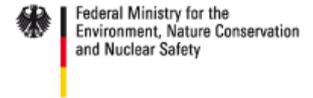


INTERNATIONAL CLIMATE INITIATIVE

**Regional project
Climate Protection through Forest Conservation
in Pacific Island Countries**

On behalf of



of the Federal Republic of Germany

REDD+ and Forest Carbon Rights in Melanesia

SYNTHESIS REPORT OF COUNTRY LEGAL ANALYSES

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Executive summary

Who owns the carbon in the forest? This is a question of great importance for all developing countries preparing to engage with REDD+ — no more so than in Melanesia where land plays a central role in the cultural identity and lives of the indigenous people.

Deforestation and forest degradation account for approximately 17% of global greenhouse gas emissions – more than the entire global transport sector. Beginning in 2005, this has prompted the development of a new mechanism known as Reducing Emissions from Deforestation and forest Degradation (**REDD+**), under the 1992 United Nations Framework Convention on Climate Change (**UNFCCC**). The purpose of REDD+ is to provide developing countries with a financial incentive to reduce their levels of deforestation and forest degradation, and to increase their forest carbon stocks.

Melanesia is a sub-regional grouping of five countries in the Pacific, incorporating Fiji, New Caledonia, Papua New Guinea, Solomon Islands and Vanuatu. As with all Pacific Island countries, land in Melanesia is of central importance to the cultural identity and economic security of customary communities. Consequently, the right to control forest carbon and the right to enjoy the economic benefits that may flow from this under REDD+, are also of critical importance.

“One of the main challenges for regulating the use of forest carbon rights in Melanesia is how to enable customary landowners to take advantage of REDD+, while maintaining the nature of their customary land tenure and traditional connection with the land.”

The purpose of this Synthesis Paper is to summarize the legal position as to how carbon rights are treated under existing legal frameworks in the four Melanesian countries (Section 4), including options for law reform.

Melanesia has one of the highest levels of customary land ownership in the world. Any discussion regarding customary land in the Pacific, and Melanesia, must start with the recognition of the centrality of customary land tenure in the lives of the people of the Pacific. It should therefore be of no surprise that the overall conclusion of this Paper is that forest carbon rights are owned by customary communities in Melanesia, unless

there are other lawful competing land uses authorized over the land, such as forestry or mining rights.

However customary land tenure in Melanesia has some particular characteristics which raise a number of challenges for defining forest carbon rights and for forest carbon projects (Section 3). These include the following:

- Most customary land in Melanesia is unregistered (except in Fiji), which means it is difficult to identify those who are entitled to deal with customary land, as owners, and those who are the holders of various customary interests in the land and its natural resources (usufruct rights).
- Because most customary land is unregistered (except in Fiji), the boundaries of customary land are not surveyed and are often disputed. In the absence of a survey, land boundaries are usually defined in terms of physical markers, such as rivers, mountains, hills, stones and trees.
- In some countries (e.g. particularly in Solomon Islands), 'ownership' rights over land and forest can be held by different groups or clans, making it very difficult to identify the owner or owners of the carbon rights.
- Customary land is governed by customary laws, which are not written down and differ from place to place. Therefore, if a forest carbon transaction were to take place over customary land according to customary law (such as in Vanuatu where un-leased customary land is concerned), this would be subject to much legal uncertainty.

One solution to identify the owners of forest carbon rights on customary land is to use a mechanism to record customary rights. 'Recording' is a process which involves deciding on the level of a group holding – family, clan or other larger grouping – and the area over which they have customary claims. It is different to land registration, which in most countries (PNG, Solomon Islands and Vanuatu) results in the permanent alienation of customary land.¹ The Solomon Islands is the only country with legislation which allows the recording of customary claims, which can be done under the *Customary Land*

¹ This distinction is outlined clearly in PIFS (2008). *Customary Land Management and Conflict Minimisation: Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific*, Pacific Islands Forum Secretariat, Suva, Fiji.

Records Act.² This could be used to record ownership of forest carbon rights in Solomon Islands and provides a useful model for PNG and Vanuatu.

Section 4 of this Paper summarizes the findings in the Country Papers regarding the difficulties of identifying the customary 'owners' of forest carbon rights in each country. It also concludes that carbon rights, which are generally owned by customary landowners, cannot be 'nationalized' without payment by the State of fair compensation. Section 4.5 summarizes the findings as to whether 'timber rights' are 'carbon rights' in each country. The conclusion is reached that even if carbon rights are found to have passed to the government or concession holder under a timber rights agreement, in practical terms, the consent of customary landowners will still be required to convert a timber rights licence into 'carbon rights' in accordance with the principle of free, prior and informed consent. A negotiated outcome between the concession holder, customary landowners and government will clearly be required in such circumstances.

Section 5 explores the options for linking carbon rights ownership to land and/or forest ownership.

Section 6 addresses the issue as whether third parties, such as Project Proponents and logging companies, should be permitted to own carbon rights as a separate property right. In addressing the controversial question as to whether carbon rights should be allocated to logging companies, policy makers should consider the need to align carbon rights with the particular drivers of deforestation and forest degradation in their country so as to maximise the potential for carbon emission reductions and removals in the forest sector.

It is noted that the drivers of deforestation and forest degradation, and the opportunities for increasing forest carbon stocks, differ quite significantly between the Melanesian countries, and in this regard, different approaches to allocation may be required. For example, in PNG and Solomon Islands, the main driver of deforestation and forest degradation is planned deforestation, driven primarily by commercial logging, sometimes coupled with the prospect of converting logged land to agricultural use, such as for oil palm. By comparison, Fiji and Vanuatu have smaller land and forest areas and are not experiencing the same degree of commercial pressure on their forests. Rather, their opportunities under REDD+ are more likely to arise in the "plus" area of REDD+, such as activities to improve forest conservation and the enhancement of forest carbon stocks.

² [Cap 132] (*Customary Land Records Act*).

The Paper concludes (Section 7) by addressing one of the fundamental challenges for forest carbon projects in Melanesia, which is how to overcome the general restriction that prohibits the alienation of customary land and of rights and interests in customary land. This restriction presents less of a challenge in Fiji and Vanuatu, where leasing is a common and familiar mechanism for leasing customary land to enable development. **However, the restriction on alienation presents very complex challenges in PNG and Solomon Islands, where there is a serious risk that the forest carbon contracts that underpin REDD+ projects could be declared void by the courts.** This highlights one of the main challenges for defining and regulating the use of forest carbon rights in Melanesia, which is how to reform the rules on customary land tenure to allow customary landowners to take advantage of REDD+, while maintaining but not undermining their customary land tenure and connection with the land.

Addressing the issue of forest carbon rights is crucial for Melanesian countries if they are to attract market-based carbon finance for REDD+. This is likely to require some level of legislative change, particularly in PNG and Solomon Islands, possibly in Vanuatu, and to a lesser extent in Fiji.

Supporting Country Papers

This Synthesis Paper and its supporting Country Papers have been commissioned by the SPC/GIZ Regional REDD+ Project, *Climate Protection through Forest Conservation in Pacific Island Countries*, funded by the International Climate Initiative of the German Federal Environment Ministry.

This Synthesis Paper is a summary of the following four Country Papers which each contain a detailed country analysis of forest carbon rights in the four Melanesian countries:

- [FIJI REDD+ Forest Carbon Rights Legal Analysis2012](#),
by Ms Christine Trenorden
- [PNG REDD+ Forest Carbon Rights Analysis2012](#),
by Mr Steven O'Brien
- [Solomons REDD+ Forest Carbon Rights Analysis2012](#),
by Professor Jennifer Corrin

- [Vanuatu REDD+ Forest Carbon Rights Analysis2012](#) ,
by Professor Jennifer Corrin.

All Papers have been informed by the proceedings of the Regional Workshop on Forest Carbon Rights in Melanesia, also convened by the SPC/GIZ Regional REDD+ Project, held in Nadi, Fiji, on 22-23 October 2012.

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Disclaimers

This paper attempts to summarize the position on carbon rights across four different countries. Notwithstanding some similarities, there are also significant differences between these countries. Consequently, broad statements about the general position in Melanesia are made in this Paper. Exceptions are noted where possible. Where specific country information is required, the particular Country Paper should be consulted.

A note on terminology

The terms 'carbon rights', 'forest carbon rights' and 'forest carbon property rights', are used interchangeably throughout this Paper. Similarly, the terms 'REDD+ projects' and 'forest carbon projects' are used interchangeably, although forest carbon projects may be considered to cover a broader range of project types than REDD+ projects.

Abbreviations and technical terms

AFOLU	Agriculture, Forestry and Other Land Uses
A/R	Afforestation / Reforestation
CCBS	Climate, Community and Biodiversity Standard
CDM	Clean Development Mechanism of the Kyoto Protocol
COP	Conference of the Parties
ERPA	Emissions Reduction Purchase Agreement
FCPF	Forest Carbon Partnership Facility of the World Bank
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
JICA	Japan International Cooperation Agency
PICs	Pacific Island Countries
PNGFA	Papua New Guinea Forest Authority
REDD+	REDD, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks (“+”)
SABL	Special Agriculture and Business Lease (SABL), PNG
UNDRIP	United Nations Declaration on Rights of Indigenous Peoples 2007
UNFCCC	United Nations Framework Convention on Climate Change 1992
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and forest Degradation

Purpose of this Paper

The purpose of this Paper is to synthesize the information contained in the four detailed Country Papers that were prepared for this project on forest carbon rights in Melanesia. This Paper and the Country Papers do not purport to set out a comprehensive legal and policy framework for clarifying and allocating forest carbon rights in each Melanesian country. Rather, the Papers seek to establish the current legal position as to how carbon rights are likely to be treated under existing legal frameworks in Melanesia, and to use this as a baseline to identify a range of options for law reform. Whether and how each country decides to pursue law reform activities to clarify carbon rights will then be a matter for further consultation and discussion in each country.

There are some areas related to carbon rights but which are not addressed in detail in this Paper due to considerations of time, cost and space. These include the following issues:

- how forest carbon rights will be linked with benefit-sharing;
- how to address the risks and liabilities associated with the ownership of carbon rights (e.g. through the use of buffers and other risk management mechanisms);
- policy and legislative options for creating a “Sellers’ Entity” to manage the sale of emission reductions and removals for forest carbon projects on behalf of multiple customary communities; and
- the manner in which national REDD+ registries to track the creation and performance of REDD+ activities might be created.

1. Context for REDD+ and carbon rights in Melanesia

Who owns the carbon in the forest? This is a question of great importance for all developing countries preparing to engage with REDD+ -- no more so than in Melanesia.

Deforestation and forest degradation account for approximately 17% of global greenhouse gas emissions – more than the entire global transport sector.³ Since 2005, this has prompted the development of a new mechanism known as Reducing Emissions from Deforestation and forest Degradation (**REDD+**), under the 1992 United Nations Framework Convention on Climate Change (**UNFCCC**).⁴ The purpose of REDD+ is to provide developing countries with a financial incentive to reduce their levels of deforestation and forest degradation, and to increase their forest carbon stocks.

While the architecture for the UNFCCC REDD+ mechanism is still evolving and is not yet fully functional, funds are already flowing for individual forest carbon projects through the compliance and voluntary markets.⁵



Map 1.1 Location of Melanesian countries in the South Pacific Ocean

³ IPCC Fourth Assessment Report, 2007.

⁴ To date, the Conference of the Parties of the UNFCCC has adopted four decisions on REDD+, see: Decision 2/CP.13 on Reducing emissions from deforestation in developing countries: approaches to stimulate action (Bali); Decision 4/CP.15 on Methodological guidance for REDD+ (Copenhagen); Decision 1/CP.16, The Cancun Agreements, Ch. III(C) on Policy approaches and positive incentives on issues relating to REDD+; Decision - /CP.17 Guidance on systems for providing information on how safeguards are addressed and respected and modalities relating to forest reference emission levels and forest reference levels as referred to in decision 1/CP.16 (Durban).

⁵ For a review of the current status of the forest carbon markets, see: Peters-Stanley, M., Hamilton, K., and Yin, D., (2012). [Leveraging the Landscape: State of the Forest Carbon Markets 2012](#), Ecosystem Marketplace.

Melanesia is a Pacific sub-regional grouping of five countries – Fiji, New Caledonia, Papua New Guinea, Solomon Islands and Vanuatu – located in the South Pacific (**Map 1.1**).⁶ While the Melanesian countries have many cultural elements in common, such as high levels of customary land ownership and natural resource management, there are also significant differences based on land size, population, and drivers of deforestation, with PNG having by far the largest land area and population (Table 1.1).

Table 1.1: Country profiles in Melanesia⁷

Country	Land area (1,000 ha)	Population	Forest cover (1,000 ha)	% of land area	Annual deforestation rate (2000 -2010)
Fiji	1,827	844,000	1,014	56%	0.3%
PNG	45,286	6,577,000	28,726	63%	0.5%
Solomon Islands	2,799	511,000	2,213	79%	0.2% ⁸
Vanuatu	1,219	234,000	440	36%	NIL

1.1 Carbon rights and customary land ownership in Melanesia

Customary land tenure is the dominant form of land tenure in Melanesia, varying across countries from between 88% to 97% (Table 3.1), with forest ownership also being largely determined according to customary law.⁹ This is in contrast to many countries in Africa¹⁰

⁶ Although New Caledonia is a Melanesian country, it is not covered by the Paper. New Caledonia is an overseas territory of France and is therefore not eligible to participate in the emerging UNFCCC REDD+ mechanism, in which only developing countries (non-Annex 1 countries) may participate. For this reason, a reference to 'Melanesia' in this Paper does not include a reference to New Caledonia.

⁷ All country statistics are from FAO (2011), *State of the World's Forests*, Rome, pp. 108, 117.

⁸ This figure is substantially lower than the annual deforestation figure cited in the UN-REDD National Programme Document for Solomon Islands 2011 – 2012, which notes that Solomon Islands has the highest deforestation rate in the South Pacific, at 2.2% per year (Section 2: Situation Analysis).

⁹ The extent to which forest ownership coincides with customary land tenure, and the manner in which it is decided, is addressed in each of the Country Papers.

¹⁰ It is estimated that 95% of forests in Africa are in public ownership: Romano, F. (2007). [Forest tenure changes in Africa: making locally based forest management work](#). *Unasylva* 58 11-17, at p. 12.

and Asia¹¹ countries where the State has ownership of much of the land and the forest resource.

It appears to be widely accepted by both governments and communities in Melanesia that forest carbon rights are owned customary landowners, a position which the Pacific Island Regional Policy Framework for REDD+ expressly acknowledges.¹² This acknowledgement appears to reflect the legal and cultural assumption that if customary communities own the land and the forest resource, they must, by implication, also own the carbon. The challenge, however, in Melanesia is not whether customary landowners should be entrenched as owning carbon rights, but rather how to identify *which* customary owners own the carbon rights. This uncertainty arises from the nature of customary land tenure itself, where there can be multiple groups or clans with ownership and/or usufruct rights over the forest resource, and *where* the boundaries of land and forest ownership are often disputed between customary groups.

1.2 Support for REDD+ readiness

All four Melanesian countries are currently undertaking REDD+ readiness activities and are in Phase 1 of REDD+, developing their national REDD+ programmes. Table X summarizes the main multilateral and bilateral support currently in place for each country.

	Fiji	PNG	Solomon Islands	Vanuatu
GIZ bilateral support¹³	Yes ¹⁴	Yes	Yes	Yes
FCPF (World Bank)	No ¹⁵	Preparing R-PP ¹⁶	No	Preparing R-PP ¹⁷

¹¹ For example, in Indonesia, most land and forest is under State control: Cotula, L., and Mayers, J., (2009). *Tenure in REDD+: Start-point or afterthought?* International Institute for Environment and Development, London, UK, pp. 42-44.

¹² "Almost 90% of land in the Pacific Islands is under customary ownership making the indigenous people of the Pacific major resource owners": Pacific Islands Regional Policy Framework for REDD+ (2012), Para. 4.6.4.

¹³ GIZ's support for REDD+ readiness activities in Papua New Guinea, Solomon Islands and Vanuatu is delivered through the [SPC/GIZ Pacific German Regional Project – Climate Protection through Forest Conservation in the Pacific Island Countries](#), which is also supporting the development of the Pacific Regional REDD+ Policy Framework.

¹⁴ The development of Fiji's National REDD+ Programme is supported by the [SPC/GIZ Project – Coping with Climate Change in the Pacific Island Region](#).

¹⁵ Although not currently a member, Fiji is actively seeking participation in the FCPF.

¹⁶ An informal presentation of PNG's R-PP was made on 22 October 2012.

	Fiji	PNG	Solomon Islands	Vanuatu
UN-REDD Programme	No	Yes	Yes	No
JICA¹⁸	No	Yes ¹⁹	No	No

A recent key development for REDD+ in the Pacific is the endorsement by the Third Regional Meeting of Ministers of Agriculture and Forestry, of the [Pacific Islands Regional Policy Framework for REDD+ \(Regional Policy Framework\)](#). This meeting was held in Nadi, Fiji, on 28 September 2012, and was convened by the Secretariat of the Pacific Community. The Regional Policy Framework calls for Pacific Island countries to clarify land tenure and forest carbon tenure arrangements as a key condition of REDD+ implementation, as well as effective, equitable, and transparent benefit-sharing arrangements for REDD+ activities.²⁰

1.3 Relevance of carbon rights to REDD+ activities in Melanesia

All Melanesian countries have opted for a national approach to REDD+ and are developing national REDD+ programmes, with international support, with a focus on national scale carbon accounting and national benefit-sharing arrangements. However, given that it may take some years for the UNFCCC's REDD+ mechanism to become fully functional, Melanesian countries are adopting a project-based approach in the interim, with a view to integrating these into their national REDD+ frameworks at a later date.²¹

¹⁷ An informal presentation of Vanuatu's R-PP was made on 22 October 2012. R-PP is expected for PC14.

¹⁸ Although JICA is not providing direct technical support to Fiji, Solomon Islands and Vanuatu, it has been providing support on a regional basis by making a forestry adviser available, based in the SPC Land and Resources Division. The advisor is providing technical advice on the development of species-specific biomass allometric models. Funding for this position was made available from the ACP EU Forestry Research Network (FORENET) and is expected to end in early 2013.

¹⁹ JICA is supporting PNG's REDD+ readiness through its Forest Preservation and Monitoring Project under JICA's Technical Cooperation Project, which is assisting with national forest monitoring and carbon accounting. Australia is also supporting REDD+ readiness activities in PNG under the Papua New Guinea-Australia Forest Carbon Partnership, which commenced in 2008 with a funding envelope of AUD\$3 million.

²⁰ The Pacific Islands Regional Policy Framework for REDD+ contains the following provision on carbon rights in Paragrah 4.6.3:

“REDD+ implementation can take place on government-owned land, freehold land, and/or customary land. Performance-based payments for REDD+ will be dependent upon clear delineation of land tenure, carbon tenure arrangements, as well as effective, equitable, and transparent benefit-sharing arrangements for REDD+ implementation activities.”

²¹ It is not yet clear whether Papua New Guinea will permit voluntary trading of forest carbon. While a decision of the National Executive Council (Dec. 55/2010) states that voluntary trading of forest carbon is inadvisable and premature, both the Office of Climate Change and Development

This is in accordance with the Regional Policy Framework which acknowledges that the global REDD+ sector includes the potential for a future UNFCCC REDD+ instrument, but that there are also current and future REDD+ mechanisms outside the UNFCCC framework, such as the voluntary carbon market, and that countries may wish to keep their options open to engage with all present and future REDD+ mechanisms.²²

The fact that all Melanesian countries will or are likely to permit a project-based approach to REDD+ at some level is of direct relevance to forest carbon rights as it is only necessary to clearly define forest carbon rights where a country adopts a project-based approach involving direct crediting. The bold/black arrows in **Figure 1.1** indicate when it is necessary for a country to clarify forest carbon rights based on the funding modality and scale of REDD+ activities that is adopted.

and the Papua New Guinea Forest Authority are adopting a project-based approach to REDD+. OCCD has prepared two project-based guidelines to date: the National REDD+ Project Guidelines (March 2012) and the Draft Guidance to Establishing Free, Prior and Informed Consent for REDD+ Projects in PNG (2011). For a more extensive explanation of this position, see: Papua New Guinea National REDD+ Readiness Activities, State of Play: March 2012, IGES.

²² In accordance with the approach of keeping options available for all REDD+ financing mechanisms, countries are also likely to permit a broad range of forest carbon project types, including afforestation and reforestation, and conversion of non-forest land to forest land including plantation establishment, and agroforestry (Pacific Islands Regional Policy Framework for REDD+, para. 4.1 on Scope of Activity Types), which may fall outside the UNFCCC framework for REDD+, although this is at present unclear. In this respect, a reference to 'REDD+ activities' in this Paper is a reference to the broad scope of forest carbon projects that may be undertaken.

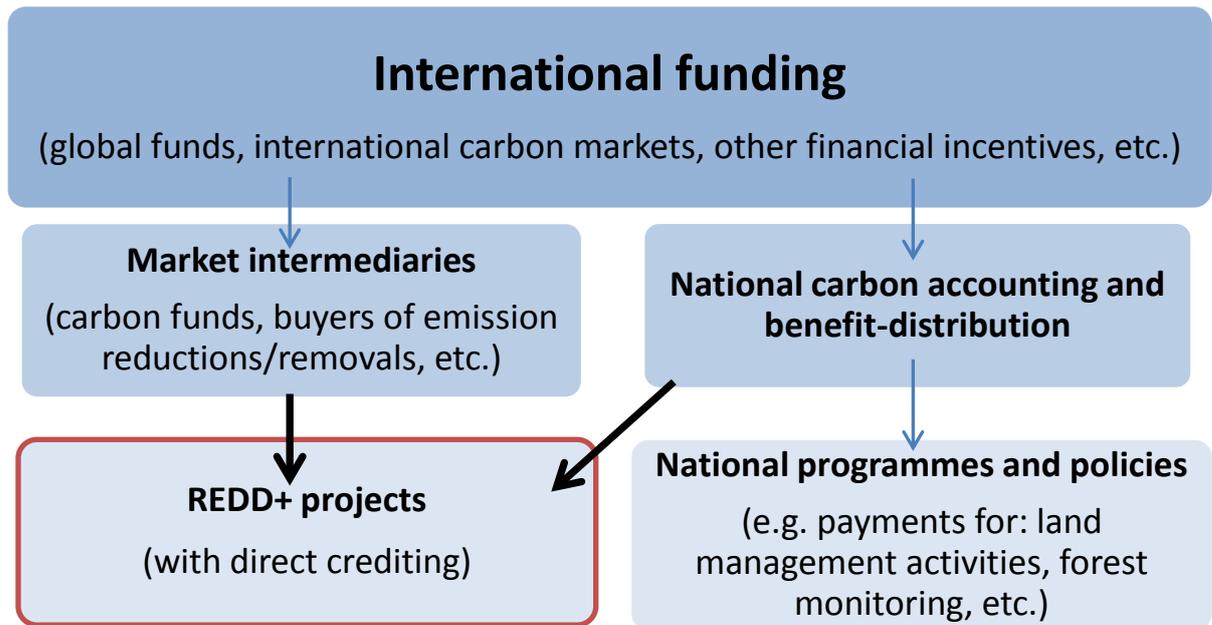


Figure 1.1 Relevance of carbon rights to various REDD+ funding modalities²³

A market-based mechanism requires a very clear identification of who owns the underlying asset, the forest carbon rights, that will generate the verified carbon emission reductions and removals, along with clear identification of REDD+ project boundaries. Clarification of these matters is also necessary to avoid double-counting (including double-selling) of carbon emission reductions and removals. Due to the stringent requirements when contracting for forest carbon projects, this Paper focuses largely on the challenges that a project-based approach to REDD+ presents in the customary land and customary law context of Melanesia. By comparison, where a national approach to REDD+ is adopted involving national carbon accounting and national benefit-sharing, it is advisable but not essential for forest carbon rights to be clarified, unless the allocation of benefits is based on these rights.²⁴

1.4 Decision-making framework for forest carbon rights

Countries need to make some key decisions when designing a legislative system to clarify and allocate forest carbon rights. These included decision on whether to nationalize carbon rights or base them on land and forest ownership, and whether to

²³ Adapted from Vatn, A. and A. Angelsen, (2009). Options for a national REDD+ architecture. In Angelsen A. (ed.): *Realising REDD+: National strategy and policy options*. Bogor, Indonesia: CIFOR, p. 64.

²⁴ For a more detailed discussion on the relevance of carbon rights in REDD+ depending on the national REDD+ architecture that is adopted, see: Brodnig, G., and Peskett, L., (2010). [Carbon Rights in REDD+: Policy Note](#), REDD-net and The World Bank, Report No: 65863, pp. 4-5.

allow third parties (such as logging companies or REDD+ project developers) to hold or own forest carbon property rights. **Figure 1.2** below contains a decision tree illustrating this process, each part of which is analysed below in more detail.

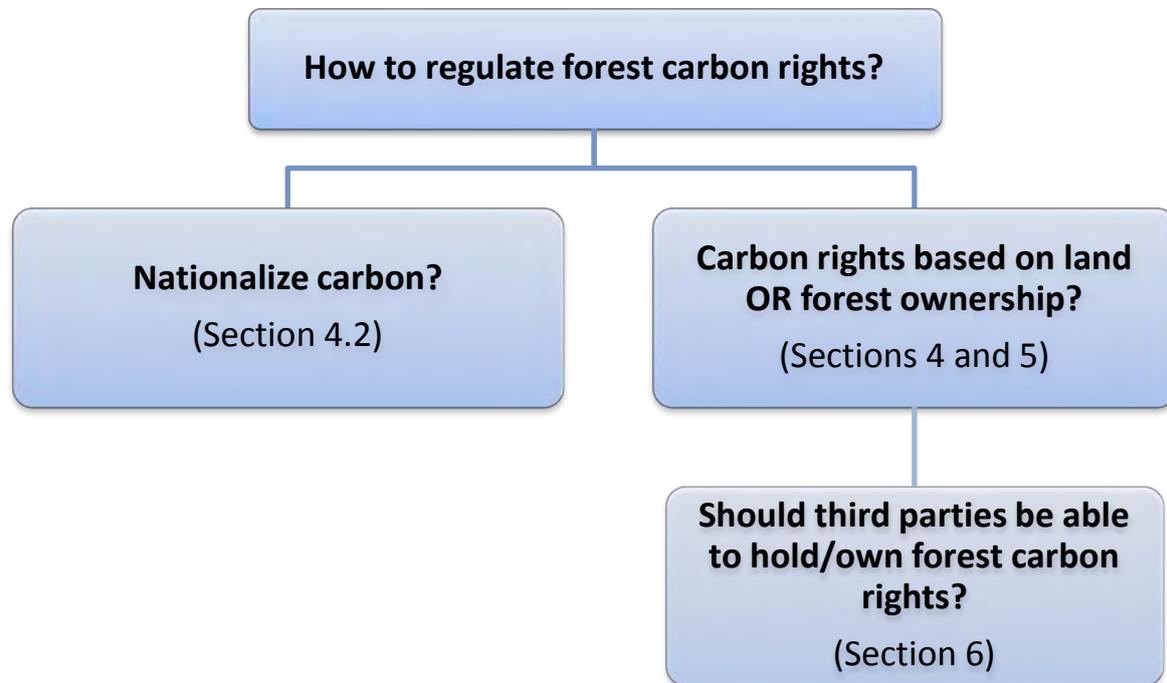


Figure 1.2 Decision-making tree for designing a forest carbon rights framework

2. What are forest carbon rights?

2.1 A new form of property right

While there are many interpretations in the REDD+ literature as to what carbon rights are, the approach adopted in this Paper is that forest carbon rights represent a new form of property right.

There is no commonly accepted definition of carbon rights under international law²⁵ or under the emerging UNFCCC policy framework for REDD+,²⁶ and only a few countries

²⁵ There is no consistency in the REDD+ literature concerning the term 'carbon rights', with REDD+ commentators using different definitions throughout the literature. For a description of some of the different categories of carbon rights, see Takacs (2009), *Forest Carbon – Law and Property Rights*. pp. 13 – 17.

²⁶ While the UNFCCC framework for REDD+ makes no specific mention of carbon rights, it does 'request' State Parties to address land tenure issues when developing their national REDD+ strategies, and it establishes some other guiding principles that are relevant to the way that countries should develop their framework for carbon rights, such as the need to ensure the full and effective participation of ... indigenous peoples and local communities and the need to promote and support certain social safeguards: see the UNFCCC, COP Decision 1/CP.16 (Cancun Agreements), paras. 69 and 72, and Appendix I.

have introduced a legislative scheme defining forest carbon rights.²⁷ However the term “carbon rights” is generally used to refer to the right of a person or group to the legal, commercial or other benefit, whether present or future, generated by exploiting the forest carbon.

What does a person or group need to establish to show that they hold the carbon rights over a particular area? A person or group must be able to show the following three things, concurrently:

- That they own or have legal control over the **land**. This might take the form of customary land tenure, or perhaps a lease which expressly incorporates the carbon rights in the land, or some other form of permission from the landowner (e.g. a licence).
- That they own or have legal control over the **carbon sink**, the physical elements of forest and soil that contains the forest carbon, to the exclusion of all other competing interests, such as forestry rights, mining rights or competing customary rights. Where competing interests exist, such as a logging concession, ownership of carbon rights might need to be established through a negotiated agreement with those who hold the competing interests (e.g. the holder of a logging concession, or an agreement from the holder of a mining tenement to pay compensation if the land is later used for mining purposes).
- That they can **maintain their control** over the land and forest for the required period of time (e.g. 10 – 30 years). This will depend on the duration of the contractual or legal obligation that is being undertaken. The person/group must be able to show that they can manage and protect the forest resource.

Box 2.1 Explanation of terms

Forest carbon: the physical amount of carbon that is stored in forests and soil (the

²⁷ For example, each State and Territory in Australia has introduced legislation clarifying the ownership of carbon rights. There is also a national scheme which enables the generation of forest carbon offsets which can be used within Australia’s Emissions Trading Scheme which commenced on 1 July 2012: *Carbon Credits (Carbon Farming Initiative) Act 2011*. Vanuatu also has carbon rights legislation in the form of the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000* (also known as “The Plantation Act”), although this legislation only applies to leased land. It is understood that Vanuatu is considering repealing the Act to replace it with a more comprehensive framework for carbon rights due to the fact that it appears to have been introduced without sufficient community or national consultation and does not appear to have been used.

carbon sink), and the carbon that will be sequestered in them over time.

Forest carbon (property) rights: the right of a person or group to the legal, commercial or other benefit (whether present or future) from exploiting the forest carbon.

Carbon sequestration: the process by which trees absorb carbon through photosynthesis, thus 'removing' it from the atmosphere. Also referred to as 'removals'.

Carbon sink: the natural features (forest and soil) that hold and absorb carbon from the atmosphere.

In the absence of national legislation, the ownership of carbon rights must be inferred or derived from the existing constitutional, statutory and customary law framework in each country. Indeed, this is what happens in most REDD+ projects at the moment, whereby ownership of carbon rights are simply *asserted* by a local community, who warrant (promise) under the terms of an ERPA that they own the carbon rights in the REDD+ project area. The buyer of the carbon must be satisfied through their own inquiries (due diligence) that this is the case.

However, deriving ownership of carbon rights from the underlying legal framework can be a time consuming and costly exercise, raising the transaction costs for REDD+ projects and leaving the result exposed to legal challenge. One of the main purposes of this Paper (and its supporting Country Papers) is to identify the baseline legal position regarding ownership of carbon rights, and then to identify options for how each country in Melanesia can begin to develop a clear legislative framework for defining, allocating and regulating the ownership and use of carbon rights.

Allocation of carbon rights may well be very controversial in some Melanesian countries, based on the sensitivity surrounding customary land. The allocation of carbon rights at the national level and at the project level, and the related decisions as to who will be entitled to buy and sell carbon credits, has also been identified as carrying corruption risks which should be addressed during the design of any framework for forest carbon rights.²⁸

²⁸ Transparency International (2012). [Keeping REDD+ Clean: A step-by-step guide to preventing corruption](#), Berlin, Germany.

2.2 Voluntary carbon standards and carbon rights

REDD+ projects often take place under voluntary carbon standards. It is therefore useful to understand the requirements set by some of these standards to understand the level of clarity that is required (see **Box 2.2**).

Box 2.2 Extracts of provisions on carbon rights from selected voluntary carbon standards

Verified Carbon Standard (VCS)

- Project proponent must show proof they have the “unconditional, undisputed and unencumbered” right to claim the project’s GHG reductions or removals
- This can be proved by showing, *inter alia*:
 - A right established by law, regulation or decree (e.g. legislation on carbon rights)
 - A right arising from a property or contractual right in the land (e.g. a lease assigning carbon rights)
 - An enforceable and irrevocable agreement with the landowners who own the carbon rights (e.g. an ERPA).

Plan Vivo

- Smallholders/community groups must have “clear, stable and long-term land tenure, which includes the rights to climate services for all project intervention areas (Para. 1.1)

Climate, Community & Biodiversity Standard (CCB)

- Project proponents must have “clear, uncontested title to the carbon rights, or provide legal documentation demonstrating that the project is undertaken on behalf of the owners with their full consent” (Para. G5)

In short, the standards generally require that the project proponent demonstrate clear and uncontested title to the carbon rights. This means that all competing claims should have been identified and resolved before the commencement of the project.

For a forest carbon project to be validated (e.g. under the VCS), the Project Proponent will need to show that they hold the carbon rights in the project area. The Proponent could be a government body or an NGO, or it might be the Sellers Entity (see **Section 2.3** below). Ownership of carbon rights could be demonstrated through a number of

means: legislation which makes it clear that the project proponent holds the carbon rights; a government approval which certifies that the carbon rights belong to the Proponent, or evidence that a specific legal process has been completed (e.g. if the Proponent holds a REDD+ or Ecosystem Services Licence over the land: see **Section 7.6** on Licencing the rights to forest carbon or ecosystem services).

2.3 Benefits, risks and obligations of carbon rights ownership

Ownership of forest carbon rights carries with it both benefits, and risks and obligations.

It is beyond the scope of this Paper and the Country Papers to fully explore the links between ownership of forest carbon rights and benefit-sharing. However, in principle, the owner/s of forest carbon rights will be entitled to:

- receive or control the carbon credits that are generated by a REDD+ project, where a **project-based approach** to REDD+ is taken;
- a proportional share of the REDD+ revenues that are received by their national government, where a **national approach** to REDD+ is taken.

However ownership of carbon rights also carries risks and obligations. **Obligations** arise from the need for the owner of the carbon rights to ensure, through the giving undertakings (promises), either to the government as the counter-party or to a REDD+ investor, that the forest will be managed in a certain manner to ensure that a certain number of carbon offsets will be delivered over a given period of time. The ERPA will determine who bears the loss for under-delivery or non-delivery of credits. In the customary law context of Melanesia, there are significant legal barriers which prevent customary landowner from adopting these contractual obligations because the effect of the obligations may often be to dispose of or affect customary interests in land, which is generally prohibited by law (see Section X).

The owner of carbon rights also bears some of the **risks** if the carbon stored in the forests is released into the atmosphere during the life of the project, which may be a minimum of 10 – 20 years.²⁹ This is known as ‘loss of permanence’, or a ‘reversal’.³⁰

Loss of permanence might occur through intentional release (such as by legal or illegal

²⁹ For example, the VCS AFOLU framework requires a minimum commitment period (crediting period) of 20 years, with project proponent to reassess baseline every 10 years: see VCS Standard, Version 3.3, 4 October 2012, para. 3.8.1. AFOLU Requirements, Version 3.3, 4 October 2012, Para. 3.1.10.

³⁰ Under the UNFCCC framework, the environmental safeguards listed in Annex I to the Cancun Agreements require countries to address the risk of reversal (loss of permanence) in their national REDD+ programme.

logging), unintended release (as a result of negligence), or through natural causes (such as a cyclone, wildfire or insect attack). To insure against the possibility that the forest carbon might be released, voluntary carbon standards (e.g. the Verified Carbon Standard) require the project proponent or the central administrator to set aside a certain number of carbon credits from the project into a buffer account in order to manage these risks ('a reversal buffer').³¹

2.4 Distinction between forest carbon rights and carbon credits

An informed policy discussion on forest carbon rights should be based on a clear understanding of the difference between the transfer or sale of forest carbon (property) rights, and the sale of the verified emission reductions/removals from a REDD+ project that are sold as carbon credits. There is often a misunderstanding that it is necessary to create a legal framework which enables forest carbon property rights to be separated from the title to land in order to facilitate carbon trading – which is incorrect. This distinction is explained further below in Box 2.4.

Box 2.3: What is the difference between selling forest carbon property rights and selling carbon credits?

If a landowner sells or transfers their **forest carbon rights**, they are, in effect, selling part of their property, or part of their natural resources. The person who buys the forest carbon rights is buying the right to exploit that resource at some time in the future. Forest carbon rights will usually need to be coupled with forestry rights to be effective. The buyer may or may not choose to exploit the forest carbon rights (e.g. by carrying out a REDD+ project).

This is different to a landowner keeping the forest carbon rights, but **selling the carbon emission reductions and/or removals as carbon credits**. In a typical REDD+ project, it is the verified carbon emission reductions and/or removals that are sold to a buyer in the form of carbon credits, usually under an Emissions Reduction Purchase Agreement (ERPA), while the underlying property right, the forest carbon rights, remain with the landowner/s.

³¹ For example, the Verified Carbon Standard requires credits to be placed into an AFOLU Pooled Buffer Account. This is a single account which contains non-tradable AFOLU buffer credits for all projects in order to cover the risk of unforeseen losses in carbon stocks across the VCS AFOLU project portfolio: VCS Program Definitions, Version 3.

2.5 Contracting requirements for forest carbon projects

Accommodating the contracting requirements that underpin REDD+ projects creates significant challenges for customary land tenure in Melanesia (although these challenges present fewer difficulties in Fiji where customary land is registered).

There are three main challenges:

- How to identify who owns the carbon rights where there are multiple use rights held by multiple customary groups/clans over both land and forest resources?
- How to identify clear boundaries for a REDD+ project area where customary land is unregistered? (PNG, Solomon Islands and Vanuatu)
- How to overcome the constitutional and/or legislative restrictions which prohibit customary landowners from alienating (selling or restricting) their customary land or customary interests/rights in their customary land, particularly in PNG and Solomon Islands.

In order to identify and analyse the legal challenges that contracting presents in Melanesian countries it is necessary to understand how contracting is structured for forest carbon projects.

It should be noted, however, that the contracting arrangements for each REDD+ project will vary from project to project and within each country, depending on the particular requirements of the project proponent, the government, the local communities and their Seller's Entity, and the buyer of the carbon credits.

Figure 2.1 below sets out a simple example of a typical contracting structure for a forest carbon project.

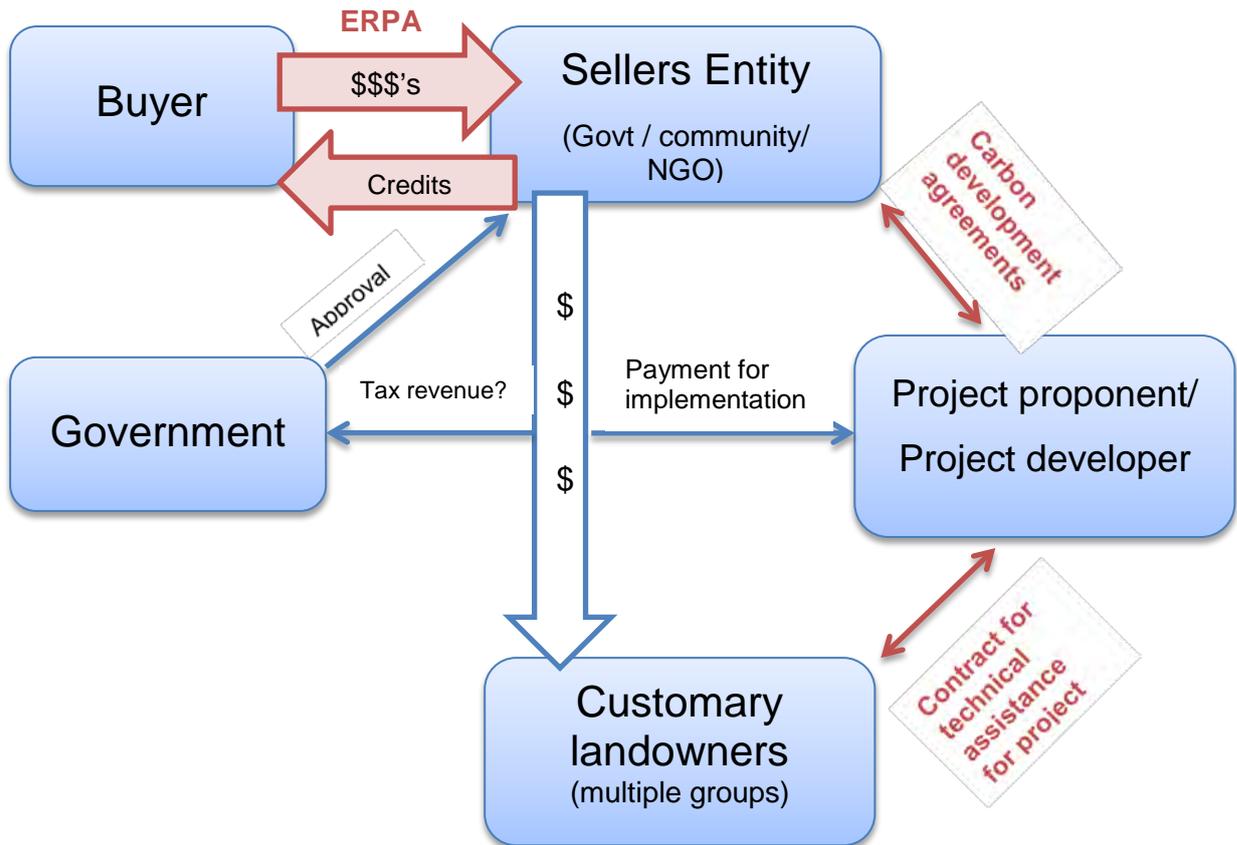


Figure 2.1: Typical contracting structure for a forest carbon project³²

Verified emission reductions/removals (carbon credits) from a REDD+ project are usually sold to a buyer under a contract known as an “Emission Purchase Reduction Agreement” (**ERPA**).³³ The ERPA sets out things such as: how many carbon offsets the landowners will provide over an agreed period of time (e.g. 10 – 30 years); how much the buyer will pay for them; and usually includes any penalties for default (breach of contract) or under-delivery of credits. Where there are multiple groups of landowners involved (as is likely to be the case in Melanesia), landowners are usually required to establish a single entity known as a “Sellers Entity”, which can enter into the ERPA with the Buyer. The Buyer will also want to see evidence that the Proponent holds the carbon rights.

Restrictions on the way in which customary landowners can use their land are likely to arise within this contracting structure (see contracts highlighted in REDD+ in **Figure 2.1**),

³² Adapted from presentation by Mark Lambert, Terra Global Capital, SPC/GIZ Regional Forest Carbon Rights Workshop, 22-23 October 2012, Nadi, Fiji.

³³ These are also called Voluntary Emission Reduction Purchase Agreements, or VERPAs. For more detail on how a typical ERPA for forest carbon is structured, see: Hawkins, S., *et al.* (2010). *Contracting for Forest Carbon: Elements of a Model Forest Carbon Purchase Agreement*, Duke Law, Forest Trends and the Katoomba Group.

although exactly how and where will depend on the terms of the particular contracts used in a project. Typical restrictions might be to impose restrictive obligations (e.g. an undertaking by landowners not to deforest certain areas) and/or positive land management obligations (e.g. an undertaking to manage fire risk on the land). For example, an ERPA may contain restrictions on how land can be used (particularly if the ERPA involves a forward purchase of credits that have not yet been created), or the contract between the landowners and the project proponent / project developer may be tied to the implementation of project activities.

To the extent that any of the contracts used in a forest carbon project purport to restrict the way in which customary land can be used, these contracts may be declared void in PNG and Solomon Islands. This is because any such restriction or obligation is likely to constitute a restriction (or encumbrance) over the land, limiting the manner in which customary rights can be exercised over that land. Under the current legal frameworks in PNG, Solomon Islands and Vanuatu, customary rights and interests cannot be alienated except to other nationals in accordance with custom. This is a significant issue which will require legislative reform in these countries (see Section 7).

3. Characteristics of land tenure in Melanesia

3.1 Dominance of customary land tenure

Any discussion regarding reform of customary land in the Pacific, and Melanesia, must start with the recognition of the centrality of customary land tenure in the lives of the people of the Pacific, taking customary land tenure as its starting point.³⁴ Table 3.1 shows that customary land ownership is the dominant form of land tenure in Melanesia, with the majority of this land being unregistered.

Table 3.1: Land statistics and ownership in Melanesia³⁵

Country	Land area (‘000 ha)	Customary land (%)	State land (%)	Freehold land (%)	Registration of customary land
Fiji³⁶	1,827	87.9%	3.91%	7.94%	Most

³⁴ PIFS 2008, p. 19.

³⁵ Unless otherwise stated, these statistics are drawn from PIFS 2008, pp. 38-39, Table 1.1.

³⁶ Statistics extracted from REDD+ and forest carbon rights in Fiji, November 2012, Table 1, by C. Trenorden.

PNG ³⁷	45,286	97%	2.5%	0.5%	0%
Solomon Islands	2,799	87%	8%	5%	0%
Vanuatu ³⁸	1,219	99%	1%	0	0%

3.2 Differences between customary land tenure and Western property rights

Customary land tenure in Melanesia operates very differently land tenure systems in the West which are generally based on the notion of registration. The disjoint between customary and Western notions of ownership and property rights has serious implications for carbon rights and forest carbon projects in Melanesia.

Under customary land tenure, 'ownership' is based on an enduring notion of inter-generational stewardship or guardianship of the physical property and what it represents to the group. Customary land ownership is a complex system based on familial group or clan and individual access rights. Under this system, different landowning groups 'own' a collection of rights, each of which carries various social responsibilities, obligations and restrictions.⁴⁰

The multi-user and fragmented nature of customary land tenure in the Pacific has been described by the noted Pacific scholar, Ron Crocombe, as follows:

"...rights to land were in all cases multiple, conditional and negotiable. What was owned was not the land or water so much as rights to it – rights vis-à-vis other people. No rights were absolute. Some rights were held by individuals, but there were many shades of difference between the rights of even close relatives No one person held all rights to any one plot ... individual rights were nested with those of extended families, lineages, clans, tribes."⁴¹

³⁷ Statistics for PNG and Solomon Islands are drawn from PIFS (2008).

³⁸ Statistics extracted from REDD+ and forest carbon rights in Vanuatu, Table 3.1, November 2012, by Professor Corrin.

³⁹ Unlike PNG and Solomon Islands, in Vanuatu a significant portion (9.3%) of unregistered customary land is leased.

⁴⁰ This definition is drawn from PIFS (2008). *Customary Land Management and Conflict Minimisation: Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific*, Pacific Islands Secretariat, Suva, Fiji, page 15, 47.

⁴¹ Crocombe, R. G., (2001), *The South Pacific: An introduction*, University of the South Pacific, Suva, Fiji, pp. 295-296, as cited in PIFS (2008), *Customary Land Management and Conflict Minimisation*, at p. 45.

This is very different to the Western concept of property ownership which is based on the notion of individualised property rights, under which property rights are held exclusively, are divisible and are fully transferable.⁴² The system of Western property rights is reflected in the Torrens Title system of land registration, under which land titles are registered in a central land titles office and interests in land held by third parties (e.g. mortgages, covenants, easements, and in Australia – carbon rights) are registered on the title (see **Section 6.1**). Registration of land ownership and interests is ‘indefeasible’, which means it cannot be legally challenged unless the land transaction can be shown to be fraudulent.

Another element of legal systems in Melanesia is that many countries operate within a pluralistic legal framework. In PNG and Solomon Islands, customary law operates alongside statute law. In Vanuatu, the situation is even more complex with three sources of law in operation: common law (based on English law), civil law (based on French law), and customary law.

3.3 Implications for forest carbon rights

The implications of customary land tenure for carbon rights and REDD+ in Melanesia are as follows:

- Most customary land is unregistered (except in Fiji), which means it is difficult for outsiders, such as REDD+ project proponents and buyers of carbon credits to identify those who are entitled to deal with customary land. Various groups may claim ownership or usufruct rights over the project area and its natural resources (**Section 4**).
- Communities are traditionally represented by customary chiefs when it comes to decisions on land ownership and use. However, given the changes in customary society and practices since colonization, and in more recent times, difficulties have arisen in identifying exactly who the chiefs are.⁴³
- In some countries (e.g. Solomon Islands), ‘ownership’ rights to land and forest can be held by different groups or clans, making it very difficult for outsiders to identify the owner or owners of the carbon rights.

⁴² The legislative frameworks for carbon rights in all Australian States and Territories which permit carbon rights to be created as a separate property right which can be registered over the land title and held and transferred separately to the underlying land title is a good example of this notion of divisibility and transferability.

⁴³ For example, see Solomon Islands Country Paper, Box 4.2.

- Because most customary land is unregistered (except in Fiji), the boundaries of customary land are not surveyed and are often disputed. In the absence of a survey, land boundaries are usually defined in terms of physical markers, such as rivers, mountains, hills, stones and trees.
- Customary land is governed by customary laws, which are not written down and differ from place to place. Therefore, if a forest carbon transaction were to take place over customary land according to customary law (there is the potential for this to occur in Vanuatu), this would be subject to much legal uncertainty.
- Generally across Melanesia, customary land, and customary rights and interests in land, are inalienable, except to other nationals in accordance with custom (this is described in more detail in **Section 7**).⁴⁴ Any contract or agreement which purports to avoid this restriction can be declared void by the courts. Given that the forest carbon contracting that underpins REDD+ projects is likely to affect customary rights and interests in land (because it imposes restrictions on the way in which the land can be used), these contracts could be declared void under the current laws.
- In some countries, there is no suitable mechanism for customary landowner groups to join together as a legally recognised entity to hold and manage forest carbon rights (e.g. to act as a Sellers Entity), and to distribute benefits in an open and transparent way.⁴⁵

4. Who owns the forest carbon rights under existing laws?

The design of a new framework for forest carbon rights in each country in Melanesia should be informed by an analysis of who owns the forest carbon rights under the existing national legal frameworks. In the absence of legislation, determining who owns the forest carbon rights must be derived or inferred from the constitutional, statutory and customary law framework in each country.

Understanding who owns the forest carbon rights under the existing legal framework is important for a number of reasons:

⁴⁴ This is less of a problem in Fiji, where the iTaukei Land Trust Board can deal with customary land and interests on behalf of the customary landowners.

⁴⁵ This issue is not addressed further in this Synthesis Paper and could be the subject of a further study on benefit-sharing mechanisms for REDD+. The issue is addressed briefly in the Country Papers.

- It helps to identify what needs to be done in each country in order to clarify these rights, e.g. where land and forest ownership and use can be held by different groups under customary law, a process will need to be adopted to address this complexity
- It has implications for how these rights can be allocated. For example, if customary landowner are currently the owners of forest carbon rights then any decision by the State to either nationalize those rights or assign them third parties could constitute a ‘taking’ of property, which is usually prohibited under the constitution or national law unless fair compensation is paid.
- The leasing mechanism is used widely in Melanesia (particularly in Fiji and Vanuatu). It is therefore important to understand whether carbon rights are held by the lessee or lessor under existing leases, and whether the standard lease conditions will need to be varied to ensure the clear allocation of carbon rights, e.g. where a lessee is developing an afforestation or reforestation project, they are likely to want certainty that they will also hold the carbon rights.

4.1 Customary landowners

The general legal position in Melanesia is that customary landowners own the forest carbon rights in customary land, unless there are other lawful competing land uses authorized over the land, such as forestry or mining rights.⁴⁶

However, as **Table 4.1** below shows, although the starting point is clear that customary owners own the carbon rights in their land, in three of the four countries (PNG, Solomon Islands and Vanuatu) the difficulty lies in identifying *who* those customary owners are, largely because the customary land in these countries is unregistered.

The difficulty in identifying the ‘owner’ of the forest carbon may be because ownership and use rights over land and forest can be held different groups or clans (e.g. Solomon Islands), and because the customary law that applies to ownership and use of land and natural resources varies from place to place. In addition, it can sometimes be difficult to identify who are the legitimate customary chiefs with authority to deal in the land. The

⁴⁶ This conclusion flows from the constitutional and statutory position in each country: e.g. in Vanuatu, the *Constitution* provides that ‘all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants’ (Art. 75). By implication, this must also extend to carbon. In Solomon Islands, the *Land and Titles Act* provides that where forest is on customary land, forest ‘ownership’ and use are primarily governed by customary laws (s. 239(1)), which implies that carbon ownership probably also rests with customary landowners.

situation is less complex in Fiji where almost all *iTaukei* land (customary land) is registered under the provisions of *the iTaukei Lands Act* [Cap 133].

Table 4.1: Deriving ownership of forest carbon rights in Melanesia⁴⁷

Who owns the forest carbon in...?	Fiji	PNG	Solomon Islands	Vanuatu
Customary land (unleased)	The customary (<i>iTaukei</i>) landowners listed on the title of the registered customary land. ⁴⁸	Unclear. Under customary law, ownership and use of land and forest can be held by different customary groups.	Unclear. Ownership is determined according to customary law. Rights to land and forest resources can be held by different clans.	Unclear. Customary land is governed by customary law, which varies from place to place.
Leased customary land	The lessor (customary landowner), unless the lease specifies otherwise	Under a Special Agriculture and Business Lease, carbon rights are held by the lessee for the term of the lease.	Unclear	The lessor (customary owners), unless they have granted the forestry rights to a third party. ⁴⁹
Mangroves	State	Customary parties with	Unclear. Law is uncertain as	Custom landowners,

⁴⁷ The material for this Table is drawn from each of the four Country Papers for this project.

⁴⁸ The Registrar of Titles maintains *the Registrar of iTaukei Lands*. As the ownership of land is vested in the mataqali or other landowning unit (as registered in the RTL) no individual titles are issued. Individual members of the mataqali are however recorded in the *Vola ni Kawa Bula*.

⁴⁹ This can be done under the Forestry Rights Registration and Timber Harvest Guarantee Act 2000, which allows the carbon rights (a subset of forestry rights) to be separated from the land and granted to a third party. It appears, however, that this legislation has never been used in Vanuatu.

Who owns the forest carbon in...?	Fiji	PNG	Solomon Islands	Vanuatu
(foreshore land)		usufruct rights to that area, unless a State lease is in place	to who owns land below the high watermark.	including the area below the high water mark.

One solution to identify the owners of forest carbon rights on customary land is to use a mechanism to record customary rights. 'Recording' is a process which involves deciding on the level of a group holding – family, clan or other larger grouping – and the area over which they have customary claims. It is different to land registration, which in most countries (PNG, Solomon Islands and Vanuatu) results in the permanent alienation of customary land.⁵⁰ The Solomon Islands is the only country with legislation which allows the recording of customary claims, which can be done under the *Customary Land Records Act*.⁵¹ This could be used to record ownership of forest carbon rights in Solomon Islands and provides a useful model for PNG and Vanuatu.

4.2 Mangroves

Significant amounts of carbon are stored and sequestered in coastal ecosystems of tidal marshes, mangroves and seagrass meadows. This is often referred to as 'Blue Carbon'.⁵² A number of standards are developing which will permit carbon credits to be generated for mangrove restoration and conservation (see Box 4.2 below). It is therefore of practical use for Melanesian countries to clarify who owns the carbon in tidal marshes, mangroves and seagrass meadows.

⁵⁰ This distinction is outlined clearly in PIFS (2008). *Customary Land Management and Conflict Minimisation: Guiding Principles and Implementation Framework for Improving Access to Customary Land and Maintaining Social Harmony in the Pacific*, Pacific Islands Forum Secretariat, Suva, Fiji.

⁵¹ [Cap 132] ('*Customary Land Records Act*').

⁵² For a discussion of the emerging international policy frameworks for Blue Carbon, see: Herr, D., Pidgeon, E., and Laffoley, D. (eds.) (2012). *Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group*. Gland, Switzerland: IUCN and Arlington, USA.

Box 4.1: REDD+ and mangroves

Although it is possible for countries to include mangrove specific activities in their national REDD+ strategies, it is not yet clear whether the emerging UNFCCC framework for REDD+ will include such activities.⁵³

However, in the meantime, it is possible to generate carbon credits from projects to reduce emissions and increase removals from restoring and conserving wetlands and mangroves under the following standards and methodologies:

- **CDM Afforestation/Reforestation projects**, for which the Executive Board has approved a large-scale⁵⁴ and small-scale⁵⁵ methodology concerning mangroves
- **Verified Carbon Standard (VCS)**, which recently recognised Wetlands Restoration and Conservation as an eligible project category (October 2012), covering areas including mangroves, salt marsh and seagrass meadows.⁵⁶

4.3 Nationalization of forest carbon rights

An alternative to forest carbon being owned by customary landowners is for the State to assume ownership of forest carbon property rights. Under this option, the rights (and liabilities) in forest carbon would be reserved exclusively for use by the State in a similar way in which the rights to mineral resources are often reserved to a State.⁵⁷ This is sometimes described as the ‘nationalisation’ of forest carbon rights. However, the preliminary legal conclusion reached in this Paper that forest carbon rights on customary land in Melanesia are owned by customary landowners has important implications for how this might be managed.

⁵³ For a discussion on the potential for this, see: Herr, D., Pidgeon, E., and Laffoley, D. (eds.) (2012). *Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group*. Gland, Switzerland: IUCN and Arlington, USA, at pp. 13 – 14.

⁵⁴ See the methodology: *Afforestation and reforestation of degraded mangrove habitats*, AR-AM0014, Ver. 01.0.0.

⁵⁵ See the methodology: *Simplified baseline and monitoring methodology for small scale CDM afforestation and reforestation project activities implemented on wetlands*, AR-AMS0003, Ver. 02.0.0. Small-scale projects are defined as removing less than 16,000 tonnes of CO₂/year and are developed or implemented by low income communities.

⁵⁶ *VCS Agriculture, Forestry and Other Land Use (AFOLU) Requirements, Version 3, Requirements Document*, 4 October 2012, v3.3: pp. 23 – 30.

⁵⁷ For example, see the *Mines and Minerals Act s 2(1)*, Vanuatu.

Putting to one side whether a State might reserve forest carbon rights to itself would be appropriate having regard to the social and cultural importance of customary land in Melanesia, any such action would also need to address the following matters:

- In all but Fiji, the Constitution of each Melanesian country guarantees citizens the right not to be deprived of property or of any rights or interests in property.⁵⁸ All Constitutions provide that the State can only compulsorily acquire property for limited purposes, such as for a public purpose. If carbon rights were subsumed by the State, this would need to fall within one of the permitted purposes, in addition to which the State would need to pay customary landowners ‘just terms’ or reasonable compensation. Such compensation, could, however, be paid under the terms of a national REDD+ benefit-sharing plan, assuming that the provisions of the scheme constituted fair and equitable payments.
- A decision to nationalize carbon rights would need to be taken with the ‘full and effective participation of relevant stakeholders, inter alia indigenous peoples and local communities’, as required by the UNFCCC’s Cancun Agreements, assuming the country wished to participate in the UNFCCC mechanism.⁵⁹
- Similarly, any decision to nationalize carbon rights would need to occur with the free, prior and informed consent of each country’s indigenous peoples’ representative institutions, as required by the *United Nations Declaration on the Rights of Indigenous Peoples (2007)*.⁶⁰ UNDRIP acknowledges the right of indigenous peoples to own, use, develop and control lands and resources which they have traditionally owned and the obligation of States to give legal recognition accordingly.⁶¹ This incorporates the right of land ‘owners’ to give or withhold their

⁵⁸ PNG: Constitution, s. 53; Solomon Islands: s. 8; Vanuatu: s. 5. Fiji is presently without a Constitution.

⁵⁹ The Cancun Agreements, Para. 72. The Cancun Agreements were made under UNFCCC framework at COP 16 in 2010, and are set out in Dec. 1/CP.16.

⁶⁰ UNDRIP, Art. 19. UNDRIP is incorporated by reference in the text of the Cancun Agreements. The Cancun Agreements were made under UNFCCC framework at COP 16 in 2010, and are set out in Dec. 1/CP.16. Para. 69 affirms that countries should promote and support the safeguards set out in Appendix I (Para. 2), when developing their national REDD+ strategies or action plans. Appendix I, Para. 2(a) states that REDD+ activities should be consistent with relevant international conventions and agreements, while Para. 2(c) expressly notes the relevance of UNDRIP.

⁶¹ UNDRIP Art 26.

free, prior and informed consent to legislation, administrative measures and projects that may affect their land, territories and other resources.⁶²

- In the case of Fiji, it is a party to the *Indigenous and Tribal Peoples Convention, (1989) (ILO 169)* which requires State Parties to safeguard the rights of indigenous peoples to the natural resources of their lands and protects the right of indigenous peoples to participate in their use, management and conservation (Art. 15). Fiji is one of only 22 countries to have ratified this treaty.
- A decision by a State to nationalize carbon rights may be contrary to the Safeguards set out in the Pacific Islands Regional Policy Framework for REDD+ which note the importance of delineating carbon tenure arrangements in REDD+ implementation.⁶³

4.4 ‘Deeming’ State ownership of forest carbon rights

There has been some discussion within Melanesian countries as to whether it is necessary for a State to ‘deem’ itself to be the owner of carbon rights on behalf of the domestic rights owners in order for the State to participate in any intergovernmental or other international carbon finance transactions that require a national level counter party. However, a review of the manner in which carbon units are created and traded under the Kyoto Protocol’s Clean Development Mechanism indicates that this is unlikely to be necessary (see **Box 4.4**).

Box 4.4: Characterization of carbon units by international law under the Kyoto Protocol

All of the carbon units that are created under the Kyoto Protocol are created by an act of international law, namely the ratification of the treaty. All credits are therefore owned and held by governments under international law as a consequence of the ratification of the Kyoto Protocol by each participating country. The carbon credits (Certified Emission Reductions) that are generated are owned, held and traded by the State Parties to the Protocol. No ‘deeming’ of ownership is required for this to occur.

⁶²UNDRIP, Arts 19 and 32. Also of relevance to forest carbon rights is Article 26.2 which provides:

“Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.”

⁶³ Pacific Islands Regional Policy Framework for REDD+ (2012), para. 4.6.

However the Kyoto Protocol clearly envisages that States can transfer their rights (credits) if they so choose to the sub-national actors who carry out CDM projects. This is done by the State Party authorizing, through its Designated National Authority, private entities to hold, own and trade the Certified Emission Reductions generated by the project concerned.⁶⁴ It should be noted, however, that it is not yet clear whether the UNFCCC will adopt the same approach in its emerging REDD+ regime.

4.5 Are 'timber rights', 'carbon rights'?

The forestry laws in Melanesian countries allow for customary landowners to allocate their timber rights to a third party, which may either be a government authority (e.g. in PNG, the PNG Forest Authority) or directly to a logging company (as in Solomon Islands). Where timber rights have been granted, have the carbon rights also passed to the government agency or concession holder?

This is an important question in PNG and Solomon Islands where customary landowners have already granted their timber rights over large areas of forest. For example, in PNG, of the 15 million hectares of available Production Forest, 12 million hectares (80%) has already been acquired by the PNG Forest Authority under Forest Management Agreements. Of that area, Timber Permits have been issued over 10 million hectares.⁶⁵ However, the figure is expected to be high given that Solomon Islands has one of the highest deforestation rates in the South Pacific (2.2% per year), coupled with the projection that large-scale logging in commercially exploitable areas is likely to be exhausted by 2015.⁶⁶

Whether carbon rights pass with timber rights will depend upon the specific provisions of the forestry legislation concerned, as well as the specific terms of the each particular timber rights agreement or forest management agreement. For example, the definition of 'timber rights' and 'timber rights agreements' will need to be carefully scrutinized in each country to see whether they could or do extend to the forest carbon resource.

Table 4.2 contains a summary of the results on this point from each of the Country Papers.

⁶⁴ Kyoto Protocol, Article 12(9). For a discussion on this point, see Peskett and Brodnig (2009), at p. 7. See also Wemaere M., and Streck, C., "Chapter 3: Legal Ownership and Nature of Kyoto Units and EU Allowances", in Freestone, D., and Streck, C. (eds.), 2005. *Legal Aspects of Implementing the Kyoto Protocol Mechanisms*, Oxford University Press, Great Britain.

⁶⁵ UN-REDD PNG Joint Programme Document 2011 – 2013, p. 6, Exhibit 1. Equivalent statistics from the Solomon Islands showing the area of forest already covered by timber rights agreements are not available.

⁶⁶ UN-REDD National Programme Document in Solomon Islands 2011 - 2012, Section 2 (Situation Analysis).

Table 4.2 Extract of timber rights definitions in forestry laws

	Definition of timber rights in legislation	Observation
Fiji	<p><i>Forest Decree 1992</i></p> <p>Logging concessions for up to 30 years can be granted as a timber licence (s. 11(2)).</p>	<p>The rights in the forest trees pass to the concession holder (licensee), who has an obligation to log the trees. Because the licensee has control of the carbon for this limited purpose, it is unclear whether this would also amount to control of the carbon rights.</p>
PNG	<p><i>Forestry Act 1991</i></p> <p>“timber rights’ means the rights to fell, cut, remove and dispose of growing or dead trees, whether standing or fallen, and any part of such trees, and any other vegetable growth, and the right to plant, grow and manage trees and to carry out regeneration and reforestation work...” (s. 2)</p>	<p>Where customary owners have alienated their forest by disposing of the right to it pursuant to a Forest Management Agreement, it is no longer their forest and as the PNG Forest Authority would be possessed of the whole of the entitlement under the Forest Management Agreement.</p>
Solomon Islands	<p><i>Forest Resources and Timber Utilisation Act [Cap 40]</i></p> <p>‘Timber rights’ include a right to ... cut, trim, lop trees...plant and cultivate trees...take any measure for the healthy growth and protection of any tree...extract any timber or trees... (s. 6).</p>	<p>Unclear whether timber rights include carbon rights as the definition of ‘timber rights’ does not extend to the produce of trees.</p>
Vanuatu	<p>Forestry Act [Cap 276]</p> <p>“timber rights’ means the rights to fell,</p>	<p>Whilst not expressly stated in the <i>Forestry Act</i>, the grant of a</p>

	Definition of timber rights in legislation	Observation
	cut, remove, sell and dispose of growing or dead trees, whether standing or fallen, and any part of such trees, and any other vegetable growth..." (s. 3).	timber rights agreement and timber rights licence over unleased customary land would appear to transfer all forest carbon rights to the Licensee.

Even if the definition of 'timber rights' in the forestry laws is found from a strict legal perspective to be sufficiently broad to include 'carbon rights' (in the absence of legislative amendment clarifying this point), any timber concession holder as Project Proponent would still need to demonstrate, to the standards set by the voluntary carbon standards and to the satisfaction of a Buyer of the carbon credits from the project, that they hold clear and uncontested title to the carbon rights. In practical terms, a government agency (e.g. the PNG FA) or the concession holder who purports to hold the carbon rights in a particular area by virtue of a timber rights agreement would still require the free, prior and informed consent of the customary landowners in order to effectively convert the carbon rights into carbon credits through a successful REDD+ project.⁶⁷ A negotiated outcome is clearly required.

Each country should address this area of uncertainty of whether timber rights incorporate carbon rights by creating a clear legislative framework which sets out whether and when timber rights can be converted to carbon rights, which process should be followed for this to occur (e.g. how the consent of local communities will be obtained in accordance with the FPIC principle), and how any resulting REDD+ revenues might be shared.

4.6 Reconciling carbon rights with incompatible land uses

Where incompatible land uses, such as forestry or mining, have been authorised over land, customary landowners will not hold the carbon rights over that area for the duration of licence or permit authorising the other land use because the landowner lacks legal control over the carbon sink (the physical forest resource).

⁶⁷ This obligation is likely to arise under the emerging UNFCCC mechanism for REDD+ which incorporates the provisions of UNDRIP. Most of the voluntary carbon standards will also require the consent of the landowners. The Papua New Guinea National REDD+ Project Guidelines (2010) also require a Project Proponent to obtain the free, prior and informed consent of those whose rights will be affected by a REDD+ project (p. 13).

In all Melanesian countries, the general legal principle applies that statutory concessions, licences, approvals and permits remain valid during the currency of their term, unless cause has been given for them to be suspended or revoked - usually when there has been a failure to comply with the relevant law or the conditions of the licence have been breached. Consequently, if landowners wish to exercise their forest carbon rights, they will need to negotiate with the holders of those licences or concessions to reach agreement on the financial terms in return for their surrender over the project area.⁶⁸

5. Options for allocating ownership of forest carbon rights

5.1 Defining forest carbon rights in legislation

As a starting point, each Melanesian country should adopt a clear definition of carbon rights in legislation. The definition should be sufficiently broad to include the benefits from avoiding the release of the carbon already stored (or sequestered) in forests and soil ('stored forest carbon'), and not just the carbon that will be sequestered (absorbed) by the trees and soil in the future (as for A/R). It should also refer to the carbon in the five carbon pools.⁶⁹ The definition will need to be nested in an appropriate place within the larger legislative framework of a country to indicate with carbon rights are linked to land, forest, or a sub-set of timber rights. **Box 5.1** contains a suggested definition.

Box 5.1 Suggested definition of forest carbon rights

'Carbon sequestration' means the process by which land, trees or forest absorb carbon dioxide from the atmosphere.

'Forest carbon rights' in relation to land means the exclusive legal right to obtain the benefit (whether present or future) associated with the stored forest carbon and any carbon sequestered in the future, by any existing or future tree or forest on the land, and includes the carbon contained in:

- above-ground biomass
- below-ground biomass
- dead wood

⁶⁸ Some legislation contains express provision enabling licences and permits to be surrendered, e.g. in Fiji, Clause 49 Standard clauses of *iTaukei Forest Concession Agreement* [TLTB, 2012]. Where legislation is silent, the right to full or partial surrender of a permit or licence will need to be implied.

⁶⁹ The 2006 IPCC Guidelines specify five carbon pools: see the Intergovernmental Panel on Climate Change, *2006 Guidelines for National Greenhouse Gas Inventories* (WMO/UNEP, 2006) vol 4, Ch. 1, table 1.1 <<http://www.ipcc-nggip.iges.or.jp/public/2006gl/vol4.html>>.

- litter, and
- soil organic matter.

‘**Land**’ includes forest carbon rights.

‘**Soil organic matter**’ means the organic matter found in soil to a depth of [insert number] metres.

5.2 Should carbon rights be linked to land or forest ownership?

Each country will need to decide whether to attach carbon rights to land or forest ownership, depending on its country circumstances. This may be a relatively simple exercise in Fiji where land and forest are generally held by the same customary group. However, on customary land in Solomon Islands, land ownership and the customary right to control the forest resource on that land can be held by different groups. Simply legislating to declare that ‘land’ includes ‘forest carbon rights’ may therefore not resolve the question of ownership.⁷⁰

There are three factors that should be borne in mind when Melanesian countries are selecting a mechanism to clarify the ownership of carbon rights over unregistered customary land:

- It is of critical importance that the process selected be robust, thorough and consultative, in order to obtain a result that is broadly accepted by the local community.
- The process will need to be sufficiently flexible to take into account the multiple ownership and use rights (usufructs) within customary communities. A simple allocation of carbon rights to one owner or group (as occurs under the framework in Australia), may not be appropriate in Melanesia.
- The mechanism should include a process for clearly identifying the land boundaries over which the carbon rights are held. While land boundaries do not need to be established through registration of title, they do need to be clear and undisputed.

⁷⁰ The two options available to address this question in Solomon Islands are: (a) to use the *Customary Land Records Act* to identify and record the ‘owners’ of forest carbon rights on customary land; or (b) to use the model of the *Forest Resources and Timber Utilisation Act* as noted, by which the Provincial Executive holds a meeting to identify which of the customary owners is entitled to grant the ‘timber rights’, and extend it to forest carbon rights. However, it should be noted that the *Forest Resources and Timber Utilisation Act* has generated a high level of community disquiet, and this may therefore not be a suitable option.

5.3 Reconciling carbon rights with mining interests

In all Melanesian countries, mining tenements (i.e. exploration licences and mining leases) generally take priority over other forms of land use.⁷¹ Given the importance of the mining sector to national economies, it is not expected that priority will be given to REDD+ activities.

Given this, there are two options available to a landowner who wishes to carry out a REDD+ project in an area where a mining tenement is in place:

1. Negotiate with the holder of the mining tenement to surrender all or part of the tenement over the REDD+ project area before the commencement of the REDD+ project;
2. Negotiate an agreement with the mining company on the compensation that will be paid in the event that mining rights are exercised over the REDD+ project area during the term of the REDD+ project. Compensation might require the mining company to pay out the value of the carbon credits that would have been generated under the remainder of the term of the Emission Reduction Purchase Agreement. In some countries, the mining legislation may already require compensation to be paid where mining affects 'improvements' in land.⁷² These provisions should be scrutinized to determine whether they are likely to extend to carbon rights.

6. Should third parties be able to hold or own carbon rights?

A key decision that policy makers need to make in Melanesia is whether to permit third parties, such as project proponents or logging companies, to hold forest carbon rights.

6.1 Creating a separate property right in carbon

In some countries, such as Australia, carbon rights have been created as separate property right that can be bought and sold separately to the land to which they are attached (see **Box 6.1**).

⁷¹ For example, in Fiji, the *Mining Act* has priority over the *iTaukei Land Trust Act* (S7 iTaukei Land Trust Act), and the *State Lands Act* (s. 3).

⁷² For example, in Fiji, compensation is payable for damage to the surface of the land and improvements thereon (including plantations) by any prospecting, mining or other operations carried out by the holder of a mining tenement under the provisions of the *Mining Act* (s. 40), although it is not clear whether this will extend to damage to naturally occurring forest trees (s. 2). In PNG, under Section 154 of the *Mining Act 1992*, the holder of a mining tenement is liable to pay compensation in respect of the entry and occupation of the land, and for all loss and damage suffered or foreseen.

Box 6.1: Carbon rights as separate property rights in Australia

Every State and Territory in Australia has introduced legislation to clarify the ownership and nature of carbon rights as a new property interest. While the legislative frameworks differ from State to State,⁷³ the general approach taken is to allocate the carbon rights to the landowner, who may then permit the carbon rights to be separated from the land on which they are situated and transferred or sold to a third party. The carbon rights and the name in which they are held are then registered on the land title. Purchasers of the land are therefore on notice that the carbon rights are held by a third party.⁷⁴

If Melanesian countries were to adopt this approach it would mean that third parties, such as project proponents or land investors, could hold the carbon property rights in a REDD+ project area, as distinct from a contractual entitlement to a share of the carbon credits (this distinction is explained in **Section 2.4** above).

However, this approach is likely to encounter the following difficulties:

- Allowing a separate property right to forest carbon is a mechanism more suited to Western-style (Torrens title) property systems, such as those in Australia, which depends for its efficacy on a robust system of land registration and administration. The approach carries with it increased risks of fraud and corruption as third parties may seek to improperly register carbon rights.
- The approach involves registration of the separate property interest on the land title. Given that REDD+ activities are likely to take place on unregistered customary land in Melanesia (excepting Fiji, where customary land is registered), there will be no title on which the interest can be registered.
- In some countries, such as PNG, the legal nature of customary land tenure may mean that seeking to recast in statute as a separate item of property something

⁷³ For example, in New South Wales, Queensland and Tasmania, forest carbon rights are deemed to constitute a profit-a-prendre: see the Conveyancing Act 1919 (NSW), s. 87A, Forestry Act 1959 (Qld), s. 61J(5), and the Forest Rights Registration Act 1990 (Tas.) s. 5). By contrast, in Western Australia, a statutory carbon right is created upon registration of the underlying carbon agreement: Carbon Rights Act 2003 (WA).

⁷⁴ For a comprehensive description and critique of the various State and Territory legislative schemes in Australia regulating forest carbon rights, see: Hepburn, S., (2009). *Carbon Rights as New Property: The benefits of statutory verification*. Sydney Law Review, 31:239.

which already exists could result in an immediate legal challenge that the existing property right had been taken away and substituted with something else.⁷⁵

6.2 Should carbon rights be allocated to logging companies?

When designing a national legal framework for carbon rights, Melanesian countries should consider whether it is appropriate to allocate carbon rights to logging companies. Such an approach could be implemented by allowing particular categories of timber licences to be converted to REDD+ licences, under specified conditions. In addressing this question, policy makers should consider the need to align carbon rights with the particular drivers of deforestation and forest degradation in their country to maximise the potential for carbon emission reductions and removals in the forest sector.

The drivers of deforestation and forest degradation, and the opportunities for increasing forest carbon stocks, differ quite significantly between the Melanesian countries, and in this regard, different approaches may be required. For example, in PNG and Solomon Islands, the main driver of deforestation and forest degradation is planned deforestation, driven primarily by commercial logging, sometimes coupled with the prospect of converting logged land to agricultural use, such as for oil palm. As noted earlier in this Paper (Section 4.5), 12 million hectares or 80% of Production Forests in PNG have already been acquired by the PNG Forest Authority and are therefore available for logging, of which timber licences have been granted over 10 million hectares. It is therefore important that the framework that PNG adopts for carbon rights is effectively aligned to address this driver if REDD+ is to be successful in PNG.

By comparison, Fiji and Vanuatu have smaller land and forest areas and are not experiencing the same degree of commercial pressure on their forests. Rather, their opportunities under REDD+ are more likely to arise in the “plus” area of REDD+, such as activities to improve forest conservation and the enhancement of forest carbon stocks.

Allocation of carbon rights to logging companies is likely to be a controversial step, particularly for those landowner communities that will be affected and may feel that they have been unlawfully deprived of their property. They may also be concerned about corruption risks if REDD+ revenues are to be controlled by the logging company.⁷⁶ It is therefore critical that any proposed legislative change to allow timber rights to be

⁷⁵ See *Background Analysis to Forest Carbon Rights in PNG*, Section 10.3.

⁷⁶ Transparency International (2012). [Keeping REDD+ Clean: A step-by-step guide to preventing corruption](#), Berlin, Germany.

converted to carbon rights is accompanied by a robust and thorough period of public and stakeholder consultation.

7. Overcoming restrictions on the alienation of customary land and interests

As described in the sections of this Paper above, the general position in each Melanesian country is that forest carbon rights are held by customary owners on customary land, and that legal reform in each country is required to clarify this position. However, if Melanesian countries wish to permit customary landowners to undertake REDD+ projects which involve direct crediting, then legislative reform will also be required to enable this to occur. One of the key issues which much be addressed is how each country will overcome its restriction on the alienation of customary land.

7.1 Restrictions on the alienation of customary land

All Melanesian countries restrict the alienation of customary land and interests or rights in customary land to a certain extent. This has important implications for whether and how contracting for forest carbon projects can occur where the project involves customary land (**Section 2.5** above describes the process for forest carbon contacting).

In PNG and Solomon Islands, the restrictions on alienation are particularly strict and may mean that the contracting arrangements that underpin a forest carbon project (such as an ERPA or a contract between landowners and the Project Proponent) can be declared void if they are found to restrict or affect how landowners can manage their customary land. **Table 6.1** summarizes the restrictions on alienation of customary land.

Table 6.1 Legal provisions restricting alienation of customary land in Melanesia

	Statutory provision restricting alienation of customary land
Fiji	<p><i>ITaukei Land Trust Act</i> [Cap 134]</p> <p>“[iTaukei] land shall not be alienated by [iTaukei] owners whether by sale, grant, transfer or exchange except to the [State], and shall not be charged or encumbered by [iTaukei] owners...” (s. 5(1))</p> <p>“All instruments purporting to transfer, charge or encumber any native land or any estate or interest therein to which the consent of the [iTaukei Lands Trust] Board has not been first given shall be null and void.” (s. 5(2))</p>

	Statutory provision restricting alienation of customary land
PNG	<p><i>Land Act 1996</i></p> <p>“Subject to [acquisition by agreement] and [acquisition for a special agricultural and business lease], a customary landowner has no power to sell, lease or otherwise dispose of customary land or customary rights otherwise than to citizens in accordance with custom, and a contract or agreement made by him to do so is void.” (s. 132)</p>
Solomon Islands	<p><i>Land and Titles Act [Cap 133]</i></p> <p>“...no person other than a Solomon Islander may hold or enjoy any interest of whatsoever nature in over or affecting customary land.” (s. 241(1))</p> <p>“Every contract, agreement or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly, defeating, evading or preventing the operation of subsection (1), be utterly void and of no effect;...” (s. 241(3))</p>
Vanuatu	<p><i>Constitution</i></p> <p>Only indigenous citizens of the Republic of Vanuatu ... shall have perpetual ownership of their land.” (Art. 75). The rules of custom form the basis for all land use and ownership (Art. 74).</p> <p>The only way that foreigners can deal with land or interests in land outside of custom is through the creation of a lease (<i>Land Leases Act [Cap 163]</i>).</p>

7.2 Exempting forest carbon contracts from alienation restrictions

One option for overcoming these restrictions in PNG and Solomon Islands is to expressly exempt “approved”⁷⁷ forest carbon contracts from the statutory provisions prohibiting alienation. However, any such amendment should only be done with extensive consultation and ensuring that sufficient safeguards are in place to ensure that landowners are not exploited through such an exemption. The restrictions on alienation are there for the purpose of protecting landowners rights for the present and future

⁷⁷ This is to suggest that only forest carbon contracts arising from REDD+ projects which have received some form of government approval would fall within the exemption.

generations, and due regard should be had to this important protection when considering any legislative amendment.

This dichotomy highlights one of the important challenges for defining and regulating forest carbon rights in Melanesia, namely, how to amend the land tenure rules to allow customary landowners to take advantage of REDD+ while maintaining, and not undermining, their customary land tenure and connection with the land.

7.3 Converting customary land tenure to registered title

In Melanesian countries, customary land can be ‘released’ from its constraints on alienation by converting the land to freehold or through some other form of alienation, such as the creation of a lease. However, as with the ‘exemption’ option noted above in Section 7.2, this is an option that must be approached with great caution since, in PNG and Solomon Islands, customary land, once registered and alienated, can then be charged, mortgaged and sold – being permanently lost to the community. Indeed, past experience in the Pacific suggests that the privatisation of customary land is not a necessary or sufficient condition for increasing security of tenure.⁷⁸ Therefore, while registration or alienation of customary land may appear to be the obvious solution to address the difficulties of clarifying forest carbon rights over customary land and facilitating REDD+ projects, it may in fact have the opposite effect.⁷⁹

In any event, in PNG and Solomon Islands, and to a certain extent in Vanuatu if a lease is required to facilitate a REDD+ project, registration of customary land as the preferred pipeline for facilitating a project-based approach to REDD+ is unlikely to be successful, given the past reluctance of landowners to register their land for fear of permanently losing the land. Fear of alienation still remains and has been an important factor behind the high sensitivity over land in the Pacific.⁸⁰ If this is the only option open to customary landowners, it is likely that few will choose to engage with REDD+.

7.4 Leasing customary land

In Fiji and Vanuatu, leasing of land is a practical option for facilitating REDD+ projects and the management of carbon rights as leasing is already a common and familiar legal mechanism used to release customary land from its restrictions on alienation to make it available for development.

⁷⁸ PIFS (2008), p. 47.

⁷⁹ This observation applies only to PNG, Solomon Islands and Vanuatu, where customary land is not registered. In Fiji, the majority of customary land is registered.

⁸⁰ PIFS (2008), at p. 54.

In Fiji, restrictions on alienation are less stringent because the iTaukei Land Trust Board (and more recently, the Department of Lands under the *Land Use Decree*), has broad powers as a statutory body to lease, licence and deal with customary land on behalf of customary landowners.⁸¹

In Vanuatu, the restrictions can be overcome by leasing customary land.⁸² However, leasing arrangements in Vanuatu have not been without difficulty, and some landowners may be reluctant to lease their land. In the absence of a lease, the contracting for forest carbon projects would take place under customary arrangements and would be governed by customary law – creating significant uncertainties for Project Proponents and carbon buyers. This is a particular challenge for Vanuatu – how to permit REDD+ projects over customary land without requiring the land to be leased?

However leasing of customary land to facilitate forest carbon projects is not a practical option in PNG and Solomon Islands. In PNG, customary land is generally leased through a Special Agricultural and Business Lease (SABL), but this mechanism has been widely abused over the past decade and is now discredited.⁸³ In Solomon Islands, leasing is also unlikely to present a practical (or popular) option for releasing customary land from its restrictions on alienation, as the creation of a lease results in the permanent and irreversible loss of customary land tenure to the local community.

7.5 Integrating carbon rights into timber rights frameworks

All Melanesian countries have forestry legislation which allows customary landowners to grant or assign timber rights either directly to a government agency (e.g. in PNG, the PNGFA) or directly to a logging company (e.g. Solomon Islands). Although this is likely to affect customary interests and would normally constitute an alienation of customary rights, this approach is permitted in the forestry sector, with the forestry legislation in some countries expressly authorizing customary rights to be alienated in this way.⁸⁴

⁸¹ *iTaukei Lands Trust Act* [Cap134], s. 8.

⁸² The *Forestry Rights Registration and Timber Harvest Guarantee Act 2000* in Vanuatu allows for forest carbon rights to be registered over a land title, but relies on the pre-existence of a lease. Country representatives from Vanuatu have indicated that this legislation is being reviewed and may be repealed as it was introduced without proper consultation.

⁸³ The use of SABLs is currently the subject of a Commission of Inquiry in PNG, which is expected to deliver its findings in late 2012, or early 2013.

⁸⁴ In PNG, section 56(3) of the *Forestry Act 1991* provides: “No acquisition [of timber rights] under this section shall affect the customary rights of ownership of the land.” In Solomon Islands, section 43 of the *Forest Resources and Timber Utilization Act* [Cap 40] provides: “Nothing contained in section 241 of the *Land and Titles Act* shall prohibit or invalidate the acquisition by a

It is suggested that a similar approach could be used for carbon rights, which could ‘piggy-back’ on the timber rights provisions, allowing a similar exemption for carbon rights. One advantage of this approach would be to ensure the harmonization of legal frameworks for timber rights and carbon rights in a country. A significant disadvantage, however, would be that it may perpetuate the current weaknesses in forestry laws surrounding the grant and use of timber rights.

Table 6.2 Timber rights provisions in Melanesian countries

	Timber rights provisions
Fiji	<i>Forest Decree 1992; Forestry Regulations</i> Logging concessions are granted for 10-30 years.
PNG	<i>Forestry Act 1991</i> Timber rights are acquired by the PNG Forest Authority from customary owners under a Forest Management Agreement (s. 56). The PNGFA then assigns timber rights to logging companies (s. 59).
Solomon Islands	<i>Forest Resources and Timber Utilization Act [Cap 40]</i> Any person can acquire timber rights on customary land from the owners of such customary land (s. 7). The Provincial Executive determines whether the persons proposing to grant the timber rights are lawfully entitled to grant such rights (s. 8(3)(b)). However, the courts have interpreted this Act in a manner which has resulted in a situation where the land ‘owners’ may not be the same people as the ‘owners’ of the timber rights. It is therefore unlikely to provide a useful model for clarifying the ownership of carbon rights.
Vanuatu	<i>Forestry Act [Cap 276]</i> Any person can acquire the timber rights from custom owners of land, subject to obtaining approval to negotiate and clear identification of who the custom owners are (ss. 15-28). Timber rights agreements run for 10

person other than a Solomon Islander of any right to cut and remove any trees growing on customary land...”.

	years, but can be renewed (s. 26(4)).
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7.6 Licencing the rights to forest carbon or ecosystem services

One option for creating a mechanism to clarify that a person or group holds the carbon rights in a particular area, and is authorized by the government to exercise those rights, is to amend forestry laws to introduce a licencing mechanism for carbon rights that is similar to the way in which timber rights are granted. The licence could relate only to carbon rights, or could apply to the broader category of ecosystem services, which includes carbon sequestration services, watersheds, biodiversity and possibly ecotourism.

A licencing mechanism could address the following: set out a process to clarify who is entitled to exercise the carbon rights; establish a process to identify the project boundaries; include a confirmation that the project area is not subject to other incompatible rights and permits. Any such licence would, of course, need to be integrated with the approval process for REDD+ projects in each country.⁸⁵

A licencing process similar to this is currently used to facilitate forest carbon projects in Indonesia under which a Project Proponent can demonstrate that they hold the forest carbon rights in a REDD+ project area by obtaining an Ecosystem Restoration Licence (see **Box 7.1**).

Box 7.1 Ecosystem Restoration Licences in Indonesia⁸⁶

In Indonesia, an individual, state-owned enterprise, local government-owned enterprise or private sector firm can apply to the Minister of Forestry for an Ecosystem Restoration Licence (IUPPHK-RE) under the Ministry of Forestry Regulation No: P.61/Menhut-II/2008 on *Provisions and Procedures for Issuing Ecosystem Restoration Forest Timber Utilisation Permits for Natural Forests in Production Forests through Applications*. The Regulation provides that an Ecosystem Restoration licence can be issued within forest area units which are not subject to other rights or permits, and are preferably granted in

⁸⁵ For example, PNG has already set out an approval process for REDD+ projects: see the *Papua New Guinea National REDD+ Project Guidelines* (2010), Office of Climate Change and Development. In Fiji, approval of REDD+ projects will most likely be granted by the Conservator of Forests: see the Draft Fiji REDD+ Financing Guidelines v4 (December 2011).

⁸⁶ The author is grateful to Mr Mark Lambert from Terra Global Capital for making this suggestion and suggesting this example from Indonesia.

unproductive forest areas (Art. 2).

Licences are granted for a period of up to 60 years and can be extended once for 35 years (Art. 17), which will likely be a sufficiently long period to sustain a forest carbon project. Project proponents who obtain an Ecosystem Restoration Licence can use the Licence to support their claim to additionality, as the Licence is granted over forest zoned as Production Forest where planned deforestation is the main driver of deforestation.

8. Conclusion

Addressing the issue of forest carbon rights is crucial for Melanesian countries if they are to attract market-based carbon finance for REDD+. This is likely to require some level of legislative change, particularly in PNG and Solomon Islands, possibly in Vanuatu, and to a lesser extent in Fiji.

The particular areas that require attention are the need to design a system which allows for a clear identification of the owners of carbon rights, and the land boundaries over which they are held, in the context where large areas of forested land are held as unregistered customary land with multiple customary claims to ownership and use. In the absence of legislative amendment, there is the risk in PNG and Solomon Islands that the forest carbon contracts that underpin REDD+ projects may be declared void because they breach the prohibitions on the alienation of customary land.

This highlights one of the main challenges for defining and regulating the use of forest carbon rights in Melanesia, which is how to reform the rules on customary land tenure to allow customary landowners to take advantage of REDD+, while maintaining but not undermining their customary land tenure and connection with the land.

Clear decisions also need to be made on whether to permit third parties, such as logging companies and REDD+ project proponents, to hold carbon rights. In PNG and Solomon Islands, consideration should be given as to how to align carbon rights with the need to address planned deforestation, the main driver of deforestation and forest degradation. In this regard, there is considerable uncertainty as to how carbon rights relate to timber rights, with significant potential for conflict between the two, particularly in PNG and Solomon Islands. When designing a framework for carbon rights, countries should avoid creating competing regimes for carbon rights and timber rights. Harmonization of these laws is required.

ANNEX 1: FIJI

This Annex contains extracts from the Country Paper on Fiji: REDD+ and forest carbon rights in Fiji. The full paper can be accessed [here](#).

Nearly 88% of the land in Fiji is owned by indigenous (iTaukei) landowning groups, and approximately 90% of this land is forested. Most iTaukei land is registered in the *Register of iTaukei Lands* with the boundaries recorded (even if not formally surveyed), with members of the landowning group recorded in the *Vola ni Kawa Bula*.

Under the legal system prevailing in Fiji, the landowner owns the forest on his land, whether it is in his possession or leased and in consequence, would own forest carbon rights in relation to that forest. In the case of forest planted with the consent of the landowner (plantations), ownership of the trees resides in the lessee during the term of the lease, but unless negotiated as part of the lease agreement, the lessee cannot assume to have the benefit of the forest carbon rights.

Fiji has to make a policy decision on the way ahead for carbon rights to proceed with the REDD-Plus policy. The choices are between the various options for ownership of carbon rights.

One option is for the State to assume ownership of forest carbon rights and to legislate to reserve ownership of the rights, in the same way as the rights in minerals in land is reserved to the State. However this could result in Fiji being in contravention of its international obligations in relation to indigenous landowners, and is unlikely to be essential for participation by the State in international carbon finance transactions that require a national level counterparty.

A second option is for a landowner (who by law owns the carbon rights in his forest) to benefit from them by engaging directly in a relationship for a REDD+ project on his land. This could be achieved through a legislative system that provides for the creation of an ecosystem restoration licence as a prelude to engaging in a REDD+ project. The licence conditions would be enforced by the State. A landowner could engage in a REDD+ project by leasing the land to a REDD+ developer (through TLTB or the Land Bank) who would obtain the ecosystem restoration licence and engage a service provider to carry out the REDD+ project including fulfilling the terms of the licence.

A specific illustration of this option, modelled on the forest concession licence and having regard to the likely need to aggregate parcels of land for carbon credits to be of sufficient volume to attract an emissions reduction purchaser, is the following:

- a group of landowners would form an incorporated landowning entity,
- which leases the lands (through TLTB or the Land Bank),
- obtains an ecosystem restoration licence and contracts with another person (e.g., an NGO) to manage the provision of services (the service provider) to fulfil the purpose and conditions of the ecosystem restoration licence.

The project proponent could be bound to employ and train members of the landowning units that comprise the landowning entity where it includes iTaukei landholders. The landowning entity would sell the verified emission reductions to a purchaser for value.

A third option is to create a separate forest carbon property right, so as to enable separation of the forest carbon rights from the land and facilitate their ownership and consequent trading, by third parties (other than the landowner). This has the disadvantage of requiring the establishment of a system or registering and recording forest carbon rights in order to avoid fraudulent activity.

The forest ecosystem licence and lease model in the second option offers the greatest certainty and benefit for all parties, and although it would necessarily require some legislative change, particularly to address competing interests in the land from other forestry projects. It would also be consistent with Fiji's international obligations, be easily understood by all landowners and relatively simple to apply without the need for differentiated application between landowners in the different categories of land tenure.

Adoption of any of the options will require legislative change to implement the approach and provide safeguards for purchasers of either carbon rights or carbon credits, and the forest carbon rights owners.

ANNEX 2: PAPUA NEW GUINEA

This Annex contains extracts from the Country Paper on PNG: REDD+ and forest carbon rights in Papua New Guinea. The full paper can be accessed [here](#).

There is, as yet, no legislation specifically dealing with REDD+, forest carbon rights or payments for environmental services generally in Papua New Guinea (**PNG**). However, PNG has a well-developed legal system with a number of elements which could support the creation of national framework for REDD+ and forest carbon rights.

PNG has a strong tradition of private property ownership and protection. It is often said that 97% of the land in PNG falls under customary ownership, so this forms the primary type of land ownership in PNG. Ownership and control of forest, and the carbon sequestered in the forest, derives from the customary ownership of the land on which the forest grows.

However, the conclusion reached in this Paper is that customary land tenure, as presently structured, cannot legally support a market-based approach to REDD+ which involves site-specific forest carbon projects due to the legal restrictions which customary land tenure brings and the contractual obligations that underpin REDD+ projects.

Characteristics which make customary land unsuitable for commercial arrangements include the following:

- Customary land is unregistered in PNG, which means that it can often be difficult to clearly identify who the landowners are for a particular area and who has various customary interests in the land (usufructs), although legislation has recently been passed permitting registration of clan land (section 3.4.4).
- The boundaries of customary land are not surveyed and are often disputed.
- Customary land is governed by customary laws, which are not written down and which differ from place to place.
- Customary land is inalienable, except to the State and in other very limited circumstances, and any instrument purporting to create an interest in customary land (such as a forest carbon contract) can be declared void.

- There is no suitable mechanism for customary landowner groups to join together as a legally recognised entity to hold and manage forest carbon, and to distribute benefits in an equitable, open and transparent way.

Further, approximately 12 million hectares, or 80% of production forest, has already been “acquired” by the PNG Forest Authority under the *Forestry Act*, with the PNGFA and other third parties (logging companies) holding legal rights to harvest trees from these forests.⁸⁷ This has significant implications for how forest carbon right might be allocated in PNG, as these interests will need to be reconciled with the interests of customary landowners who may wish to engage in REDD+ activities.

Legislation is required to address these issues. Set out below is a summary of the reform options relating to customary land.

Step 1: Clarify the position of forest carbon in land legislation

An amendment may be made to the *Land Registration Act* to ensure that “land” as defined in that Act includes “forest carbon rights”. This would put freehold land, state lease land and registered clan land on a common footing in regards to REDD+ and any other forest carbon proposals and would provide a basis for registering any instruments dealing with forest carbon rights on the land records, if that option is preferred.

Further amendment should also be made to the *Forestry Act* to insert the same common definitions into the forest regime to ensure that consistency and integration is maintained where customary landowners have transferred their forest ownership entitlements to the PNG Forest Authority under a Forest Management Agreement, although this must be done in accordance with the principle of free, prior and informed consent by landowners.

Step 2: Ensure identification and recording of who owns the forest carbon rights on customary land

This will require amendments to the *Forestry Act* to ensure that the identity of customary land which has become subject of a Forest Management Agreement are effectively recorded and put onto a registry. The circumstances identified where there is potential for conflict between the consequences of registration as Clan Land and the Forest Management Agreement need clarification and that mechanism of clarification could be

⁸⁷ [UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries, Joint Programme Document](#), 2010, p. 6.

expanded to provide synthesis between the two processes based on the register maintained under the *Land Registration Act*.

Step 3 Legislating to enable REDD+ and Forestry Rights under the National Forest Plan

The forestry regime needs amendment to find an appropriate and balanced position for REDD+ and forestry harvesting in the National Forest Plan. This will mean amending the *Forestry Act* to ensure the present single purpose mandatory statutory powers and functions of the PNG Forest Authority are expanded to include REDD+ and carbon sequestration activities in the National Forest Plan and the machinery which surrounds its implementation.

ANNEX 3: SOLOMON ISLANDS

This Annex contains extracts from the Country Paper on Solomon Islands: REDD+ and forest carbon rights in Solomon Islands. The full paper can be accessed [here](#).

Solomon Islands has no current laws on forest carbon rights, nor is the ownership of forest carbon readily deducible from existing laws. The natural resources of Solomon Islands belong to its people and government. The vast majority of land (86%) is held under customary tenure, which is unregistered and is governed by customary law.⁸⁸ It is therefore very difficult for outsiders to identify land boundaries for customary land or who 'owns' the land.

Under the current laws:

- Customary land is governed by customary laws, which differ from place to place and are not written down
- Customary land is inalienable, except to Solomon Islanders, and in other very limited circumstances
- Those entitled to deal with customary land, as owners, and as holders of various interests in the land and its natural resources, are not readily identifiable to outsiders
- The boundaries of customary land are not surveyed and are often disputed
- There is no suitable mechanism for customary landowner groups to join together as a legally recognised entity to hold and manage forest carbon, and to distribute benefits in an open and transparent way.

Legislation is required to address these issues. Set out below is a summary of the steps which might be taken to facilitate the clarification of forest carbon rights:

Step 1: Define forest carbon rights in legislation

An amendment to the definition of 'land' in the *Land and Titles Act* to include 'forest carbon rights' would make it clear that forest carbon rights are held by the owner of public land, perpetual estate, fixed term and leasehold interests.

The situation is more complex regarding customary land and further steps are necessary. The term 'forest carbon rights' should itself be defined as well.

⁸⁸ *Land and Titles Act* s 239(1).

Step 2: Identify and record who 'owns' the forest carbon rights on customary land

On customary land in Solomon Islands, land ownership and the customary right to control the forest resource on that land can be held by different groups. Simply legislating to declare that 'land' includes 'forest carbon rights' may therefore not clearly resolve the question of ownership.

There are two options available here:

(a) Customary Land Records Act model: Use the *Customary Land Records Act* to identify and record the 'owners' of forest carbon rights on customary land. This Act allows a customary land holding group which claims an interest in customary land to apply to the Land Record Office to record their 'primary rights' (in this case, their rights to the forest carbon), and includes the demarcation of the boundaries. Use of this option would require the Government to establish the infrastructure required for the *Customary Land Records Act* to operate, such as supporting regulations and a functioning Central Land Record Office; **or**

(b) Forest Resources and Timber Utilisation Act model: Use the model of the *Forest Resources and Timber Utilisation Act* (ss 7 and 8) as noted, by which the Provincial Executive holds a meeting to identify which of the customary owners is entitled to grant the 'timber rights', and extend it to forest carbon rights. This would mean that the owners of forest carbon rights would be identified using the process set out in that Act. However, it should be noted that the *Forest Resources and Timber Utilisation Act* has generated a high level of community disquiet, and this may therefore not be a suitable option.

Step 3 Legislate to enable customary land owners to enter into REDD+ contracts (Section 8)

Customary landowners cannot presently enter into contracts to sell their emission reductions/removals from their customary land because of the statutory restriction on disposing of customary land or disposing of *interests* in customary land (*Land and Titles Act*, ss 240 and 241(1)). A REDD+ contract could amount to an 'interest' in customary land because the effect is to limit how that land can be used (e.g. often for a period of 10 years or more). Therefore, for customary landowners to undertake a REDD+ project which involves a contract to sell verified emission reduction and removals to a REDD+ developer, an amendment will be required to these sections of the *Land and Titles Act* exempting these REDD+ contracts. The only alternative would be to require customary landowners to sell or lease their customary land. However, under current law leasing or granting a fixed term estate results in the permanent alienation of customary land.

Alternative Option: Allow third parties to hold/own forest carbon rights over customary land (Section 9)

In the same way that third parties (such as logging companies) can hold timber rights over customary land, as permitted under the *Forest Resources and Timber Utilisation Act*, Solomon Islands needs to decide whether it wishes to permit third parties to hold the rights to forest carbon. To enable this to happen, the *Forest Resources and Timber Utilisation Act* could be amended to provide that 'timber rights' include 'forest carbon rights'. The person/company who holds the timber rights in an area would therefore be entitled to exercise their timber rights, forest carbon rights, or a combination of the two.

Conclusion

Having regard to the relative advantages and disadvantages of each of the options, it is suggested that the following mechanism be considered to facilitate REDD+ projects on customary land in Solomon Islands:

1. Recording of forest carbon rights under the *Customary Land Records Act*.
2. Landowners enter into a REDD+ agreement with a project developer to sell their verified emission reductions and removals (an amendment to the *Land and Titles Act* is required to permit this).
3. Landowners consent to a conservation covenant of some description over the forest to be protected, with sufficient flexibility to manage the forest sustainably.

ANNEX 4: VANUATU

This Annex contains extracts from the Country Paper on Vanuatu: REDD+ and forest carbon rights in Fiji. The full paper can be accessed [here](#).

All land in Vanuatu belongs to the indigenous ‘custom owners’. Almost all land is held under customary tenure, whether leased (9.3%) or un-leased (89.7%).

Vanuatu is the only country in Melanesia which already has a statutory framework for forest carbon rights, although this only applies to leased land: the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000*. The legislation creates a separate property right, which allows the carbon to be decoupled from the land. The grant of forestry rights under the Act is dependent on the prior creation of a lease over the land. Consequently, it does not provide a framework for customary land ‘owners’ to exercise their forest carbon rights on un-leased customary land. In any event, this legislation does not appear to be well supported in Vanuatu as it was apparently introduced without sufficient public consultation. It does not appear to have been used since its introduction.

Un-leased customary land and forest carbon projects

There are a number of characteristics of un-leased customary tenure that make it difficult to identify the ‘owners’ of forest carbon rights over that land, including the following:

- Customary land is governed by customary laws which are not written down and which differ from place to place
- Customary land is inalienable, except amongst Ni Vanuatu (indigenous people from Vanuatu), although it may be leased or by acquired by the State in the public interest
- Those entitled to deal with un-leased customary land are not readily identifiable by outsiders
- The boundaries of un-leased customary land are not normally surveyed and are often disputed, and
- The options for indigenous groups to join together as a legally recognised entity that can deal with forest carbon rights from a commercial perspective are limited.

Where un-leased customary land is concerned, the conclusion reached in this Paper is that it will be very difficult to structure a forest carbon project which give sufficient certainty to a project proponent or buyer of forest carbon.

The following options have been identified to facilitate a forest carbon project on un-leased land:

- Step 1: Identifying the owners of the land and the forest carbon rights. This is likely to be difficult as this must be determined according to custom. Unlike the Solomon Islands which has the *Customary Land Records Act*, there is no statutory framework in Vanuatu that could be used to record customary interests, such as interests in forest carbon rights.
- Step 2: Land 'owners' contract with the project proponent or buyer of forest carbon. Assuming that the 'owners' of the land and the forest carbon rights can be sufficiently identified (Step 1), these owners could then enter into a forest carbon contract with either a project proponent, or the government (as intermediary). However, as required under the Constitution which provides that the rules of custom form the basis of land ownership and use (Art. 74) any such agreement would have to be negotiated in accordance with the rules of custom. As customary rules differ from place to place, this might be difficult to ensure.
- An alternative to steps 1 and 2 that would enable customary owners to undertake a REDD+ project over un-leased customary land would be for the land 'owners' to request the Minister to make a declaration of a forest as a Conservation Area under the *Forestry Act*. Commercial forestry operations are prohibited in a Conservation Area. However there is no process defined for ascertaining the custom owners of the land entitled to request such a declaration. Further, such a declaration does not provide a great deal of long-term certainty as a declaration can be cancelled by the Minister on the request in writing by the custom owners of the land.

Leased customary land and forest carbon projects

On leased land, there are three options for developing a forest carbon project:

1. A lease from customary owners either to themselves, the government, or a project proponent, under which the lessor would hold the carbon rights (head lease). The lessor could then sub-lease the land to a landowner body (see

options in Section 11), or could lease the land to a project proponent. The lessor and lessee could then enter into a contract to sell the emission reduction/removals to a carbon buyer. **A standard form lease could be amended or developed for this purpose.**

2. A lease, followed by a grant and registration of forestry rights under the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000*, either back to the custom owners, or a third party.
3. A forestry lease.

Some of these proposals require legislative change. If Vanuatu wishes to permit forest carbon projects to be developed over un-leased customary land, it must give further consideration as to how this might be done given the level of uncertainty that currently exists in this area. Although the leasing option carries less uncertainty, it would still be advisable to clarify how this pipeline might work, e.g. by developing a standard form lease for the purpose of forest carbon projects.

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