelines on FPIC in UN-REDD program activities.

There is therefore little doubt that in the national context Guatemala needs to apply Free Prior and Informed Consent (not consultation) for REDD+ activities, and this is the standard that Guatemala says it will use in the R-PP (e.g. p. 32).

4.2.2 National Framework

1985 Constitution

The Constitution contains general commitments by the State to recognize and respect indigenous customs, social organizations and traditional land administration (Arts. 66 and 67). Under Art. 70 a specific law should regulate these commitments, but such a law has never been passed.

Municipal Code 2002

The Municipal Code recognizes that indigenous peoples have the right to legal personality and to have their traditional authorities recognized and respected by the State (Art. 20). It also recognizes indigenous or community mayors (where they exist) as parallel (though implicitly subordinate) authorities with whom the Municipal Government should coordinate on a wide range of issues (Art. 55).

Under the Code, Municipal Governments should consult with community authorities and establish mechanisms that guarantee the use, conservation and administration by communities of communal land that has been traditionally entrusted to the Municipal Government (Art. 109).

The Code establishes three different procedures for binding consultations at the municipal level (Arts. 63-66). Where an issue is sufficiently important, the Municipal Council can convene a "Consultation of the Neighbors" Where a general issue will affect all the members of a municipality, the community itself may require that the Municipal Council carry out "Consultation Requested by Neighbors." Where an issue affects indigenous communities or their authorities especially, they may require a "Consultation of Indigenous Communities or Authorities of the Municipality." Such a consultation should apply those community's traditions and customs.

2002 Law of Urban and Rural Development Councils

Development Councils exist at the community (COCODE), municipal (COMUDE), departmental (CODEDE), regional and national level. They are intended to be the principal mechanism for participation in the democratic planning of development at each of these levels and must include representatives of indigenous peoples and cooperatives. According to the R-PP, the Development Councils will be the principle means for carrying out public consultation on REDD+.

Jurisprudence

The sentence of the Constitutional Court (1102-12) upholding the Mining Law despite the lack of FPIC contains valuable discussion on the nature of the government's duty to carry out FPIC. According to the judgment:

- The Constitution establishes the procedure for passing new laws through a process of representative democracy and ILO 169 should not be interpreted as changing that procedure for general laws with universal applicability.
- Where the object of a law is specifically an indigenous or tribal group, however, it is "viable" for the legislature to "support" itself on a process of "adequate" consultation.
- Where there is opposition to the application of a general law at the local level, a community should organize consultations at that level. That led the Court to repeat its demands to the Government that it regulate the process of consultation for indigenous communities under ILO 169 and the Law of Urban and Rural Development Councils.

Court cases have repeated that the right to consultation is unquestionable under ILO 169 and needs to be regulated at the national level. However, two subsequent Constitutional Court judgments on community

consultations opposing mining in the Municipalities of Mataquescuintla (Jalapa Department) and San Rafael (Santa Rosa Department) have varied and the question as to whether or not it was constitutional to recognize the results of community consultations as binding remains unsettled.

4.3 WHO DOES THE REQUIREMENT TO CARRY OUT FPIC APPLY TO?

The two dimensions of the trigger for FPIC in the Guatemalan national context are (i) some degree of affectation by REDD+ activities; of (ii) indigenous peoples.

Degree of Affectation

UNDRIP, the Commission on the Elimination of Racial Discrimination, the International Finance Corporation and the Inter-American Court on Human Rights each use a different threshold (UN-REDD 2013). The UN-REDD+ FPIC Guidelines contain a useful checklist of circumstances that could trigger FPIC and suggests working with potentially affected rights holders to consider when and with whom it will be applied.

Indigenous Peoples

Guatemala recognizes the Garifuna, Xinca and 22 linguistic groups with Mayan origins, each of which have defined areas of influence and contain communities with historical continuity and traditional forms of organization, often managing communal or municipal forests. However despite receiving special mention in the Constitution, Peace Agreements and Municipal Code there is no special tenure regime for indigenous land nor have their rights for consultation or participation been made effective through enabling legislation.

Furthermore, centuries of an economic model aimed at separating communities from their land, together with more recent mass-displacements (between 500,000 and 1.5 million people – IDMC 2011) during the Civil War and the government led policy of colonization in the FTN and Petén has led to dispersion and fragmentation of indigenous communities.

Indigenous people are not a subset of the rural poor but rather make the up of the bulk of it, separately in traditional and recently-founded communities but also intermingled with the non-indigenous population. One of the consequences of this is that there is no easy definition of an "indigenous community." Nor has there been a concerted effort at the national level to determine this or to identify or help establish, structures for the legitimate representation of indigenous communities.

The UN-REDD FPIC guidelines cite Inter-American Court of Human Rights' judgments that customary rights must be respected whether or not they have been officially recognized (Awas Tingi Community vs. Nicaragua) and that until the demarcation and titling of indigenous lands is complete the State must refrain from acting or authorizing others to affect the existence, value, use or enjoyment of such territory unless the State obtains the FPIC of the [indigenous] Community (*Saramaka Merits Judgment*; UN-REDD 2013).

4.4 FPIC IN THE REDD+ R-PP

The R-PP identifies Guatemala's obligation to seek FPIC from directly affected indigenous peoples (p. 41-42) however it seems to state that this could be done through Development Councils not just through indigenous traditional mechanisms and implies that what is being sought is legitimization rather than consent (p. 43). The implication is therefore that FPIC will not be sought from non-indigenous smallholders.

However the R-PP also includes (p. 31-32) the results of interviews it has carried out on FPIC that include a range of opinions, among them that FPIC applies also to local communities and that Government merely needs to inform and let the community organize its own consultation. It is unclear what the status of these opinions is.

In general, the R-PP mixes the processes of participation, consultation and consent together (e.g. p. 46, 56). The different mechanisms that could be used for information sharing, participation and consultation at the national sub-national, regional and project scale are summarized in the R-PP, yet there is no process outlined for how the outcomes of consultation could feed back into the R-PP and result in changes to planned activities.

The R-PP (p. 46) contains a comprehensive list of different actors representing indigenous and *campesinos*, but acknowledges the need to go beyond these organizations to identify communities holding rights over forests and engage with them directly. Those it mentions are:

- Local indigenous authorities, including the different indigenous councils that together make up the Council of Western Peoples (CPO), the Guatemalan Association of Indigenous Mayors and Authorities (AGAAI) and the Network of Indigenous Authorities and Communities;
- Indigenous NGOs like Sotz'il and others;
- Indigenous leaders;
- Local community development and natural resource organizations, including those that make up the National Alliance of Guatemalan Community Forestry Organizations; and
- *Campesino* organizations like CUC and CONIC.

Initially, however, the process will only include three community actors, the Indigenous Roundtable on Climate Change (MICCG), the Network of Indigenous Authorities and Communities, and the National Alliance of Guatemalan Community Forestry Organizations (R-PP p. 46).

4.5 RECOMMENDATIONS

(A) GBBCC, GCI, indigenous and community representatives, Safeguards Committee - Develop FPIC strategy

There is a need to revise provisions on consultation in the R-PP, setting clear, justified criteria between populations whose consent will be sought and those who will merely be consulted. This can be achieved through a clear roadmap with timelines for the process of FPIC underscoring that FPIC is a key element of REDD+ readiness and not a process that can proceed on a parallel track to the implementation of the rest of REDD+. This should be done with full participation of indigenous and community groups – reaching consensus on what issues need to subject to consent and by whom.

The UN-REDD FPIC Guidelines provide useful guidance on steps to follow and suggests that they be incorporated retrospectively into the R-PP as part of the stakeholder engagement plan and/or Strategic Environmental and Social Assessment (SESA). This would involve the following steps:

- Mapping the substantive rights of indigenous peoples and where applicable, forest-dependent communities, that may be affected by REDD+ activities and therefore require FPIC to protect said rights;
- Consulting on key issues related to the national application of FPIC;
- Determining who gives consent (e.g. through a rights-holder mapping);
- Determining the possible activities requiring FPIC (e.g. through rights-impact and other assessments);
- Determining when (timing) the FPIC will be sought; and
- Determining operational steps for applying FPIC (e.g. develop a national methodology/guidelines for applying FPIC).

(B) CNCC, GBBC, GCI - FPIC will need to be carried out at different levels

Also as per the UN-REDD FPIC guidelines, FPIC will need to be carried out at various levels; national level FPIC does not obviate local level FPIC.

Given that Guatemala intends to use its existing forestry incentive schemes as an incentive and benefit sharing mechanism under REDD+ then at least the elements of the national incentive programs that may affect indigenous peoples' rights could be subject to FPIC. For example provisions of PINPEP Regulations and Probosque that relate to communal tenure (including over land titled in another's name).

At the local level, FPIC will be required in respect of REDD+ activities that affect indigenous land or municipal land in which there are claimed or disputed indigenous rights. For example a Municipal administration could require FPIC from the community before entering municipal forests into a forestry incentive scheme under REDD+.

(C) CNCC, GBBCC, GCI, indigenous and community representatives - Study ways to incorporate FPIC into existing consent mechanisms

INAB could consider how to adapt its existing processes for applying for forestry incentives so as include identification of customary rights and FPIC. This will inevitably imply extra costs and delays and will require technical accompaniment to ensure that it is carried out properly.

Some of the REDD+ Early Initiative project proponents have already had experience of applying FPIC in relation to their projects and will be able to provide useful lessons learned.

The Municipal Code includes "Consultation of the Neighbors" and "Consultation of Indigenous Communities or Authorities of the Municipality." These could be a way of carrying out FPIC at the municipal level, particularly since the later envisages applying the communities' traditions and customs. The CNCC and MARN should make sure when regulating the LMCC that they devolve the decision of whether or not to participate in REDD+ to the local level in order to avoid the validity of consultations being questioned (as it has been in relation to mining).

(D) GBBCC, GCI, indigenous and community representatives - Review the Constitutional Court judgments on previous FPIC cases in San Rafael and Mataescuintla

These decisions merit further study to determine whether or not the different outcomes are based on principles with wider application.

(E) GoG - Advance with the participatory regulation of FPIC under ILO 169

The level of interest and controversy around FPIC in mining could limit how far Guatemala will be able to advance on FPIC in the context of REDD+ without addressing FPIC more generally. Guatemala should prioritize the participatory construction of a national regulation on FPIC that is applicable across sectors and programs, including to REDD+.

5.0 CONCLUSIONS

The success of Guatemala's approach to REDD+ is deeply linked to land and resource tenure. Ownership, possession and occupation of land and forests control which stakeholders participate, how they can negotiate, what benefits they may be entitled to, and what responsibilities they will have to carry out.
By passing the 2013 Climate Change Framework Law, Guatemala became one the first countries worldwide to define tenure rights over carbon. The Framework Law and its pending enabling regulations provide Guatemala with the opportunity to clarify a number of ambiguities, overlaps, and/or unnecessary complications with respect to REDD+ operationalization. This TGCC Resource Tenure and Sustainable Landscape Assessment considers these opportunities through:

- a tenure-based stakeholder analysis;
- an assessment of tenure within existing and planned forest incentive policies;
- an analysis of what "carbon rights" may mean in a Guatemalan context; and
- an assessment based on the Guatemalan legal framework of free, prior and informed consent.

The analysis focused on the three sub-national regions (Northern Lowlands; Sarstún Motagua and Western) prioritized by the Emissions Reduction Program Project Idea Note (ER-PIN) and on the three focal activities: 1) the expansion of existing forestry incentive programs; 2) REDD+ Early Initiatives centered on protected areas; and 3) (to a lesser extent) sustainable production and efficient use of firewood.

Land Policy and Tenure Classifications

Distribution of land in Guatemala is highly uneven with 1.9% of properties covering 56% of the land area, and 67.5% of properties covering 8% of the land area. The need for land reform was one of the main drivers of the 1954 revolution and the Guatemalan Civil War. The 1996 Peace Agreements that ended the war promoted a market-based land redistribution program and resulted in the National Land Registration and Cadaster Program, designed to increase tenure security for smallholders. However, in the absence of policies to help smallholders make productive use of their land, the result has been that many have sold land to cattle ranchers and palm oil growers, resulting in increasing land concentration. This has been the case particularly in the highly forested (and REDD+ prioritized) region of Peten in the North of the country and was exacerbated by the fact that all land was titled individually since the program initially lacked a mechanism to enable communities to register land communally. These communities were made up recent migrants who originally had been given parcels of empty land by government on the condition that they clear it, or who cleared land themselves and later legalized it. That behavior was encouraged in earlier decades; now however when they sell up and move further into Northern Peten in search of land to settle they are criminalized for encroaching on Protected Areas. These dynamics and characteristics of land ownership have resulted in antagonism between the campesino and conservationist movements and have significant implications for REDD+.

The concentration and informality of land ownership mean that disputes over land are common. As of December 2013, the Land Affairs Secretariat, under the Presidency, has registered land disputes involving almost 300,000 hectares and over 150,000 families and (or roughly 20% of Guatemala's rural population).

There are four main types of rights holders of land in Guatemala: State; Municipal; Individualized Private; and Communal (including indigenous). The tenure rights (and ability to participate in different incentive schemes) of each of these groups are based on whether they are: Owners (with registered title); Possessors with documented but unregistered title; or Occupiers of land belonging to another, including rental, un-regularized peaceful occupation and illegal occupation. Possessor is the category with least legal clarity and also the

dominant one among smallholders and inside protected areas; it is therefore of key importance to REDD+.

Mayan indigenous peoples held land and natural resources communally. Though the Spanish and subsequent liberal governments took much of this land, they recognized communal tenure to a limited extent as ejidos. With the passage of time, however, many of these were registered to municipalities by default or by communities looking to protect their land. Today, customary indigenous communal land tenure persists over many Municipal and State forests. There are also some examples of indigenous communities with registered land title, but there is no legal concept of indigenous territory or reserve; these titles are no different to those held by campesino groups like cooperatives. A 2009 regulation to allow the titling of communal land has led to a number of active processes but not yet to any new registrations.

Recommendations from a review of land policy and tenure classifications include investment in: better defining/regulating the tenure category of "Possessors"; continuing to work with indigenous communities to secure tenure; allowing communities to establish internal consultations on registering communal property; prioritizing land use planning and soil studies in REDD+ Early Initiative Areas; and revisiting land distribution policies.

Tenure and REDD+ Stakeholders

With respect to tenure and REDD+ stakeholders, the analysis finds that government efforts to involve different stakeholder groups, together with a relatively low public profile of REDD+, mean that Guatemala has managed to avoid the kind of social conflicts associated with REDD+ in other countries in the region. However, the centralized approach to REDD+ development to date and lack of FCPF R-PP funding for local consultations means that there has been weak local level participation from campesinos, local communities and indigenous representatives. There has also been little involvement from municipalities and the private sector.

The lack of representative bodies for the indigenous population is a structural issue not solely related to the forest sector or to REDD+. Mayan populations form the majority of rural poor across the entire country rather than a subset of the rural poor living on the border of forested areas. Different NGOS therefore tend to represent indigenous communities as urban or rural poor rather than as indigenous peoples.

Recommendations include prioritizing the signature of the FCPF grant agreement to fund local-level consultations; and operationalize the national Forests, Biodiversity and Climate Change Group to include better cross-representation from government ministries.

Tenure and Forest Incentive Programs

Guatemala's National Forest Policy incentive programs, PINFOR and PINPEP (and the future Probosque), are designed to reach different types of land holders. PINFOR is open to titled Owners of at least 2 ha of land (with incentives highly skewed toward plantations and reforestation), while PINPEP is open to Posessors (without registered title) of up to 15 ha of land (focusing on natural forest protection). Probosque is projected to replace PINFOR in 2016 and will be open to Owners of smaller extensions of land.

There are a number of stakeholders who are currently ineligible to participate in these programs, such as occupiers of Municipal land, who should be increasingly considered in REDD+. A concern for REDD+ within each of these programs is that the incentives do not continue indefinitely, and eligibility is limited to a single contract. This poses potential challenges both to long-term forest protection and to the viability of plantations.

Recommendations include: prioritizing incentives based on environmental and social criteria as in the Costa Rican model; increasing the proportion of incentives devoted to managing natural forests; incentivizing natural forest production for fuelwood; unifying criteria between the PINPEP and Probosque to ensure that the full range of relevant stakeholders can participate; and considering allowing continuous/long-term contracts within the incentive programs.

Tenure and Protected Areas

Security of tenure in and around protected areas is a major concern for REDD+. Protected areas cover 31% of the country and 52% of the forests, and many of these have large legal and illegal settlements. The Sierra de las Minas Biosphere Reserve for example has 80,000 people living in it and almost 50% of the area is devoted to agriculture. There are multiple, overlapping zoning categories for Protected Areas, which can be split into three main types: strict protection, restricted use or sustainable use/buffer zone. However Protected Areas status does not affect pre-existing private property (known as "Old Settlements"); private property may exist even in strict protection areas. For populations with strong rights, Protected Area managers use "cooperative agreements" to regulate activities, while recent settlements can be evicted or pushed to exit without relocation compensation. The implementation of REDD+ creates a risk that only registered Owners of land will receive benefits, leaving the large numbers of legal Old Settlements and illegal Occupiers subject to increased control without compensation. This is particularly an issue given that these stakeholders may be the group that is most influencing deforestation. Recommendations include: expanding the model of community concessions; harmonizing instruments relevant to Protected Area zoning; piloting community co-administration of Protected Areas; increasing police enforcement in Protected Areas and addressing the issue of "Old Settlements" in strict protection areas, including special attention to indigenous populations in these areas.

Tenure and Carbon Rights

Guatemala is the second country globally to pass specific legislation relating to carbon rights. This includes a clear link of the rights to emission reductions units to ownership of the underlying land. Nevertheless, the Climate Change Framework Law has shortcomings that should be addressed in the forthcoming regulations.

The concept of "carbon rights" continues to vex lawyers, politicians and practitioners alike, with a lack of clarity on whether an "environmental service" is property or a personal service. This analysis offers a suggestion that: 1) environmental services cannot be owned or traded, but the land that produces the service can be owned or traded, as can products of the land, such as emission reduction units; 2) legal persons cannot provide environmental services, but they can be contracted to provide services that affect the quality and quantity of environmental services; and 3) (consistent with the Guatemalan Law) emission reduction units belong to the Owner or Legal Possessor of the land, who can pay third parties for personal services that generate products from the land (including emissions reduction units).

A challenge within the current law is that it appears to condition ownership of emission reduction units not only on ownership or possession of land, but also on being the owner of a registered project. It is not currently clear how this will be operationalized in relation to projects that include many different properties subject to different tenure regimes, the case both for REDD+ Early Initiatives and for the Forest Incentive Schemes. Will all land Owners and Possessors within REDD+ Early Initiative project areas be implied to have their own registered projects, and likewise do all participants in PINPEP and PINFOR have their own registered projects? With respect to PINFOR and PINPEP, existing contracts could easily be modified to transfer emission reduction units to government who is paying the incentives, however the challenge remains that the incentive program payout periods are significantly shorter than REDD+ project time frames.

Guatemala has a number of mechanisms that it could use to flow down obligations to property rights holders and prevent them from deforesting. These include the existing (but poorly enforced) regulation that prohibits land use change of forests for areas greater than 1 ha without a license; a ban of new occupations in Protected Areas; and a prohibition on issuing harvesting licenses in areas that have previously received forests protection incentives. With greater investment and enforcement, these may act as a framework for ensuring national or subnational results.

Carbon rights are often used in the literature in relation to benefit sharing. While PINPEP and PINFOR have existing payment modalities, Guatemala currently envisages that REDD+ Early Initiatives distribute only non-monetary benefits to individual smallholders, municipalities and communities. There are common

challenges of elite capture and representation that have yet to be fully considered.

Recommendations related to carbon rights include: simplifying the link between land ownership and ownership of emission reduction units; ensuring that ownership of emission reduction units covers important tenure categories, including concessions on State land and Old Settlements inside Protected Area (without registered title, and with and without Cooperative Agreements); clarifying which State entities can negotiate emission reduction units arising from State land; linking participation in forestry incentive programs to emission reduction unit ownership; and ensuring that customary/claimed rights holders are included in REDD+ benefits.

Tenure and Consultation

To date national REDD+ preparation has not yet reached the phase of widespread consultation or Free, Prior and Informed Consent (FPIC), which is called for under Guatemalan law. However the issue of FPIC for indigenous peoples on mining and hydroelectric initiatives is incredibly contentious in Guatemala. All stakeholders will approach discussions on consultation and FPIC in relation to REDD+ with their attention firmly on how the outcomes will relate to these existing disputes.

The Guatemalan Municipal Code creates mechanisms for local consultation, including a specific mechanism for use by indigenous peoples. Additionally, Guatemala's membership of both the FPCF and UN-REDD, results in the need to implement the principle of FPIC. In the Guatemalan context, FPIC is triggered by degree of affection of rights holders, and by this impacting indigenous peoples. As highlighted above, this is a particular challenge in Guatemala because indigenous peoples make up the bulk of the rural poor and there is no national framework for indigenous representation.

Within Guatemala's R-PP there is also some lack of clarity as to whether FPIC will apply broadly to local communities, and not just indigenous people and as to how consultations and FPIC will be carried out. Key recommendations include: developing a strategy for national application of FPIC; ensuring the consultations are carried out at a variety of levels; exploring ways to incorporate FPIC into existing consultation mechanisms; and taking care to avoid the pitfalls encountered in mining consultation processes.

Conclusion

The importance of addressing the challenges or recommendations described above is not limited to REDD+, or contingent on future forest carbon financing. Clarifying these land and resource tenure ambiguities and overlaps will encourage investment, reduce conflict and improve land management in Guatemala's rural lands. Some of these options are "easy wins," while others may reflect a longer-term political commitment, investment, and trust-building between government and rural communities. The tenure reforms needed to successfully implement REDD+ in Guatemala can be done incrementally and should be a part of forthcoming strategies and programs and the national, subnational and local levels.

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