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Climate Protection through Forest Conservation in Pacific Island Countries

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REDD+ and forest carbon rights in Vanuatu

BACKGROUND LEGAL ANALYSIS

November 2012

SPC Secretariat of the Pacific Community

Growing the Pacific. Growing our future together. L'Océanie, le terreau de notre avenir.

SPC Land Resources Division

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Executive summary

Who owns the carbon in the forest? This is a question which all developing countries preparing to engage with REDD+ need to address, including Vanuatu. 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.

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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Disclaimer:

The law of Vanuatu is not easily accessible. Whilst there is a consolidation of legislation up to 2006, and later Acts and some case law are available in hard copy or online, there is no comprehensive collection of the laws available. This report is therefore subject to the proviso that, whilst every endeavour has been made to base it on the current law of Vanuatu, including consultation with national collaborators, the author cannot be certain that all relevant primary material has been considered.

Unless otherwise stated, the legislation referred to in this report is domestic legislation.

Abbreviations and technical terms

CBD	Convention on Biodiversity (1992)
CCBS	Climate, Community and Biodiversity Standard
CDM	Clean Development Mechanism of the Kyoto Protocol
COP	Conference of the Parties
DNA	Designated National Authority
FCPF	Forest Carbon Partnership Facility of the World Bank
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GHG	Greenhouse Gas
IPCC	Intergovernmental Panel on Climate Change
MRV	Measurement, Reporting and Verification
NACCC	National Advisory Committee on Climate Change
Ni-Vanuatu	Indigenous people from Vanuatu
PICs	Pacific Island Countries
PMU	Project Management Unit
REDD	Reduced Emissions from Deforestation and forest Degradation
REDD+	REDD, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks ('+')
SFM	Sustainable Forest Management
tCO_2e	Tonnes of CO_2 equivalent (a measure of greenhouse gases)
UNDRIP (2007)	United Nations Declaration on Rights of Indigenous Peoples
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:

- Explain the relevance of carbon rights to a national REDD+ scheme in Vanuatu
- Explore whether the ownership of carbon rights can be deduced from the existing legal framework of the country, having regard to land and natural resource laws, including both statutory and customary law, with a view to determining whether it is also possible to determine who might own the carbon rights in the resources.
- Identify some options for clarifying the ownership and allocation of carbon rights in Vanuatu.

The Paper does not purport to set out a comprehensive legal and policy framework for clarifying and allocating forest carbon rights in Vanuatu. Rather, it seeks to establish the current legal position as to how carbon rights are likely to be treated under the existing legal framework in Vanuatu, and to use this as a baseline to identify a range of options for law reform. Whether and how Vanuatu decides to pursue law reform activities on carbon rights will then be a matter for further consultation and discussion as part of Vanuatu's REDD+ readiness activities.

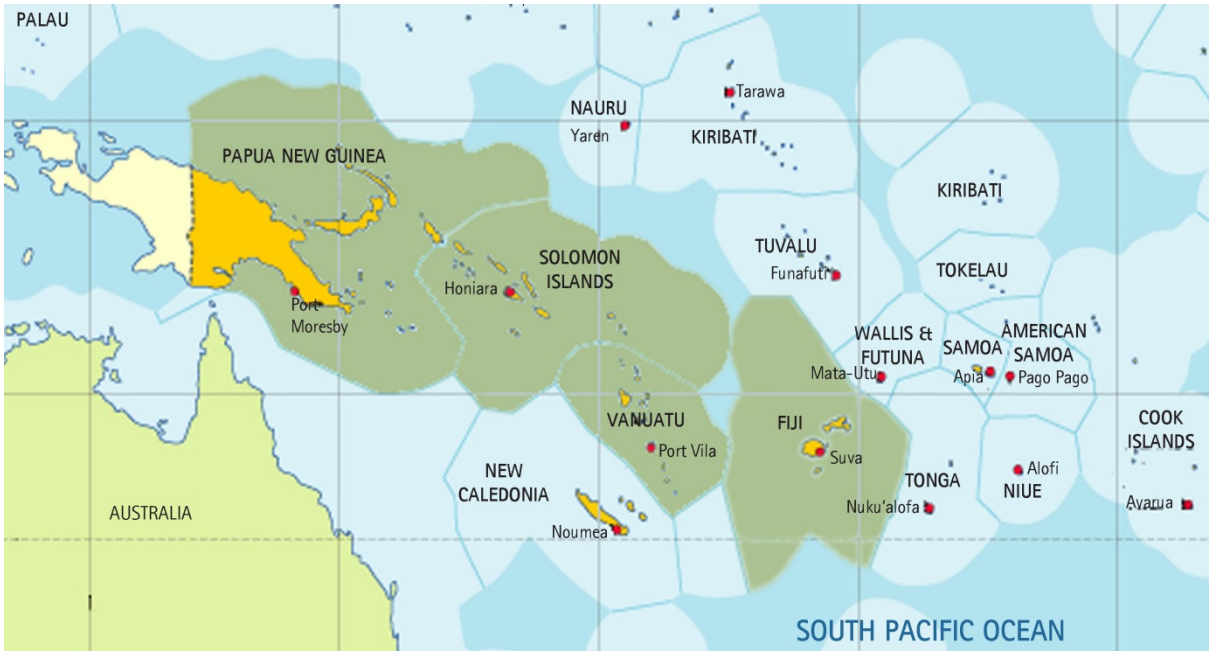
This Paper has been commissioned by the SPC / GIZ regional project "*Climate Protection through Forest Conservation in Pacific Island Countries*", funded by the International Climate Initiative of the German Federal Environment Ministry. It is part of a larger study on forest carbon rights in Melanesia. The other Country Papers (Fiji, Papua New Guinea and Vanuatu) can be accessed under "Country Reports", and the Synthesis Report entitled *REDD+ and Forest Carbon Rights in Melanesia*, can be accessed here.

1. Introduction

1.1. Country overview

Vanuatu is one of the five Melanesian countries (along with Fiji, New Caledonia, Papua New Guinea and Solomon Islands) located in the South Pacific Ocean (**Map 1.1**). It is spread over 80 islands, with a population of 234,000 people, of which 75% live in rural areas. Vanuatu has a land area of 1,219,000 hectares, with forest cover of 440,000 hectares, being 36% of its land area, reporting a nil rate of deforestation.[1]

Formerly known as the New Hebrides, Vanuatu gained independence in 1980.



Map 1.1 Location of Vanuatu in the South Pacific

1.2. Overview of REDD+ readiness in Vanuatu

Deforestation and forest degradation account for approximately 17% of global greenhouse gas emissions – more than the entire global transport sector.[2] 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

[1] All country statistics are from Food and Agriculture Organisation of the United Nations, *State of the World's Forests* (FAO, 2011) 108, 117.
[2] IPCC Fourth Assessment Report, 2007.

Framework Convention on Climate Change **(UNFCCC)**.[3] 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.[4]

1.2.1. Development partners and projects

REDD+ readiness in Vanuatu is being supported by the following development partners and programmes:

- The SPC / GIZ regional project, *Climate Protection through Forest Conservation in Pacific Island Countries*, funded by the International Climate Initiative of the German Federal Environment Ministry. This Paper has been commissioned as part of this project.

- The World Bank's *Forest Carbon Partnership Facility*. Vanuatu has prepared a draft Readiness Preparation Proposal (R-PP) (Sept 2012) in anticipation of making an application to the FCPF in 2013 to fund further REDD+ readiness activities.

- The *Vanuatu Carbon Credit Project* (VCCP). Commencing in 2006/7, this was an early project to develop REDD+ readiness capacity, and was funded by UK Global Opportunities Fund and Victoria University Wellington.

An Australian-based non-government organisation, Live and Learn Environmental Education, has received funding from the European Union to for its project, *Community*

[3] 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 (Cancun); 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).

[4] 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.

based REDD+ projects in the Western Pacific. This project involves the development of a REDD+ pilot project in Vanuatu.

While not engaged directly with REDD+-readiness activities, the work of the '*Mama Graon'* project will also be very important in informing the development of a national REDD+ framework. 'Mama Graon' is a five-year land programme (2011 – 2015), funded by Australia and New Zealand, to support the implementation of Vanuatu's Land Sector Framework 2009 – 2018.

1.2.2. Key policy documents

The key policy documents that will guide the development of REDD+-readiness in Vanuatu include:

- The *Reviewed National Forest Policy*, September 2012, prepared by the Department of Forestry, with support from SPC/GIZ.
- The *Land Sector Framework 2009 – 2018*, prepared by the Vanuatu Ministry of Lands, with support from AusAID. This Framework focuses on five areas in need of reform: (i) enhancing the governance of land; (ii) engaging customary groups; (iii) improving the delivery of land services; (iv) creating a productive and sustainable sector; and (v) ensuring the access and tenure security of all groups.

1.3. Proposed scope of REDD+ activities in Vanuatu

As with the other Melanesian countries, Vanuatu has opted for a national approach to REDD+. However, given that it may take some years for the REDD+ mechanism to become functioning under the UNFCCC framework, Vanuatu will support the development of a project-based approach in the interim and will seek to integrate this into its national REDD+ framework at a later date.

In this regard, Vanuatu will initially adopt a sub-national approach to implementation, one of the options proposed under the Pacific Islands Regional Policy Framework for REDD+, and will seek to take advantage of the Jurisdictional and Nested REDD+ Requirements recently adopted by the Verified Carbon Standard.[5] The discussion on

[5] *Draft Readiness Preparation Proposal for Vanuatu* (28 September 2012) Forest Carbon Parternship <

nesting and integration of projects in national programmes is beyond the scope of this study.

1.4. Pacific Islands Regional Policy Framework for REDD+

Vanuatu has also participated in the development of the *Pacific Island Regional Policy Framework for REDD+*, which was formally endorsed by the Ministers for Agriculture and Forestry in September 2012.[6] The Regional Framework calls on countries to develop their REDD+ policies, strategies, action plans, guidelines, and legislation to define forest carbon rights, forest carbon financing and benefit-sharing arrangements.[7]

Box 1.1: Extracts from Pacific Island Regional Policy Framework for REDD+ concerning forest carbon rights

The Regional Framework contains the following guidance on forest carbon rights for Pacific Island countries, under the ~~of~~ Safeguards heading:

> Para. 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.
>
> *4.63a Pacific Island countries and/or REDD+ project proponents will need to clarify land and forest carbon tenure arrangements as a key condition of REDD+ implementation.*
>
> *4.6.3b Pacific Island countries already possess laws and regulations guiding the production, distribution and sale of commodities (e.g.*

http://www.forestcarbonpartnership.org/fcp/sites/forestcarbonpartnership.org/files/Documents/PDF/Sep2012/FCPF%20R-PP%20Vanuatu%20Country%20Submission%20September%202012.pdf> 40-41. For more information on the announcement of the VCS Jurisdictional and Nested REDD+ requirements on 4 October 2012, see: Verified Carbon Standard, *Groundbreaking Jurisdiction REDD+ Requirements Released* (4 October 2012) VCS News and Events <http://v-c-s.org/news-events/news/groundbreaking-jurisdictional-redd-requirements-released>.

[6] The Pacific Islands Regional Policy Framework for REDD+ was prepared with support from the Secretariat of the Pacific Community and GIZ, and was adopted by the Heads of Agriculture and Forestry Services at its Fifth Regional Meeting in Nadi, Fiji, 24-27 September 2012.

[7] *Pacific Island Regional Policy Framework for REDD+* (September 2012), 8,[4.3.2].

timber, minerals) derived from natural resources. These laws and regulations can be used as a starting point for the development of laws and regulations (including taxation) guiding the production, distribution and sale of carbon assets.

4.6.3c Pacific Island countries should ensure effective, equitable and transparent distribution of benefits arising from REDD+ implementation. Benefit distribution and benefit sharing should address gender equality.

2. What are 'forest carbon rights'?

The phenomenon of climate change and the recognition by the international community that forests play an important role in reducing greenhouse gas emissions and increasing carbon removals has suddenly given value to the carbon in forests. This development has given rise to the following questions: Who owns the carbon in the forests (and soils)? Who is entitled to the associated benefits (and risks and obligations) associated with those carbon rights?

There is currently no clear or commonly accepted definition of carbon rights under international law or the international UNFCCC policy framework for REDD+.[8] While the current 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 does establish some other guiding principles that are relevant to the way that countries will develop their framework for carbon rights (e.g. safeguards).[9]

Box 2.1: Explanation of terms

Forest carbon: the carbon that is stored in forests and soil (the carbon sink), and the carbon that will be sequestered in them over time.

Forest carbon 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 forests absorb carbon.

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

For the purposes of this Paper, the term 'forest carbon rights' refers to the right of an individual or group to exploit and enjoy the legal and/or economic benefits concerning:

- ***The carbon already stored (or sequestered) in forests and soil*** *(also called 'stored forest carbon')*: It is the act of 'avoiding' the emission of this carbon into the earth's atmosphere, e.g. by

[8] Even REDD+ commentators use different definitions throughout the literature on REDD+. For a detailed discussion of the different types of carbon rights that can exist, see David Takacs, *Forest Carbon – Law and Property Rights* (Conservation International, 2009)13-17.

[9] Conference of Parties, *The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention***,** COP Decision 1/CP.16, UNFCCC, 9th plen mtg, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) [72].

avoiding logging or other activities that degrade the forest, that entitles the holder of the carbon rights to receive benefits under REDD+; and

- ***Carbon sequestration**:* This is the carbon that will be sequestered (absorbed) by the trees and the soil in the future. Sequestration is the process by which trees absorb carbon through photosynthesis, thus 'removing' it from the atmosphere (also referred to as 'removals').

For a person or group to demonstrate that they own or have control over the forest carbon rights in a certain area of land, they must be able to show:

- That they own or have legal control over the **land**
- That they own or have legal control over the **forest resource,** to the exclusion of all other competing interests, such as forestry rights, mining rights, leasehold interests or competing usufructs (e.g. competing customary rights), or through having reached agreement with those who hold competing interests
- That they can **maintain their control** over the land and forest for the required period of time (e.g. 10 – 40 years, depending on the duration of the contractual or legal obligation that is undertaken) in order to demonstrate that they can manage and protect the forest resource.

2.1. Carbon pools

Forest carbon can be divided into five carbon pools (physical sub-sets of forest carbon).

The five carbon pools specified under the IPCC 2006 Guidelines are:[10]

- above-ground biomass (stems, branches and foliage, etc.)

[10] The UNFCCC has requested that REDD+ countries estimate and report emissions and removals from five forest carbon pools when preparing their national greenhouse gas inventories. The UNFCCC has asked countries to use the most recent IPCC guidelines, as adopted or encouraged by the COP, as a basis for estimating anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks: Conference of Parties, *Methodological guidance for activities relating to reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries***,** COP Decision 4/CP.15, UNFCCC, 9th plen mtg, UN Doc FCCC/CP/2009/11/Add.1 (18-19 December 2009) [1(c)]. See also 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>. The five carbon pools specified by the IPCC 2006 Guidelines also apply to mangroves.

- below-ground biomass (live roots more than 2mm diameter)
- dead wood
- litter
- organic soil carbon (including organic carbon in mineral soils. This includes live and dead roots of less than 2mm diameter. Each country can specify the depth to which it will measure soil organic carbon).

Forest carbon rights include the rights to the carbon found in these five pools.

2.2. What are the benefits, risks and obligations of carbon rights ownership?

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

2.2.1. Benefits

While it is beyond the scope of this Paper to fully explore the links between ownership of forest carbon rights and benefit-sharing, in principle, the owner/s of forest carbon rights who can show that they will or have generated verified emission reductions/removals will be entitled:

- Where a **project-approach** to REDD+ is taken: to receive (or control) the carbon credits that are generated by a REDD+ project ; or
- Where a **national approach** to REDD+ is taken through national accounting with a national benefit-sharing scheme (e.g. under the UNFCCC framework): to a share of the REDD+ revenues that are received by the national government.

Note that under a national approach, clarification of carbon rights is not a pre-condition for benefit-sharing, as a benefit-sharing scheme could be based on a range of factors, such as paying the land 'owners' who are actively engaged in land management activities. However if the national approach incorporates a project-based approach which directly generates carbon credits, the value of some of those credits must be returned to land 'owners' as otherwise it would constitute a 'taking' of property.

The Pacific Islands Regional Policy Framework for REDD+ contains some provisions that are relevant to benefit-sharing. One of the guiding principles for the Framework is

that REDD+ should 'Contribute to poverty alleviation and enhance the livelihoods of Pacific Island communities' (Para. 8(v)). In particular, the Framework states that:

> *'Pacific Island countries should ensure effective, equitable and transparent distribution of benefits arising from REDD+ implementation. Benefit distribution and benefit-sharing systems should address gender equality'* (Para. 4.6.3c).

Benefit sharing is a difficult issue in Vanuatu. There is no general State law mechanism for the disbursement of income from customary land and this has caused problems in the past.[11] Under customary laws, benefit sharing should accord with the customary laws prevailing in the area in question. However, these laws do not necessarily result in a benefit being passed on to all members of the clan. As discussed above, the *Forestry Act* sets up a process for determining the indigenous groups entitled to grant timber rights to third parties. Those groups are then required to form a Management Committee which deals with distribution of benefits in accordance with customary laws. This Act could be used as a model for benefit sharing.

In Vanuatu, the manner in which the ownership of forest carbon rights will be linked to benefit-sharing, will need to be the subject of a separate policy analysis.

2.2.2. Risks and obligations

Ownership of carbon rights also carries obligations and risks.

The **obligations** attached to carbon rights relate to the need for the owner of the carbon rights to ensure that the forest carbon will remain sequestered in the forest for a long period of time, such as 10 – 20 years. This means that the owner of the carbon rights will need to give undertakings (promises) to the Project proponent (either the Government or a private project developer) that they will manage the land in a certain way so as to protect the forest over the long term (e.g. . that they will not permit or that they will regulate logging, to clear the area of scrub to reduce bushfire risk, to monitor the area, etc.).[12]

[11] See, for example, *Noel v Toto* (Unreported, Supreme Court, Vanuatu, Kent J, 19 April 1995) available via www.paclii.org at [1995] VUSC 3.

[12] 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 Verified Carbon Standard, *Agriculture, Forestry and Other Land Use (AFOLU) Requirements* (VCS,

There are also **risks** involved if the carbon stored in the forests is released into the atmosphere during the life of the project, reversing the environmental benefits of the REDD+ project. [13] This is known as 'loss of permanence' or a 'reversal'. Loss of permanence might occur through intentional release (such as by legal or illegal logging), unintended release (as a result of negligence), or through natural causes (such as a cyclone, wildfire or insect attack).

Where the forest carbon is released, the owner of the carbon rights may lose some or all of the benefits of the REDD+ project (e.g. carbon credits), and/or they may have to pay an additional penalty, depending on the terms of any carbon contract they have entered into, or depending on the structure of the REDD+ regulatory scheme.[14]

To insure against the possibility that the forest carbon might be released, voluntary forest carbon accreditation schemes (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').[15] The Plan Vivo Standard usually requires 10%-30% of credits expected to be generated (climate services) to be set aside, with the minimum being 10%.[16]

2.3. Why define forest carbon rights?

Clarifying forest carbon rights is an important part of REDD+ readiness and should be done within the broader framework of developing a national regulatory framework for REDD+.

Version 3.3, 4 October 2012) http://v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%20v3.3_0.pdf [3.1.10].

[13] 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.

[14] For example, under the forest carbon scheme in Australia, if carbon is released through an intentional or negligent action by the project proponent, the proponent can be ordered to buy back an amount of carbon credits up to the total number of credits that the forest carbon project would have earned: see *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) s 90.

[15] 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: Verified Carbon Standard, *Program Definitions* (VCS, Version 3, 2012) < http://v-c-s.org/sites/v-c-.org/files/Program%20Definitions%2C%20v3.4.pdf>.

[16] Plan Vivo, *The Plan Vivo Standard for Community Payments for Ecosystem Services Programmes* (Plan Vivo, 2012) <www.planvivo.org/wp-content/uploads/Plan-Vivo-Standard-2012-consultation-draft.pdf> s 6.3.

Due to the large areas of un-leased customary land in Vanuatu (89.7%), it is very difficult for outsiders to clearly identify who owns the forest carbon because this is determined according to customary law, which changes from place to place (see the legal analysis of this in Section 4 of this Paper). Identifying the 'owner/s' can be a costly and time-consuming process. Whilst there are some existing means of identification, the present situation may not confer the level of certainty that a Project proponent requires in order to invest in and support a REDD+ project. If forest carbon rights can be formalized within a clear policy and legislative framework, this is more likely to provide regulators, investors and land 'owners' with clarity and certainty they require, and hopefully will reduce transaction costs in REDD+ projects.

2.3.1. Forest carbon rights must be clear for carbon trading to occur

For REDD+ countries that wish to participate in the carbon market, as is foreshadowed in Vanuatu, it is highly desirable that they develop a clear policy and legislative framework for identifying and regulating carbon rights. This is because carbon project developers and investors want to know exactly who owns and controls the underlying resource that is being traded, namely, the carbon emission reductions/removals. Project developers and investors want an assurance that the carbon has not already been sold to someone else, and that it will not be sold to someone else in the future once they have 'bought' it (known as 'double-counting').

In particular, clarification is required to identify:

- who owns the carbon, e.g. An individual or a landowner clan or group, and
- the boundaries of the land that will form the project area.[17]

The voluntary carbon standards also require a project proponent to demonstrate that they hold the forest carbon rights in the project area in order to obtain validation of the project. Relevant extracts from some of these standards are set out in **Box 2.2**.

[17] For example, the VCS AFOLU Requirements require a project proponent to provide a map of the project area, the coordinates of the project area and boundary, the total size of the project area, and details as to its ownership: Verified Carbon Standard, *Agriculture, Forestry and Other Land Use (AFOLU) Requirements* (VCS, Version 3, 2012) <http://v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%20v3.3_0.pdf> [3.4.1].

Box 2.2: Extracts of provisions on carbon rights in 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)

An informed policy discussion on forest carbon rights should also 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 2.3.

Box 2.3: What is the difference between 'carbon rights' and 'carbon credits'?

'Carbon rights' refer to the right to exploit the carbon stored and sequestered in a forest. The holder of the carbon rights has the right to the legal or economic benefit from carbon emission reductions and removals.

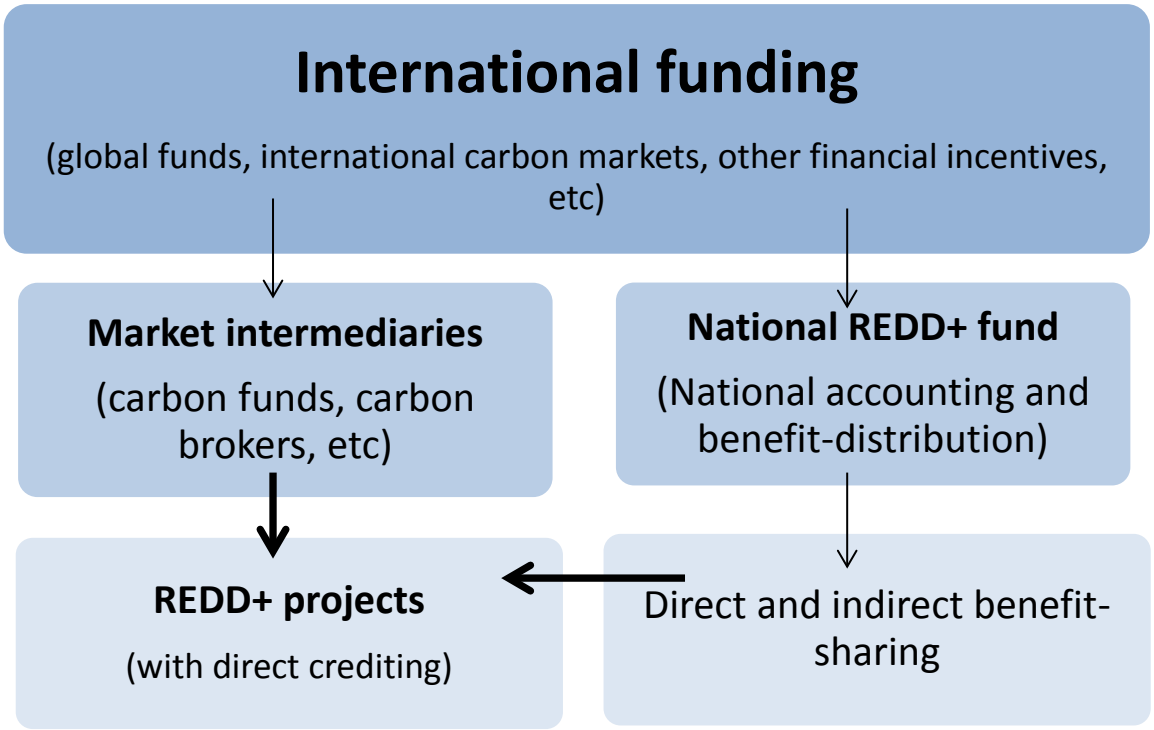
'Carbon credits' are the financial instruments that are issued once it is verified that emission reductions and removals from a project (or country) have been achieved. For example, carbon credits generated under the UNFCCC's CDM are called Certified Emission Reductions; the Verified Carbon Standard issues 'Verified Emission Units' (VCUs); while the Plan Vivo standard issues 'Plan Vivo Certificates'.

On the voluntary carbon market, carbon credits are held in an account in a carbon registry such as the Markit Environment Registry in New York, usually in the name of the project proponent.

Carbon credits are equal to one metric tonne of carbon dioxide equivalent and are issued with a unique serial number so they can be tracked through carbon registries.

It is not necessary for a country to clarify carbon rights for all elements of a national REDD+ programme, only those which involve project-based activities and market funding which are indicated by the arrows in bold (see **Figure 2.3.1**).

Figure 2.1: Elements of national REDD+ funding architecture for which forest carbon rights should be defined (indicated by arrows in bold)[18]



2.4. Approach and overarching principles for defining carbon rights

2.4.1. Decision-making framework

When designing a system to clarify and regulate forest carbon rights, countries need to make some key decisions, such as whether to nationalize carbon rights or base them on land and forest ownership, and whether to allow third parties (such as Project proponents or carbon brokers) to hold or own forest carbon rights. Each of these key decisions are analysed in more detail in the sections of this Paper below. **Figure 2.2** below contains a decision tree illustrating this process.

[18] Adapted from Arild Vatn and Arild Angelsen, 'Options for a national REDD+ architecture' in Arild Angelson (ed) *Realising REDD+ - National Strategy and Policy Options* (CIFOR, 2009) 57, 64.

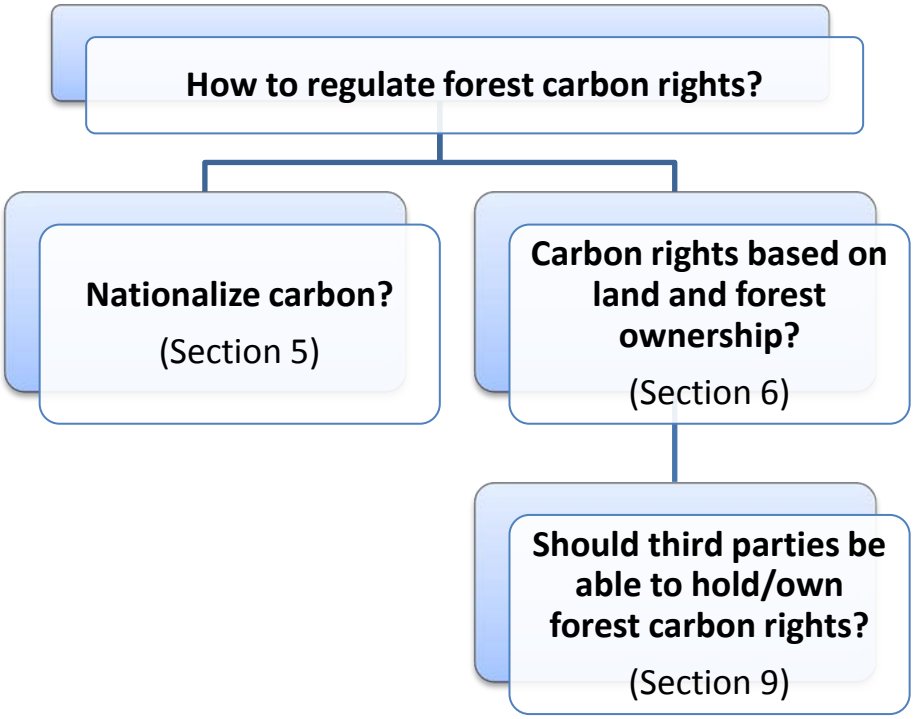


Figure 2.2 Decision-making tree for developing framework for carbon rights

2.4.2. Consistency with Vanuatu's constitutional framework

The *Constitution* guarantees the right to protection from deprivation of 'property of any description' and of any 'interest or right over property of any description'.[19] This broad provision is likely to include carbon rights as a right attracting compensation. Whilst there is currently no Vanuatu case law directly on this issue, in *Terra Holdings Ltd v Sope*, the Court held that the application of art 5 (1)(j) of the Constitution in relation to 'unjust deprivation of property' includes the broad meaning of property as defined in Sch. 2 of the *Interpretation Act*. The Court stated that:

> *Where a development will take place on custom land without the consent of the custom owners, it is necessary to consider whether the consequent impact of the development on the exercise of their rights and enjoyment as custom owners is materially affected to the extent that it can fairly be said that the authorization of*

[19] *Constitution* s 8(1).

the development amounted to a deprivation of their property, and, if so, whether that deprivation was unjust.

In *Groupe Nairobi (Vanuatu) v the Government of the Republic of Vanuatu*, Art 5(1) (j) of the Constitution was compared with Art 1 of the First Protocol to the European Convention on Human Rights. The Court held that the meaning of 'unjust deprivation' in Art 5(1)(j) is broader than deprivation which is not in the public interest.

2.4.3. Consistency with Vanuatu's international legal obligations

The Pacific Islands Regional Policy Framework for REDD+ establishes safeguards which provide that REDD+ implementation must be in line with international instruments to protect the rights of indigenous peoples.[20]

The main international instruments that are relevant to the development of a framework for forest carbon rights are:

- The **United Nations Framework Convention on Climate Change (1992)**, under which the Cancun Agreements are established. The Agreements request developing countries to follow a number of safeguards when developing and implementing national REDD+ strategies, which include respect for the knowledge and rights of indigenous people, and specifically notes the importance of the United Nations Declaration on the Rights of Indigenous Peoples.[21]

- The **United Nations Declaration on the Rights of Indigenous Peoples (2007)**[22], which 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,[23] and which incorporates the right of land 'owners' to give or withhold their free, prior and

[20] Pacific Islands Regional Policy Framework for REDD+, [4.6.4].
[21] The Cancun Agreements were made 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.
[22] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, UNGAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) ('*UN Declaration on the Rights of Indigenous Peoples*').
[23] *UN Declaration on the Rights of Indigenous Peoples* art 26

informed consent to legislation, administrative measures and projects that may affect their land, territories and other resources.[24]

The effect of these international instruments is that Vanuatu's framework for forest carbon rights should ensure that it protects the property rights of ni-Vanuatu (indigenous peoples) and should be developed in accordance with the principle of free, prior and informed consent.

2.4.4. Guiding policy principles for developing a legal framework for forest carbon rights

In developing and analysing the Options for creating a framework for forest carbon rights, the authors have been guided by the following principles:

- **Simplicity**: to develop a carbon rights framework that is easily understood by everyone, including customary land 'owners', and builds on existing legal mechanisms
- **Maintaining customary connection with the land**: to develop a system that maintains land 'owners' customary connection to the land, as much as possible
- **Transparency**: to identify options that minimize the risk of forest carbon rights being affected by fraud and corruption
- **Effectiveness**: to ensure that carbon rights are held by those who control the forest resource, in order to incentivize those people to maintain the forest
- **Establishes clear rules for all types of land tenure**, without creating complicated exceptions for different categories.

[24] *United Nations Declaration on the Rights of Indigenous Peoples* [19], [32]. Of direct relevance to forest carbon rights is art 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."

3. Land tenure in Vanuatu

3.1. Overview of land tenure categories

There are a number of different types of land tenure in Vanuatu, with the dominant type by far being customary land. These are summarized in **Table 3.1** and are explained in the sections below:

Table 3.1: Land tenure categories in Vanuatu[25]

Category	%	Sub-category	%	Purpose	Observations
Customary land	99%	Un-leased	89.7%	Customary land	No mechanism for registration of un-leased customary land. Can only be alienated to ni-Vanuatu, in accordance with custom. Cannot be alienated to foreigners, except by lease.
		Leased	9.3%	Agricultural (82%),[26] commercial / tourism (9%), industrial (1%), residential (4%), special (4%)	Max. term: 75 years Registration confers indefeasible title
				Leased public land	Max. term: 75 years
Public land (Government land)	1%			Land vested in Government at independence; public roads, etc.	Government can acquire public land from land 'owners', but must pay compensation

[25] World Bank, *Leases in Vanuatu: World Bank Jastis Blong Evriwan Vanuatu National Leasing Profile* (World Bank, 2010).
[26] Percentages of total leased land by lease class. World Bank, *Leases in Vanuatu: World Bank Jastis Blong Evriwan Vanuatu National Leasing Profile* (World Bank, 2010).

3.2. Customary land (Un-leased)

On independence in 1980, the Constitution restored all land in the Republic of Vanuatu 'to the indigenous custom owners and their descendants'.[27] Consequently, 99% of all land in Vanuatu is held as customary land,[28] which is governed by customary law.[29]

The only way that customary land can be 'released' from its constraints against alienation is through the creation of a lease (this is described in Section 3.3 below). Customary land in Vanuatu can therefore be divided into two general categories: un-leased customary land (89.7%); and leased customary land (9.3%).

3.2.1. Un-leased customary land is unregistered

There is no mechanism for the registration of un-leased customary land in Vanuatu. This has implication for REDD+, as it is likely to be difficult to identify land 'owners' and clear land boundaries where un-leased customary land is concerned.

Customary land can be alienated to other ni-Vanuatu, although this can only be done if customary law permits, and must be done in accordance with customary law. This may have implications for REDD+. Depending on its terms, a REDD+ agreement over land may constitute an 'alienation' of land, and will therefore need to be negotiated according to customary law.

Customary land cannot be transferred to foreigners,[30] except in the form of a lease.[31]

Box 3.1 Historical development of land law in Vanuatu

Vanuatu gained independence in 1980, and this was accompanied by significant changes in land law. Art 75 provides that only indigenous citizens who have acquired their land in accordance with a recognized system of land tenure can have perpetual

[27] *Constitution* art 75.
[28] World Bank, *Jastis Blong Evriwan' (JBE): Justice for the Poor in Vanuatu* (24 September 2012) Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22069979~menuPK:3282947~pagePK:148956~piPK:216618~theSitePK:3282787,00.html>.
[29] *Constitution* art 74.
[30] *Constitution* art 75.
[31] *Land Leases Act*.

ownership of land.

Article 76 of the *Constitution* provides that there will be 'a national land law' to implement the preceding articles of the *Constitution* vesting all land in the customary 'owners'. To date, no comprehensive scheme has been passed. Rather, the *Land Reform Act*[32] was passed as an interim measure to implement the constitutional provisions. It defines land as including improvements and extending to 'the seaside or any offshore reef but no further'.[33] It provides for non-custom owners in physical occupation of land to enter into a lease with the customary 'owners' or to receive compensation for any improvements.

The Act vests all public land in existence at independence to vest in the Government [34] and allows the Minister to control customary land where there is a dispute regarding its ownership.[35] The Minister must 'take all necessary measures to conserve and protect the land on behalf of the custom owners'. In *Turquoise Ltd v Kalsuak,*[36] it was held that this duty comes into play where a proposed dealing would lead to major changes in the physical and legal characteristics of land.

3.3. Leased customary land

Leasing of customary land occurs under the *Land Leases* Act, 37 which provides for the creation and transfer of leases for a period of up to 75 years.[38] About 9.3% of customary land is leased.[39] 99% of leased land is rural.[40] Leases are classified as agricultural, commercial/tourism, industrial, residential or special.[41] 43% of this leased

[32] [Cap 123] ('*Land Reform Act*').
[33] *Land Reform Act* s 1.
[34] *Land Reform Act s* 9.
[35] *Land Reform Act* s 8(1). Whilst there is some ambiguity in this section, it would appear to be intended only to apply to disputes over alienated land arising at independence.
[36] [2008] VUCA 21.
[37] [Cap 163] ('*Land Leases Act*').
[38] *Land Leases Act* s32.
[39] Above n 4.
[40] World Bank, *Jastis Blong Evriwan' (JBE): Justice for the Poor in Vanuatu* (24 September 2012) Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22069979~menuPK:3282947~pagePK:148956~piPK:216618~theSitePK:3282787,00.html>.
[41] World Bank, *Jastis Blong Evriwan' (JBE): Justice for the Poor in Vanuatu* (24 September 2012) Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22069979~menuPK:3282947~pagePK:148956~piPK:216618~theSitePK:3282787,00.html>.

land is on the main island of Efate. The maximum term of a lease is 75 years.[42] 98% of leases are for a term of 50 or 75 years.[43]

The Act does not expressly provide for how a lease should be registered when first created, nor is there an appropriate form provided. It would appear therefore that the Act is intended to be read with the *Land Reform Act* and that the applicant must apply to the Minster for a certificate as a registered negotiator.[44] A lease agreement must then be reached with the customary 'owners' and registered in the Land Records office.[45] Whilst there is no specific provision for the registration of customary land (as opposed to a lease of customary land) under the Act, the creation of a lease requires the land to be surveyed and the proprietors registered. Of relevance to REDD+ is that fact that leased land will therefore be registered under the Land Leases Act and the boundaries and 'proprietors' of the customary land recorded.

Registration confers an indefeasible title,[46] subject to any overriding interest, including easements and profits, existing at the time of first registration.[47] All leases in excess of three years in Vanuatu must be in the prescribed form and must be registered. [48] A leasehold estate can be inherited and it can also be transferred or assigned unless this is restricted by the terms of the lease. In these respects, leasehold is similar to a freehold estate. If the lease is forfeited under the Land Leases Act,[49] this will determine every registered interest.[50] Easements may be granted over registered leases in Vanuatu.[51]

All leases require the consent of the government.[52]

[42] *Land Leases Act* ss 14, 17(a).
[43] World Bank, *Jastis Blong Evriwan' (JBE): Justice for the Poor in Vanuatu* (24 September 2012) Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22069979~menuPK:3282947~pagePK:148956~piPK:216618~theSitePK:3282787,00.html>.
[44] *Land Leases Act* s 6.
[45] *Land Leases Act* s 7(b).
[46] *Land Leases Act* s 15.
[47] *Land Leases Act* s 17(a).
[48] *Land Leases Act* ss 22, 35.
[49] *Land Leases Act* s 43.
[50] *Land Leases Act* s 44.
[51] *Land Leases Act* s 67.
[52] *Land Reform Act* ss 6-7.

The *Land Leases Act* requires the consent of the lessor to a disposition of leased land or any interest in such land.[53] Disposition must be made on the correct forms, which are contained in the *Land Leases (Prescribed Forms) Regulations*.

The *Land Leases Act* establishes a Land Records Office[54] and creates a Torrens-type system of land registration. Leases, sub-leases, mortgages,[55] easements, covenants, profits and licenses over leasehold titles must be registered under the Act.[56] There is currently a backlog of leases awaiting registration, but measures are being taken to address this.[57]

3.3.1. Leased Public Land

The maximum term of a lease is 75 years in the first instance,[58] with possible renewal for a further 75 years.[59] It is unclear how much of the 9.3% of leased land is leased public land.

3.4. Public Land

1% of land is held as public land[60] (sometimes referred to as Government Land). This includes land vested in the Government at independence to be held for the benefit of the State;[61] public roads;[62] and land acquired for public purposes under the *Land Acquisition Act*. The *Land Acquisition Act* empowers the Government to acquire further land in the public interest from customary land 'owners'', which then become public land. All customary land 'owners'' and other interested persons must be duly compensated.[63]

[53] *Land Leases Act* s 36.
[54] *Land Leases Act* s 2.
[55] *Land Leases Act* s 51.
[56] *Land Leases Act* pt 10.
[57] World Bank, *Leases in Vanuatu: World Bank Jastis Blong Evriwan Vanuatu National Leasing Profile* (World Bank, 2010) < http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Vanuatu_Leasing_Data_Summary.pdf>.
[58] *Land Leases Act* ss 14, 17(a).
[59] *Land Leases Act* s 32(c).
[60] Above n 4.
[61] *Land Reform Act* s 9(1).
[62] *Land Reform Act* s 17(1).
[63] Ibid s 14.

3.5. Freehold land

There is no freehold land in Vanuatu, the closest thing to freehold being leased customary land. Freehold estate was abolished by the *Constitution*, but in 1995 the *Freehold Titles Act*[64] made limited provision for the grant of freehold title to an indigenous person holding a long lease directly from the Government. To date no such grants have been made.

3.6. Dispute resolution and ownership

In Vanuatu, disputes about the ownership of customary land are determined under the Customary Land Tribunal Act.[65] Members of the tribunals are appointed from the custom area or areas in which the land is situated, by the appropriate chiefs.[66]

Unless an ownership dispute is determined through the court system in the manner provided for in the *Constitution*, a descendant of a party to an ownership dispute that has been settled outside the court system may reopen the dispute by claiming a custom entitlement under art 73.[67] A recent case has thrown another element of uncertainty into customary land ownership. In *Thomas v SANMA Island Land Tribunal*[68] it was held that a person who was not a party to the case at first instance may be joined as a party on appeal.

Noel v Toto[69] considered the validity of customary laws giving men preferential rights over customary land. It was held that the right to freedom from discrimination in art 5 of the *Constitution* made such customary laws unconstitutional.

3.6.1. Minister may grant a lease of disputed customary land

The government is currently authorised by legislation to manage customary land if it is neglected and not adequately maintained.[70] The government is also authorised to hold and manage land if ownership is in dispute.[71] If there is a dispute as to ownership, the

[64] [Cap 233] ('*Freehold Titles Act*').
[65] *Customary Land Tribunal Act* [Cap 271] (*Customary Land Tribunal Act*).
[66] *Customary Land Tribunal Act*.
[67] *Valele Family v Touru* [2002] VUCA 3.
[68] (Unreported, Supreme Court, Vanuatu, Fatiaki J, 1 June 2012) [2012] VUSC 170
[69] (Unreported, Supreme Court, Vanuatu, Kent J, 19 April 1995) available via www.paclii.org at [1995] VUSC 3.
[70] *Land Reform Act s 8.*
[71] *Land Reform Act* s 8.

Minister has the power to lease the land,[72] although concerns have been raised about the unrestricted use of the Minister of Lands' power to sign leases over disputed customary land.[73] 21% of all rural leases have been signed by the Minister as lessor.[74]

[72] *Land Reform Act* s 8(2)(b).
[73] World Bank, *Leases in Vanuatu: World Bank Jastis Blong Evriwan Vanuatu National Leasing Profile* (World Bank, 2010) < http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/Vanuatu_Leasing_Data_Summary.pdf>. It is noted that this concern was raised during the 2006 Land Summit.
[74] World Bank, *Jastis Blong Evriwan' (JBE): Justice for the Poor in Vanuatu* (24 September 2012) Justice for the Poor <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:22069979~menuPK:3282947~pagePK:148956~piPK:216618~theSitePK:3282787,00.html>.

4. Who owns the forest carbon under current laws?

4.1. Legal concepts in Vanuatu

4.1.1. Customary law does not have a clear concept 'ownership'

At the outset, it should be noted that the search for 'ownership' is based on assumptions regarding property that do not necessarily apply in Vanuatu. Whilst this term is frequently used in Western legal systems, it does not precisely match the customary concept of land holding which recognizes multi-layered rights to ownership and use. One way of dealing with this is to use non-technical rather than legal terms and to investigate three basic questions:-

- who holds an interest in land;
- what is the content of that interest; and
- what is the subject matter of the interest.[75]

This approach avoids the assumption that ownership is a universal concept and allows for the fact that ni-Vanuatu may have different interests (or rights) in land with varying content and subject matter. For this reason, the term 'ownership' has been placed in inverted commas in this Paper.

4.1.2. Legal pluralism in Vanuatu

The term 'legal pluralism' refers to a situation where different legal systems exist in the same country or social sphere. In Vanuatu, there are three legal systems operating: common law and civil law, which are both part of State law); and customary law.

- **Customary law:** Article 95 (3) of the Constitution provides that 'customary law shall continue to have effect as part of the law of the Republic of Vanuatu'. However, the precise meaning of this phrase is unclear.[76] The Supreme Court has indicated in one case that there are limitations on the application of customary law, and that it should only be applied if there is no State law on

[75] Anthony Allott, 'Towards a Definition of Absolute Ownership' (1961) 5 *Journal of African Law* 99.
[76] See further, Jean Zorn and Jennifer Corrin, *Proving Customary Law in the Common Law Courts of the South Pacific* (British Institute of International and Comparative Law, 2002)

point.[77] However, the rules of custom are expressly stated by Article 74 of the Constitution to form the basis of ownership and use of land in Vanuatu.

- **State law:** The Constitution provides that French law and British law continue in force as part of State law, but does not say to whom such laws apply.[78] The case law on this is conflicting. In *Pentecost Pacific Ltd v Hnaloane*,[79] which involved an alleged breach of contract of employment, the Court of Appeal held that, as there was no Vanuatu legislation on point, there was a choice between French and English law, which was to 'be decided according to the nationality of the defendant'. The Supreme Court has since held that English and French laws in force apply to everyone in Vanuatu, irrespective of nationality, and irrespective of whether they were indigenous ni-Vanuatu or not. [80] Further, the Court appears to have been of the view that French law would automatically apply where a document in French required interpretation.

Accordingly, French law may apply to a REDD+ contract. However, it will only apply to the extent that there is no Vanuatu legislation on point, and where customary land tenure or use is not the issue (as this will be governed by customary laws).[81]

4.2. Who owns the carbon in un-leased customary land?

Conclusion: In respect of un-leased customary land, land is governed by customary law and the ownership of carbon rights will depend on the customary laws relating to the land in question. As customary laws vary from place to place and are not written down, it is unclear to outsiders who owns the forest carbon on un-leased customary land.

The *Constitution* provides that 'all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants'.[82] There is no express provision in the *Constitution* stating who owns on the forest, but art 73 implies that it belongs to the

[77] *Banga v Waiwo* (Unreported, Supreme Court, Vanuatu D'Imecourt CJ,17 June 1996), available via www.paclii.org: [1996] VUSC 5) .
[78] Art 95(2) ('*Constitution*'). The *Constitution* was brought into force by an Exchange of Notes between the Governments of United Kingdom and France, 23 October 1979.
[79] [1989-1994] 2 Van LR 661.
[80] *Banga v Waiwo* (Unreported, Supreme Court, Vanuatu, Vaudin d' Imecourt CJ, 17 June 1996), available via www.paclii.org: [1996] VUSC 5).
[81] *Constitution* art 95(3).
[82] *Constitution* art 73.

indigenous custom owners, and this is certainly the broadly held view in Vanuatu. Neither is there any express provision in the *Constitution* stating who owns the soil, but, again, art 73 implies that it belongs to the indigenous custom owners, and, again, this is the broadly held view in Vanuatu.

As 'the rules of custom' form the basis of ownership and use of land, the ownership of forest and use of the forest will be governed by those rules, which may differ from place to place. However, there is also statutory law which governs ownership of forest and use of the forest.

The *Forestry Act* makes provision for the protection, development and sustainable management of forests and the regulation of the forestry industry. It establishes a Forestry Board and provides that commercial forestry operations may not be carried out without a timber rights or other specified agreement and a licence.[83]

In respect of un-leased customary land, there is no express statement on carbon ownership in the written law. As such land is governed by customary law, the ownership of carbon rights will depend on the customary laws relating to the land in question. Generally, it may be said that a person is entitled to the fruits of trees which they have planted.[84] As customary laws vary from place to place and are not written down, there is no certainty in this regard.

4.2.1. Who owns the carbon in planted trees on un-leased customary land?

'Ownership' of trees planted on non-leased customary is governed by customary laws applying to the area where the trees are planted. Generally, it may be said that a person is entitled to the fruits of trees which they have planted.[85]

4.3. Who owns the carbon on leased customary land?

Conclusion: By virtue of the *Forestry Rights Registration and Timber Harvest Guarantee Act*, the proprietor of a registered lease (the lessor) is also the owner of the

[83] *Forestry Act* pts 4 and 5.
[84] Joel Bonnemaison, 'Social and Cultural Aspects of Land Tenure' in Peter Lamour (ed), *Land Tenure in Vanuatu*(University of the South Pacific, 1987) 1, 3.
[85] Joel Bonnemaison, 'Social and Cultural Aspects of Land Tenure' in Peter Lamour (ed), *Land Tenure in Vanuatu*(University of the South Pacific, 1987) 1, 3.

forestry rights, which include the carbon in the forest.

However, where the lessor grants a forestry right under the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000*, the holder of the forestry right owns the carbon rights for the term of the lease.

Where a lease has been registered, the *Land Leases Act* comes into play and use of the forest may depend on the express contractual terms contained in the lease.[86] The *Land Leases Act* does not give any express guidance on carbon rights. Neither the standard form of lease,[87] nor the standard form of sublease,[88] make any provision in this regard. The *Land Leases Act* contains a definition of 'land', which is narrower than that in the *Land Reform Act.* The *Land Leases Act* states that land includes 'land above the mean high water mark, all things growing on land…but does not include any minerals (including oils and gases) or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working'.[89]

There is no specific implied right to the produce of the land in leases. However, the implied right for the lessee to be allowed to 'peaceably and quietly possess and enjoy the leased land[90] during the term of the lease could be taken to include such a right. This appears unlikely. One reason for this is that the rights of the lessee are subject to pre-existing rights to produce of the land, which as 'profits' (defined to include substances including soil or products of the soil)[91] constitute an overriding interest.[92] Whilst the definition of profits is broad, it does not appear broad enough to include carbon rights, as this is not a substance. However, the fact that profits do not pass to a lessee make it even more unlikely that carbon rights would do so. It therefore seems more likely that the carbon rights would remain with the lessor.

[86] *Land Leases Act* s 14.
[87] *Land Leases (Prescribed Forms) Regulations* 3(1), Form 4, Order 4/1984
[88] *Land Leases (Prescribed Forms) Regulations* 3(1), Form 5, Order 4/1984.
[89] *Land Leases Act* s 1.
[90] *Land Leases Act* s 40(a).
[91] *Land Leases Act* s 1.
[92] *Land Leases Act* s 17.

4.3.1. Forestry Rights Registration and Timber Harvest Guarantee Act 2000

Vanuatu has already introduced legislation allowing the grant of 'forestry rights' (the *Forestry Rights Registration and Timber Harvest Guarantee Act*)[93] (sometimes referred to as the *Plantation Act* 2000), the purpose of which was to facilitate the development of the plantation industry. It is understood that this Act was tabled as a Private Members Bill in response to a particular investment proposal and without reference to the relevant stakeholders. The Forestry Department is currently reviewing the Act with a view to amendment or repeal.[94]

The legislation adopts a similar approach to many Australian states which permit carbon rights to be held as a separate property right. No such rights have yet been granted. The *Forestry Rights Registration and Timber Harvest Guarantee Act* differentiates between natural forest, which is governed by the *Forestry Act*, and a timber plantation, which is governed by the *Forestry Rights Registration and Timber Harvest Guarantee Act*.

As the *Forestry Rights Registration and Timber Harvest Guarantee Act* provides that the proprietor of a lease may grant forestry rights in a prescribed form, it would appear that, in the absence of such grant, the carbon rights remain with the proprietor of the lease (the lessor).

Box 4.1: Definition of forestry rights and carbon rights in Forestry Rights Registration and Timber Harvest Guarantee Act 2000

The *Forestry Rights Registration and Timber Harvest Guarantee Act* defines forestry rights as: [95]

a) an interest in the land pursuant to which a person having the benefit of the interest is entitled to enter the land and do all or any of the following:

a. to establish, maintain, and harvest a crop of trees on the land;

b. to maintain and harvest a crop of trees on the land;

[93] [Cap 265] ('*Forestry Rights Registration and Timber Harvest Guarantee Act*').
[94] The authors have not been able to obtain the second reading speech for the *Forestry Rights Registration and Timber Harvest Guarantee Act* to verify the original purpose of the legislation.
[95] *Forestry Rights Registration and Timber Harvest Guarantee Act* s 1.

c. *to construct and use such buildings, works and facilities as may be necessary or convenient to enable the person to establish, maintain and harvest the crop; or*

b) *a carbon sequestration right in respect of the land; or*

c) *a combination of the interest and right referred to in paragraphs (a) and (b).*

In turn, carbon sequestration by a tree or forest is defined as 'the process by which the tree or forest absorbs carbon dioxide from the atmosphere'. A carbon sequestration right in relation to land is 'a right conferred by agreement or otherwise to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land'. It is not clear from these definitions whether forestry rights extend to stored carbon.

With regard to planted forest, in the case of an accredited timber plantation, the *Forestry Rights Registration and Timber Harvest Guarantee Act* implies that ownership of planted forest is vested in the plantation owner. The Act empowers the owner of the timber plantation to apply to the Director-General for accreditation of the timber plantation, following which its use will be governed by the Timber Plantation Code. No such code has yet been developed.

4.4. Who owns the carbon on State land?

The position in relation to forest carbon on public land appears to be that it is owned by the registered estate holder, that is, the Government.

4.5. Who owns the carbon in the soil?

Organic soil carbon is one of the five carbon pools specified by the IPCC 2006 Guidelines. Soil in tropical forests can hold significant amounts of carbon.

The *Constitution* is silent on the ownership of soil and sub-soil, but Article 73 implies that it belongs to the indigenous custom owners, and this is the broadly held view in Vanuatu. The definition of land in the *Land Leases Act* excludes any minerals or any substances 'in or under land which are of a kind ordinarily worked for removal by underground or

surface working'.[96] The need to provide this exclusion suggests that soil and sub soil are regarded as land, and this is certainly the view of most ni-Vanuatu. As land is governed by 'the rules of custom'[97], the depth to which land is usually owned is governed by customary law. There does not appear to be any limit on the depth of soil owned by customary 'owners'.

The *Mines and Minerals Act* vests 'the property in minerals, in their natural condition, in land' in the State.[98] To achieve this end, minerals are excluded from the definition of land in the *Land Leases Act.*[99] The framework for regulating mining does not expressly deal with soil carbon.

4.5.1. Un-leased customary land

Conclusion: Ownership of carbon rights in soil is governed by customary laws relating to the land in question.

In respect of un-leased customary land, as stated above, there is no express statement on carbon ownership in the written law. Consequently, ownership of carbon rights in soil is governed by customary laws relating to the land in question.

4.5.2. Leased customary land

Conclusion: Carbon in the soil would appear to be owned by the proprietor of the land rather than the lessee.

The definition of carbon sequestration right in the *Forestry Rights Registration and Timber Harvest Guarantee Act* does not expressly refer to soil, so ownership of carbon rights in soil is uncertain. The Act provides that the proprietor of a registered lease (the lessor) is also the owner of the forestry rights, which include the carbon in the forest. However, this would not appear to extend to carbon in the soil due to the narrow

[96] *Land Leases Act* s 1.
[97] *Constitution* art 74.
[98] *Land Leases Act* s 2.
[99] *Land Leases Act* s 1.

definition of carbon sequestration right.[100] Instead, carbon in the soil would appear to be owned by the proprietor of the land.

4.5.3. Soil on public land

Conclusion: The position is uncertain, but organic carbon in soil on public land appears to be owned by the Government.

In the case of public land, the common law will apply and this provides that land includes subsoil.[101] However, the extent of the control which a landowner may exercise over subsoil is uncertain; a landowner has, at least, the right to use the soil to the extent necessary for the ordinary use and enjoyment of the land.[102] . Again, this view is supported by the fact that it was thought necessary to exclude 'any minerals... or any substances in or under land which are of a kind ordinarily worked for removal by underground or surface working' from the definition of land in the *Land Leases Act.*[103] Accordingly, the position in relation to organic carbon in soil on public land appears to be that it is owned by the registered estate holder, that is, the Government.

4.6. Who owns the carbon under a timber rights agreement and/or timber licence?

Conclusion: Whilst not expressly stated in the Forestry Act, the grant of a timber rights agreement and timber rights licence over un-leased customary land would appear to transfer all forest carbon rights to the Licensee.

The Forestry Department does not have information on the number of hectares of forest in Vanuatu which are subject to logging concessions. The last large scale logging company ceased operations in 2004. For the last 3 to 4 years, the Department has only been issuing mobile sawmill licences.

[100] *Forestry Rights Registration and Timber Harvest Guarantee Act* s 1.
[101] LexisNexis, *Halsbury's Laws of Australia,* vol 22 (at 25 September 2008) 355 Real Property, '1 Introduction' [355-20]. This is based on the maxim *cujus est solum, ejus est usque ad coelom ed ad infernos*, meaning that ownership of land extends below that land to the middle of the earth: *Re Lehrer and Real Property Act 1900* [1960] NSWR 570.
[102] *Di Napoli v New Beach Apartments* [2004] NSWSC 52.
[103] *Land Leases Act* s 1.

4.6.1. Legal framework for forest use and exploitation

The legal framework for regulating forest use and exploitation is summarised in the following table:

Law and year passed	**Purpose**	**Relevant Parts/Sections**
1. Forestry Act [Cap 276] (2003)	Provision for the protection, development and sustainable management of forests and the regulation of the forestry industry	Section 9 (Forestry Sector Plan) Section 30 (Forestry leases)
2. Forestry Rights Registration & Timber Harvest Guarantee Act [Cap 265] (2000)	Registration of forestry rights granted in land; and Provision for accreditation of timber plantations and governance of harvesting.	Part 2 (Forestry Rights) Part 3 (Timber Harvest Guarantee)
3. Environmental Management and Conservation Act [Cap 283] (2003)	Provision for conservation, sustainable development and management of the environment, and the regulation of related activities	Part 4, Division 2 (Community Conservation Areas)
4. Framework Convention on Climate Change (Ratification) Act [Cap 218] (1993)	Ratifies the United Nations Framework Convention on Climate Change	Schedule (UNFCC)

The *Forestry Act* deals mainly with commercial forestry operations. The felling of trees or removal of timber or other forest products by custom owners for sale to ni-Vanuatu in accordance with current customary usage is expressly excluded from the Act. The regulation of forest use in such cases is governed by the customary laws relating to the land in question.[104]

[104] *Constitution* art 78(2).

The *Forestry Act* established a Board to regulate logging. The process for entering into a timber rights agreement is outlined in Sch. 2 of the Act, [105] which is contained in **Annex 1** of this report. Any person wishing to negotiate timber rights must apply to the Board for approval to negotiate. If it is granted, the Board appoints a Forest Investigation Officer to undertake consultations with the custom owners and identify the boundaries of the land and the forest resource on such land; and the indigenous groups recognised by the prevailing custom of the area concerned as owning the land and timber rights which are the subject of the proposed negotiations. The officer must also make inquiries to ensure that access rights under custom and sites of cultural significance are protected.[106] Disputes concerning any decision made by the officer are determined by the Customary Land Tribunal.[107]

A negotiation team is appointed by the Board to assist the custom owners to negotiate.[108] Next, the indigenous groups identified as entitled to sell the timber rights must appoint a Management Committee.

On approval of a timber rights agreement, the Committee is obliged to perform the functions conferred on it by the Act including:

> (a) to monitor performance of the terms and conditions of the agreement; and
>
> (b) to receive and keep accurate records of any moneys payable to indigenous groups under the agreement, and apply those moneys in such manner as each group decides; and
>
> (c) to make such records available to each indigenous group and the Board on request; and
>
> (d) to plan for the use of all land subject to the agreement following the logging of that land, and arrange for the implementation of such land use plans; and
>
> (e) to perform such other functions as are conferred on it by this Act.

[105] *Forestry Act* s 15.
[106] *Forestry Act* s 20.
[107] *Forestry Act* s 23. See *Customary Land Tribunal Act* [Cap 271] (‘*Customary Land Tribunal Act*’).
[108] *Forestry Act* s 24.

The Forestry Department keeps a register of Timber Rights Agreements and Mobile Sawmilling Licences. However, the register is not accessible by the public without the permission of the Director of Forestry.

The legislative framework for the grant of forestry rights under the Forestry Act has significant implications for carbon rights relating to customary land. Whilst not expressly stated in the legislation, the grant of a timber rights agreement and timber rights licence would appear to transfer carbon rights to the Licensee.

This has the following implications for REDD+:

- Land 'owners' wishing to pursue a REDD+ project must negotiate with the licensee to surrender part or all of the timber rights agreement and timber licence over the land. The negotiation would need to address the issue of benefit-sharing.

- Depending on the REDD+ regime adopted in Vanuatu, licensees may seek to convert their timber rights agreements and timber licences into carbon rights through undertaking a REDD+ project, but this could only be done with the agreement of the customary land 'owners' in accordance with the principle of Free, Prior and Informed Consent.

4.7. Who owns the carbon in mangroves?

Conclusion: Carbon in mangroves appears to belong to the customary land 'owners'.

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'.[109] A number of standards are developing which will permit carbon credits to be generated for mangrove restoration and conservation (see Box 4.1 below). It is therefore important to determine who owns the carbon in tidal marshes, mangroves and seagrass meadows.

[109] For a discussion of the emerging international policy frameworks for Blue Carbon, see: Dorothée Herr, Emily Pidgeon, and Dan Laffoley, *Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group* (International Union for Conservation of Nature & Conservational International, 2012).

The *Land Reform Act*[110] defines land as including improvements and extending to 'the seaside or any offshore reef but no further'.[111] The *Foreshore Development Act*,[112] which prohibits any development on the foreshore without the consent of the relevant Minister defines 'fforeshore' as 'the land below mean high water mark and the bed of the sea within the territorial waters of Vanuatu (including the ports and harbours thereof) and includes land below mean high water mark in any lagoon having direct access to the open sea'.[113]

The *Constitution* provides that 'all land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants'.[114] Further, the *Customary Land Tribunal Act*[115] provides that the Act extends to the waters within the outer edge of any reef adjacent to customary land. Before independence, Britain and France made no claim to the foreshore, and in *Terra Holdings Ltd v Sope*[116] the Court confirmed that 'land' within the meaning of arts 73 and 74 of the *Constitution* extends to the waters below low water mark and includes the seabed.

It therefore appears that the customary land 'owners' own the carbon in mangroves situated on their customary land or adjacent foreshore, including the area below high water mark. However, the Minister is empowered to grant a licence allowing development along the foreshore. If such development requires the removal of a mangrove swamp, the Environment Conservation and Management Act requires an Environmental Impact Assessment ('EIA') to be conducted.[117]

[110] [Cap 123] ('*Land Reform Act*').
[111] *Land Reform Act* s 1. The *Customary Land Tribunal Act* [Cap 271] defines 'customary land' for the purposes of that Act as 'land owned or occupied, or an interest in land held, by one or more persons in accordance with the rules of custom.
[112] [Cap 90].
[113] Section 1.
[114] *Constitution* art 75.
[115] [Cap 271], s 4.
[116] [2012] VUCA 16.
[117] Section 12. If the EIA is not produced, the Department of Environment may order the development to cease. It is understood this power was used a few years at Eratap on Efate.

Box 4.2: 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.[118]

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-scale[119] and small-scale[120] 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.[121]

[118] For a discussion on the potential for this, see Dorothée Herr, Emily Pidgeon, and Dan Laffoley, *Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group* (International Union for Conservation of Nature & Conservational International, 2012) 13–14.
[119] See the methodology: Afforestation and reforestation of degraded mangrove habitats, AR-AM0014, Ver. 01.0.0.
[120] 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.
[121] Verified Carbon Standard, *Agriculture, Forestry and Other Land Use (AFOLU) Requirements* (VCS, Version 3, 2012) http://v-c-s.org/sites/v-c-s.org/files/AFOLU%20Requirements%20v3.3_0.pdf 23 – 30.

5. Could the State take ownership of forest carbon?

Conclusion: The State cannot take ownership of forest carbon unless this is in the public interest and compensation is paid to landowners.

An alternative to forest carbon being owned by land 'owners' 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 and crude oil is reserved to the State. [122] This is sometimes described as the 'nationalisation' of forest carbon rights.

Under the *Land Acquisition Act,*[123] the government can acquire land where this is in the public interest.[124] This power could be used to acquire land for REDD+ projects although this is unlikely to be acceptable to customary land 'owners''.

A decision by the State to reserve all forest carbon rights to the State may encounter the following difficulties:

- The *Constitution* guarantees the right to protection from 'unjust deprivation of property'.[125] This provision is likely to include carbon rights as a right attracting compensation. Such compensation, could, however, be paid under the terms of a national REDD+ benefit-sharing plan, assuming that the provisions of the scheme effect fair and equitable payments.

- 'Nationalisation' of carbon rights would be contrary to the Safeguards set out in the Pacific Islands Regional Framework for REDD+.

5.1. Must the State 'deem' itself owner of carbon rights in order to participate in the UNFCCC mechanism?

No. It is not necessary for a State to 'deem' itself owner of carbon rights, on behalf of the domestic owners of those rights, in order for the State to participate in intergovernmental

[122] *Mines and Minerals Act* s 2(1).
[123] [Cap 215] ('*Land Acquisition Act*').
[124] *Land Acquisition Act*.
[125] *Constitution* art 5(j).

or other international carbon finance transactions that require a national level counter party, such as the Vanuatu Government.

For example, 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 between the countries that ratified the treaty, with the carbon credits (Certified Emission Reductions) that are generated, being owned, held and traded by the State Parties. No 'deeming' of ownership is required for this to occur. However the Kyoto Protocol clearly envisages that States may transfer their rights (credits) down to the sub-national actors who carry out CDM projects. This is done by the State Party authorizing, through its Designated National Authority, the private entities to hold, own and trade the Certified Emission Reductions generated by the project.[126] However, it should be noted that it is not yet clear whether UNFCCC will adopt the same approach in its emerging REDD+ regime.

[126] *Kyoto Protocol* art 12(9). For a discussion on this point, see Leo Peskett and Gernot Brodnig, *Carbon Rights in REDD+ - Expoloring the Implications for Poor and Vulnerable People* (World Bank, 2009) 7. See also Charlotte Streck and Matthew Wemaere, 'Chapter 3: Legal Ownership and Nature of Kyoto Units and EU Allowances' in David Freestone and Charlotte Streck (eds) *Legal Aspects of Implementing the Kyoto Protocol Mechanisms*(Oxford University Press, 2005).

6. Defining forest carbon rights in legislation

The first step in developing a legal framework for carbon rights is to define in legislation exactly what is being owned. Vanuatu already has a definition of carbon rights under the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000* (s 1), which provides as follows:

> *"carbon sequestration right', in relation to land, means a right conferred by agreement or otherwise to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land.*

The *Forestry Rights Registration and Timber Harvest Guarantee Act* is currently under review to determine whether it remains suitable for Vanuatu. During this review, the definitions of 'carbon sequestration right' and 'forest carbon' could be amended. This could be in the form of the proposed consistent definitions of Melanesia suggested in Section 6.3 below. On the other hand, it could also be in the form of amendments along the lines of the following proposals.

6.1. Extending the definition of 'carbon rights' to include 'stored carbon'

It is unclear whether the current definition of carbon rights is broad enough to include the right to exploit the **stored forest carbon** in forests**,** whose emission will be avoided under an avoided deforestation/forest degradation REDD+ activity. This could be done by adding, at the end of the definition, the words 'and includes the rights associated with any avoided forest carbon emissions'.

6.2. Amending definition to refer to (five) carbon pools

Whilst not absolutely necessary, for the sake of clarity, the current definition of carbon sequestration right' could be amended to refer expressly to the five carbon pools. The IPCC has identified five carbon pools that constitute forest carbon under the forest land use category. Under the UNFCCC framework, countries should measure and report against each of these carbon pools when reporting on the greenhouse gas emissions from their Agriculture, Forestry and Other Land Use (AFOLU) sector.
The definition of forest carbon rights should therefore also address who owns the carbon contained in the **five carbon pools**:

- above-ground biomass (stems, branches and foliage);
- below-ground biomass (live roots more than 2mm diameter);
- dead wood;
- litter;
- soil organic matter (including organic carbon in mineral soils, and includes live and dead roots of less than 2mm diameter. Each country can specify the depth to which it will measure soil organic carbon).[127]

Where voluntary REDD+ projects are concerned, the particular methodology to be used will usually specify which of these five carbon pools the Project Proponent must include and measure as part of its REDD+ project.[128]

It is therefore suggested that the legislative definition of 'forest carbon rights' includes each of the five carbon pools so that the position as to who owns the carbon in each of these carbon pools is clear.

Box 6.1: Proposed definition of 'forest carbon rights' in other Melanesian countries

'Carbon sequestration' means the process by which land, trees or forest absorb carbon

[127] The *Pacific Islands Regional Policy Framework for REDD+* defines 'Carbon Pool' as:-

> *a reservoir of carbon and a system that has the capacity to accumulate or release carbon. Carbon pools are measured in terms of mass (e.g., metric tonnes of carbon). The major carbon pools associated with forestry projects include live biomass (including above and below ground components such as roots), dead biomass, soil and wood products:*

See Policy Framework Glossary. Harvested wood products constitute a carbon reservoir. Note that the 2006 IPCC Guidelines do not include 'harvested wood products' as one of the five carbon pools associated with the six land use categories, but instead suggests that the contribution that harvested wood products make to a country's annual AFOLU emissions/removals be reported separately at the national scale (see Intergovernmental Panel on Climate Change, *2006 Guidelines for National Greenhouse Gas Inventories* (WMO/UNEP, 2006) vol 4, ch 12).. The VCS treats harvested wood products as a separate carbon pool to be measured under its Approved REDD Methodology Modules: Verified Carbon Standard, *REDD Methodology Modules* (VCS, Version 1.2, 2012).

[128] For example, this is a requirement under the VCS: Verified Carbon Standard, *Agriculture, Forestry and Other Land Use (AFOLU) Requirements* (VCS, Version 3, 2012).

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
- 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.

6.3. Extending the definition of 'carbon sequestration rights' to apply to all land

At present, the definition of 'carbon sequestration rights' in Vanuatu only applies to leased customary land.[129] For a comprehensive approach to forest carbon rights, it would be best if a consistent definition were to apply to *all* land in Vanuatu.

To make it clear that *all* forms of land tenure include forest carbon rights, the definition of land would need to be amended. There are currently a number of Acts defining land in a number of different ways. Ideally, these various definitions should be replaced with one single definition. One example of how the definition might be amended is by inserting the underlined words in the existing definition in s 1 of the *Land Reform Act*:

> *'land' includes improvements thereon or affixed thereto and land under water including land extending to the seaside of any offshore reef but no further, and carbon rights.*

Inserting a definition of 'forest carbon rights' into the *Land Reform Act* would create a consistent definition that would apply across all categories of land tenure. This statutory

[129] *Forestry Rights Registration and Timber Harvest Guarantee Act* s 1.

definition could also be referred to for consistency in different land transaction instruments, such as in REDD+ contracts and leases.

7. Structuring forest carbon projects on un- leased customary land

Conclusion: As land ownership and ownership of forest carbon rights is determined according to customary law, this is likely to create an unacceptable level of uncertainty for a REDD+ project.

Given that Vanuatu's approach to REDD+ is likely to include a project-based approach, it is important to think through how a REDD+ project might be structured over un-leased customary land.

The difficulties in establishing a REDD+ project on un-leased customary land are:

- It is not clear who owns the forest carbon rights, and whether they can sell the emission reductions/removals from them, as this is determined by customary law, which changes from place to place
- Land 'owners' are unable to enter into a REDD+ agreement with foreigners if the agreement amounts to a transfer of the land in perpetuity, as only ni-Vanuatu can hold land in perpetuity (this will turn on the terms of the contract).[130]
- Un-leased customary land is not registered. It is therefore unclear to outsiders who the 'owners' of the land are, and where the boundaries are, although the Mama Graon - Vanuatu Land Program is currently addressing this issue.

7.1. Step 1: Identifying the owners of the land and the forest carbon rights

Even if the statutory definition of 'land' is amended to expressly include forest carbon rights, it will still be necessary to identify the owners of the land, as well as the owners of the carbon rights, which is likely to be difficult as this must be determined according to custom. Unlike the Solomon Islands, there is no provision in Vanuatu law that could be used to record customary interests, such as interests in forest carbon rights.[131]

[130] *Constitution* art 75.
[131] By comparison, see the *Customary Land Records Act*, Solomon Islands.

If there is a dispute as to ownership, the Minister has the power to manage and conduct transactions in respect of the land, which could presumably include the power to enter into a REDD+ contract, but this would be unadvisable.[132]

7.2. Step 2: Land 'owners' contract with Project proponent

If the 'owners' of the land and the forest carbon rights can be identified, these owners could then enter into a REDD+ 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, any such agreement would have to be negotiated in accordance with the rules of custom[133]. As these rules differ from place to place, this might be difficult to ensure. It would be advisable to include a standard warranty in the agreement in terms such as:

> *The grantor(s) warrant that the terms of this agreement are in accordance with the rules of custom of the place in which the land is situated.*

As a statutory precondition to negotiation, a representative of the customary land owners, if they are intending to grant a licence or enter into a REDD+ contract without leasing the land, must apply to the Minster for a certificate as a registered negotiator.[134] However, there is no guarantee that this person represents everyone in the clan.

7.3. Advantages and disadvantages

Advantages	**Disadvantages**
Simplicity, as customary land 'owners' will own the carbon	Because ownership of land and forest carbon rights is determined by custom,

[132] *Land Leases Act* s 8. This power must be exercised 'in interests of and on behalf of the custom owners'. More particularly, the Court of Appeal has said that this ' is not a licence for a Minister to make any decision that he likes about the care and control of disputed land pending the resolution of that dispute. A Minister exercising this power can only reach a proper and lawful conclusion after he has weighed and assessed all matters which are relevant': see *Ifira Trustees Limited v. Kalsakau* (Unreported, Court of Appeal, Vanuatu, von Doussa, Saksak, Robertson, Fatiaki, Saksak, Bulu, Tuohy JJ, 6 October 2006) available via www.paclii.org at [2006] VUCA 23. See also *Turquoise Ltd v Kalsuak* (Unreported, Court of Appeal, Vanuatu, Lunabek CJ, von Doussa, Saksak, Young JJ, 4 December 2008) available via www.paclii.org at [2008] VUCA 22. The exercise of such power would also be contrary to the principle of free, prior and informed consent.

[133] *Constitution* art 74.

[134] *Land Reform Act* s 6.

Advantages	Disadvantages
	there is no certainty of ownership
The forest carbon rights cannot be divorced from the land and transferred to a third party (see section 9, below)	Land boundaries are unclear because there is no registered title
Land 'owners' would retain control of their land and the carbon, subject to any REDD+ agreement	The registered negotiator may not represent all members of the clan, and consequently some of the clan may not benefit from the REDD+ agreement.

7.4. Declaration of Conservation Area under Forestry Act

Another possibility 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*. [135]

Before making a declaration, the Minister must consult the relevant local government council and Island Council of Chiefs or Area Council of Chiefs and seek comments from interested members of the public. A copy of the declaration must be forwarded to the relevant local government council and Council of Chiefs, and published in the Gazette.[136] Commercial forestry operations are prohibited in a Conservation Area.[137]

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 may be cancelled by the Minister on the request in writing by the custom owners of the land.[138]

The process for the appointment of a Management Committee provides a possible model for forming an association to deal with carbon rights. This is discussed further in section 11.6 below.

[135] *Forestry Act* pt 6, div 1.
[136] *Forestry Act* s 50.
[137] *Forestry Act* s 51.
[138] *Forestry Act* s 52.

8. Forest carbon projects on leased customary land

Vanuatu's land law provides for customary land to be leased. Using this option would be expensive, due to the high cost of leasing and would necessitate amending the definition of 'land' to make clear that 'land' includes the ownership of forest carbon rights. However, under Vanuatu's current legal framework, it is the only existing option for clarifying land and carbon rights ownership in order to facilitate a REDD+ project.

Using the leasing framework, there are three options available:

4. A standard form lease from customary owners either to themselves, the government, or a Project proponent, under which the lessor would hold the carbon rights

5. 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.

6. A forestry lease.

8.1. Standard form lease (for REDD+ purposes)

Where land is leased, the lease, including the names of the lessor (being the customary land 'owners') and the lessee, are registered, and the boundaries of the land are shown in the survey plan. The lessor will be the holder of the carbon rights.

The lessor could then 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.**

After registration of the head lease, it would not appear to be necessary to obtain a certificate to negotiate[139] or the approval of the Minister[140] under the *Land Reform Act*, as the negotiations for any subsequent lease, sub-lease, licence or a REDD+ contract would be with the registered proprietor of the lease under the scheme set out in the *Land*

[139] *Land Reform Act* s 6.
[140] *Land Reform Act* s 7.

Leases Act.[141] It would, however, be necessary to obtain the consent of the Lessor to any disposition, if the Lessor is not the grantor.[142]

However, it should also be noted that, as the rules of custom are expressly stated by art 74 of the *Constitution* to form the basis of ownership and use of land in Vanuatu, should the REDD+ contract, or for that matter any lease or licence, be contrary to the rules of custom, it would arguably be unconstitutional and therefore void. To date, this point does not seem to have been taken in regard to a lease and it is unlikely to find favour with the courts as it would defeat the purpose of scheme of registration under the *Land Leases Act*, which confers an indefeasible title. Notwithstanding, it would be advisable to include a standard warranty in the lease or other agreement in terms such as:

> *The proprietor warrants that the terms of this Lease [or agreement] are in accordance with the rules of custom of the place in which the land is situated.*

8.2. Standard lease followed by registration of carbon rights

A second alternative would be for the customary land 'owners' (lessor) to lease their land to a landowner body (lessee), which then registers the carbon rights on the title in the name of the landowner body, as provided for by the *Forestry Rights Registration and Timber Harvest Guarantee Act 2000*.

8.3. Forestry lease

Another possibility would be for the custom owners to grant a forestry lease of up to 75 years under the Forestry Act, which entitles the lessee to 'establish, maintain and harvest timber from a crop of trees'. The Act states that a forestry lease must be entered into in accordance with the *Land Reform Act*, so it would appear that the same process would have to be followed as applies to the creation of any other lease. A certificate would have to be issued to a registered negotiator and the lease would require the approval of the Minister. The lease is specifically required to be registered under the *Land Leases Act*.[143]

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[141] In the author's opinion, this would not be caught by s 7 of the *Land Reform Act*. Section 23 of the *Land Leases Act* specifically protects a person dealing with the proprietor for valuable consideration from the need to go behind the registration.

[142] *Land Leases Act* s 36.

[143] *Forestry Act* s 30(5).

Section 30 of the *Forestry Act* allows the custom owners to grant a forestry lease of up to 75 years, which entitles the lessee to 'establish, maintain and harvest timber from a crop of trees'. The lease must be registered under the *Land Leases Act*.

9. Should third parties be able to hold forest carbon rights?

In Vanuatu, the *Forestry Rights Registration and Timber Harvest Guarantee Act* already provides for the creation of a separate property right to carbon which can be held by third parties. These rights are based on land ownership but can only be granted where a lease is in place. Forestry rights include any forestry covenants granted in respect of the land in question, such as the obligation to construct or maintain access roads.[144] Under the current law, such rights may be transferred to any individual or body.[145]

As the forestry right is registered on the Land Leases Register, and constitutes an encumbrance, third parties who wish to have the lease transferred to them would have notice of this. However, for the sake of clarity, it might be prudent to amend the *Forestry Rights Registration* and *Timbers Harvest Guarantee Act* to state that no timber agreement shall be approved, timber licence granted or mining licence issued over land which is the subject of carbon rights. Whilst not strictly necessary, consequential changes should also be made to the *Forestry Act* and *Mines and Minerals Act*.

9.1. Advantages and disadvantages

The advantages and disadvantages of creating a separate property right to carbon are set out in the following table:

Advantages	**Disadvantages**
Certainty for investors where such rights are registered	Unnecessarily complicated
	Culturally inappropriate as it does not fit well with the community's approach to land

[144] *Forestry Rights Registration and Timbers Harvest Guarantee Act* ss 1 and 8.
[145] *Forestry Rights Registration and Timbers Harvest Guarantee Act* s 3(1).

Advantages	Disadvantages
	Assumes that the proprietor of the lease is the holder of the carbon rights, which may not accord with customary laws
	Separation of carbon rights from land 'ownership' creates opportunities for bribery, fraud and corruption.

10. Resolving competing claims to forest resources

This section explores the implications of forestry and mining activities on carbon rights. Can forest carbon rights be exercised if there are existing land uses approved for the same land? Is there a process for cancelling or surrendering logging concessions/mining permits in order for land 'owners' to reclaim their carbon rights and undertake REDD+ activities?

10.1. Forest use and exploitation

In section 4.6 we discussed the conclusion that forest carbon rights pass to the holder of a timber rights agreement and timber licence. The framework for the grant of forestry rights has significant implications for carbon rights relating to customary land. Whilst not expressly stated in the legislation, the grant of a timber rights agreement and timber rights licence would appear to transfer carbon rights to the Licensee.

10.1.1. Cancellation of timber licences

A timber licence can be cancelled for non-compliance with the licence or a provision of the Act. The licensee must normally be given the opportunity to remedy the defect. A notice of non-compliance must specify:-[146]

> *(a) the term, condition or restriction of the licence, or the provision of this Act or the regulations, which has not been complied with; and*
>
> *(b) any compensation or penalty payable under the licence for that non-compliance; and*

[146] *Forestry Act* s 37(2).

(c) the period within which such non-compliance must be made good, considering the nature of the non-compliance, and any such compensation or penalties to be paid.

The Director may also suspend a licence if there is a serious dispute between the custom owners of land and the conduct of commercial forestry operations for up to 3 months under the licence but this is likely to worsen the dispute. There is an appeal to the Magistrates' Court against the cancellation of a licence with a further appeal to the Supreme Court.[147]

A licence is immediately terminated on certain acts by the licensee, including an act of bankruptcy or appointment by a court of an official receiver or liquidator.[148]

10.1.2. Compensation for cancellation

It is specifically provided that a licensee is not entitled to any compensation upon suspension or cancellation of the licence.[149] However, this provision may be in conflict with art 5(1)(j) of the *Constitution*, which, as discussed above, provides protection from unjust deprivation of property. There is as yet no case law on this, but in *Terra Holdings Ltd v Sope*,[150] the Court interpreted 'property' in this article broadly.

10.2. Mining laws

In Vanuatu, prospecting licences cover the following areas of land:

- Santo - almost all of Santo except areas close to Matantas (Big Bay area), Luganville area and full east coast of Santo.
- Malekula - South (Farun area) and Tisman area
- Efate - North Efate close to Emua village
- Erromango - North Erromango and South Erromango
- Pentecost - South Pentecost

For most of these, the licenced areas are inland. However, those in Santo have boundaries extending to the coastline. Statistics for the total land areas covered by the

[147] *Forestry Act* s 38.
[148] *Forestry Act* s 39.
[149] *Forestry Act* s 37(1).
[150] (Unreported, Court of Appeal, Vanuatu, Lunabek CJ, Robertson, von Doussa, Saksak, Fatiaki &and Spear JJ, 19 July 2012) available via www.paclii.org at [2012] VUCA 16.

prospecting licences on each island are not available, but the area covered by each licence does not exceed 100 square kilometres.

There are also, prospecting licences offshore, covering areas around Banks, areas offshore west of Efate and around Tafea region.

The *Mines and Minerals Act*[151] provides that 'the property in minerals, in their natural condition, in land is vested in the Republic of Vanuatu'.[152] Mineral is defined as 'any substance, whether in solid, liquid or gaseous form, occurring naturally in land, formed by or subject to a geological process, but does not include water or petroleum'.[153]

The *Mines and Minerals Act* provides for the appointment of a Commissioner for Mines and Minerals[154] who regulates mining licences.[155] There is a three stage procedure for carrying out a mining operation in Vanuatu:

- Obtaining an exploration licence;
- Obtaining a prospecting licence; and
- Obtaining a mining licence.

The application for an exploration licence must be registered by the Commissioner and the register is open to public inspection.[156] Applications gain priority according to the date and hour of registration.[157]

The Minister may cancel a licence by notice in writing for default,[158] after giving the licensee 30 days' notice of his or her intention to do so. The licence may also be cancelled if the licensee is adjudged bankrupt or is wound up, enters into any agreement with his creditors or takes advantage of any law for the benefit of debtors.[159]

[151] [Cap 190] ('*Mines and Minerals Act*').
[152] *Mines and Minerals Act* s 20(3).
[153] *Mines and Minerals Act* s 20(3).
[154] *Mines and Minerals Act* s 6.
[155] *Mines and Minerals Act* pts 6 (exploration licences), 7 (prospecting licences), 9 (mining licences).
[156] *Mines and Minerals Act* s 20(3).
[157] *Mines and Minerals Act* s 20(3).
[158] *Mines and Minerals Act* s 48.
[159] *Mines and Minerals Act* s 48.

11. Options for creating landowner bodies to manage carbon rights

There are some limited options existing for landowners to join together in a legally recognised entity. These options are rarely used.

11.1. Board of Trustees

Committees of trustees were established to manage the customary lands of the three main villages around the capital, Port Vila: the Ifira, Mele and Pango villages. However, only the Ifira land trust is still functioning. These committees employed accountants and administrators to assist them in their duties.

Advantages	**Disadvantages**
A trustee has power to deal with the trust assets	The Committee is not registered and the trustees may not represent all members of the Clan. .
Trusts are subject to very little government regulation	There is a danger that decisions may serve only the personal interests of the committee members or their relatives.
Trusts have fewer formalities than a company	Trusts are complex business structures that requires on-going legal and accounting expertise
It is quite easy to wind up a trust	Trusts are expensive to establish
Trusts offer some tax advantages	Trusts do not have continuity of existence
	There is no court or tribunal to supervise the work of trust committees

11.2. Companies

This is the most complex and formal option, as it requires incorporation under the *Companies Act*.[160] A company is a separate legal entity in which there are directors and shareholders. The directors control the company and may utilise the company structure as a vehicle for tax planning and shielding personal assets.

Advantages	**Disadvantages**
A company can enter into contracts and own property	Company structures are highly regulated and subject to many rules
A company can sue and be sued in its own name	The *Companies Act* controls company formation
A company has a wide variety of ways to raise capital	Establishment of a company is more expensive than most other forms of business structure.
A company has perpetual existence, independent of its members and shareholders	
A company offers limited liability	
Control lies with the Board	

Providers of services to companies and trusts may require a licence under the *Companies and Trust Services Providers Act 2010*.

[160] [Cap 191].

11.3. Members Association

This is the least formal option, and is governed by common law. It allows a group of people to join together for a particular purpose, ranging from social to business, and is usually intended to be a continuing organization. It can be formal, with a constitution or rules and membership requirements, or it can be a collection of people without structure.

Advantages	**Disadvantages**
Simple and flexible organization structure	No continuity of existence
No government regulation	Unlimited liability of members (particularly committee members)
Simple to establish	No legal recognition of the association as an entity separate from its members
Administration costs low	Capital raising is limited

11.4. Charitable Associations (Incorporation)

The *Charitable Associations (Incorporation) Act*[161] provides for the incorporation of committees of charitable associations. 'Charitable purposes' are defined as including 'objects of a religious, educational, cultural, scientific or sporting nature or for general social welfare and any other object the main purpose of which is not financial profit which the Minister declares to be charitable for the purposes of this Act'. Conservation is not expressly included, but 'general social welfare' might be broad enough to include this. The committee must have at least six members,[162] but no maximum is specified.

The incorporated committee is registered on a register of committees, which is available for inspection on payment of the prescribed fee.[163]

The application for incorporation must be accompanied by a list of assets and liabilities (including land) and these vest in the incorporated association on the date of

[161] [Cap 140] ('*Charitable Associations (Incorporation) Act*').
[162] *Charitable Associations (Incorporation) Act* s 2(1).
[163] *Charitable Associations (Incorporation) Act* s 15.

incorporation.[164] A copy of the application for incorporation of each incorporated committee, certified by the Registrar and accompanied by a certified copy of the certificate of incorporation must be filed with the Director of the department responsible for land, who must register the committee as owner of all interests in the land listed. The committee must give 15 days' notice of its intention to transfer any interest in land.[165]

Advantages	**Disadvantages**
The registration confers certainty as to the ownership of the listed land.	The association must be for charitable purposes and qualification depends on the discretion of the Registrar.
The committee becomes a body corporate and may sue and be sued in its own name	
A charitable association has perpetual succession	
A charitable association is simple to establish	
A charitable association has some tax advantages	

11.5. Registration as Joint Owners

The *Land Leases Act* permits registration of a number of individuals as co-owners.[166] Where more than one ni-Vanuatu is involved, the application for registration must be accompanied by a statutory declaration by each joint owner showing the beneficial interests that they represent. Any transfer of the interest requires a statutory declaration that all beneficial owners have been consulted and that a majority are in favour.

[164] *Charitable Associations (Incorporation) Act* s 8.
[165] *Charitable Associations (Incorporation) Act* s 14.
[166] *Land Leases Act* s 73.

Advantages	**Disadvantages**
Certainty for those dealing with registered owners	Limited to five individuals
Creates a statutory trust	No legal recognition of the group as an entity separate from the registered individuals
Where co-owners are registered as joint proprietors, on the death of the joint proprietors, interest vests in the survivors.	Interests of other owners may not be taken into account
	Possibility of fraud
	Capital raising is limited

11.6. Management Committee

As discussed above, this *Forestry Act* sets up a process for determining the indigenous groups entitled to grant timber rights to third parties. Those groups are then required to form a Management Committee.

Advantages	**Disadvantages**
Certainty for those dealing with registered timber rights owners	Designed to allow the land to be logged
The genealogies of the groups are identified, together with the relevant custom and decision making processes	
Provides for consultation	

Advantages	**Disadvantages**
Provides process for division of proceeds	

12. Options for recording ownership and/or use of carbon rights

If forest carbon rights are to be created and carbon credits sold from forest carbon projects, there will need to be a mechanism for systematically recording who has exercised their carbon rights, and where, in order to avoid forest carbon being sold twice (double counting): see Box 12.1 on the VCS rules on and double counting of emission reductions and removals.

Box 12.1: VCS rules on double counting of emission reductions and removals

The Verified Carbon Standard has rules on Double Counting. In non-Annex B countries (developing countries) double counting can occur as double selling. 'Double selling' occurs when a single greenhouse gas emission reduction or removal is sold to multiple buyers.[167] For example, a carbon credit might be sold twice, or a singular emission reduction might be certified under two different REDD+ programmes (e.g. a national programme and a voluntary project) and sold under each.

National REDD+ programmes can address this risk through oversight procedures, such as a national REDD+ registry which is responsible for registering REDD+ projects (see section 12.3 below).

[167] See Verified Carbon Standard, *Program Definitions* (VCS, Version 3, 2012) < http://v-c-s.org/sites/v-c-.org/files/Program%20Definitions%2C%20v3.4.pdf> 5, definition of Double Counting, and Verified Carbon Standard, *Double Counting: Clarification of Rules* (VCS, Policy Brief,1 February 2012).

12.1. Registration on land title

In the case of leased customary land, the *Forestry Rights Registration and Timber Harvest Guarantee Act* provides for the registration of forestry rights on the Land Leases Register.[168]

In addition, the *Land Leases Act* allows for a caution to be entered on the register by any person entitled to an interest in registered land.[169] The caution prevents the registration of any dealing affecting the interest, including a change of ownership.[170]

This option is only of value where land is registered and depends on the forestry right being accepted in practice as a sufficient interest to allow entry of a caution. As 99% of the land is customary land, and only 9.3% of this is registered, this option is of limited use.

It should also be noted that a fully functioning Land Leases Office is essential for this option to be effective. The current land registration system would therefore require reviewing and, if necessary, supporting.

12.2. Approval process for REDD+ projects

Vanuatu should establish an approval process for REDD+ projects which authorises a REDD+ project to proceed before any carbon property rights are transferred or sold and before any contractual arrangements are made between the parties. This will involve an assessment of the environmental and social impacts of a proposed project. Vanuatu will be able to draw in part on its experience in regulating and registering climate change mitigation projects under the CDM (**Box 12.3**).

Box 12.2: The CDM in Vanuatu

Vanuatu ratified the Kyoto Protocol in 2001. Each country that wishes to participate in the CDM must establish a Designated National Authority (DNA) whose task it is to authorise and approve participation in CDM projects. The DNA must assess potential CDM projects to determine whether they will assist the host country in achieving its

[168] *Forestry Rights Registration and Timber Harvest Guarantee Act* s 3(3).
[169] *Land Leases Act* s 93.
[170] *Land Leases Act* s 94.

sustainable development goals.

The Vanuatu Meteorological & Geo Hazards Department has been appointed as Vanuatu's DNA. The DNA is overseen by the National Advisory Committee on Climate Change (NACCC), an interdepartmental committee made up of senior government officers, mandated by the Vanuatu Council of Ministers to oversee the DNA.

There are no CDM projects yet in Vanuatu.

12.3. Establishing a national REDD+ registry

Each REDD+ country will eventually require a national REDD+ registry, to be held electronically.

The overarching purpose of a national REDD+ registry is to centrally record and track:

- emission reduction programs at both the national and project-level; and
- the issue of REDD+ units or results-based payments (e.g. carbon credits, whether issued nationally or through the voluntary market).

Tracking of activities and validation are essential to ensure environmental integrity across different national REDD+ initiatives and to promote transparency in benefit-sharing with stakeholders.[171] Ultimately the registry will be linked with the country's system for Measurement, Reporting and Verification (MRV) of emission reductions and removals. Given that it is likely to take many years to develop a fully-functioning registry, in the interim countries are relying on international registries that support the voluntary market, such as the Markit Environmental Registry.

Accordingly, Vanuatu should take steps to establish a national REDD+ registry. The registry should also track the activity, its performance in reducing tonnes of CO2, and how many credits have been issued. This would ensure that there is no double counting of emission reductions from overlapping projects or emission reduction activities.

[171] For a detailed description of the role of national REDD+ registries, and how they can be developed, see: Johannes Scholl,(ed) *National REDD+ Registries: An Overview of Issues and Design Options* (KfW Entwicklungsbank, 2001).

13. Land conservation mechanisms

Given that REDD+ projects will involve land 'owners' undertaking obligations to conserve their forest over the long term, consideration needs to be given to what options are available to them.

Some land conservation mechanisms are already available to land holding groups in Vanuatu. These are as follows:

13.1. Community Conservation Areas

The *Environmental Management and Conservation Act*[172] *empowers* the Director to negotiate with custom land 'owners' for the protection and registration of any site as a Community Conservation Area. There are currently two registered conservation areas. In order to qualify, the site must:

> (a) possess unique genetic, cultural, geological or biological resources; or
>
> (b) constitute the habitat of species of wild fauna or flora of unique national or international importance; or
>
> (c) merit protection under the Convention Concerning the Protection of World Cultural and Natural Heritage.[173]

Where agreement is reached, the Director may assist interested parties to:

> (a) review and evaluate the nature of the proposed Community Conservation Area;
>
> (b) accurately identify the area to be included;
>
> (c) verify rights and interests in the land that is to be included;
>
> (d) identify and evaluate the conservation, protection and management options proposed.[174]

[172] [Cap 283] div 2 ('*Environment Management and Conservation Act*').
[173] *Environment Management and Conservation Act* s 35.
[174] *Environment Management and Conservation Act* s 36.

After the boundaries of the land and the 'owners' of interests have been identified, and an appropriate conservation plan developed, the Community Conservation Areas is registered in the Environmental Registry and a certificate issued to the land 'owners'.[175] The land 'owners' are then responsible for the implementation of the plan, although the Director may provide technical or financial support.[176] The Director may cancel or amend the registration at any time on written application by a landowner.[177]

Advantages	**Disadvantages**
Consultation with all interested parties	Only permitted in areas: • possessing unique resources; • constituting the habitat of wild fauna or flora of unique national or international importance; or • meriting protection under the World Heritage Convention.
Identification of boundaries and all parties interested in the land	registration may be cancelled or amended on written application by a landowner
Certainly provided by registration	
Assistance provided by the Director	

13.2. Conservation Areas

As discussed above, the *Forestry Act* also allows for the declaration of a conservation area.

Advantages	**Disadvantages**
Consultation with local government council and Councils of Chiefs	Minister's declaration required

[175] *Environment Management and Conservation Act* s 37.
[176] *Environment Management and Conservation Act* s 39.
[177] *Environment Management and Conservation Act* s 38.

Advantages	Disadvantages
Public consultation provided for	Only permitted in areas of scientific, cultural or social significance, or other special value for the present community or for future generations
Publication in the Gazette provides notice to third parties	Complicated procedure
Commercial forestry operations are prohibited in a Conservation Area	

13.3. Nature Reserves

The National Parks Act[178] makes provision for the declaration of an area as a national park and nature reserve. Such declaration is only available in relation to areas which:[179]

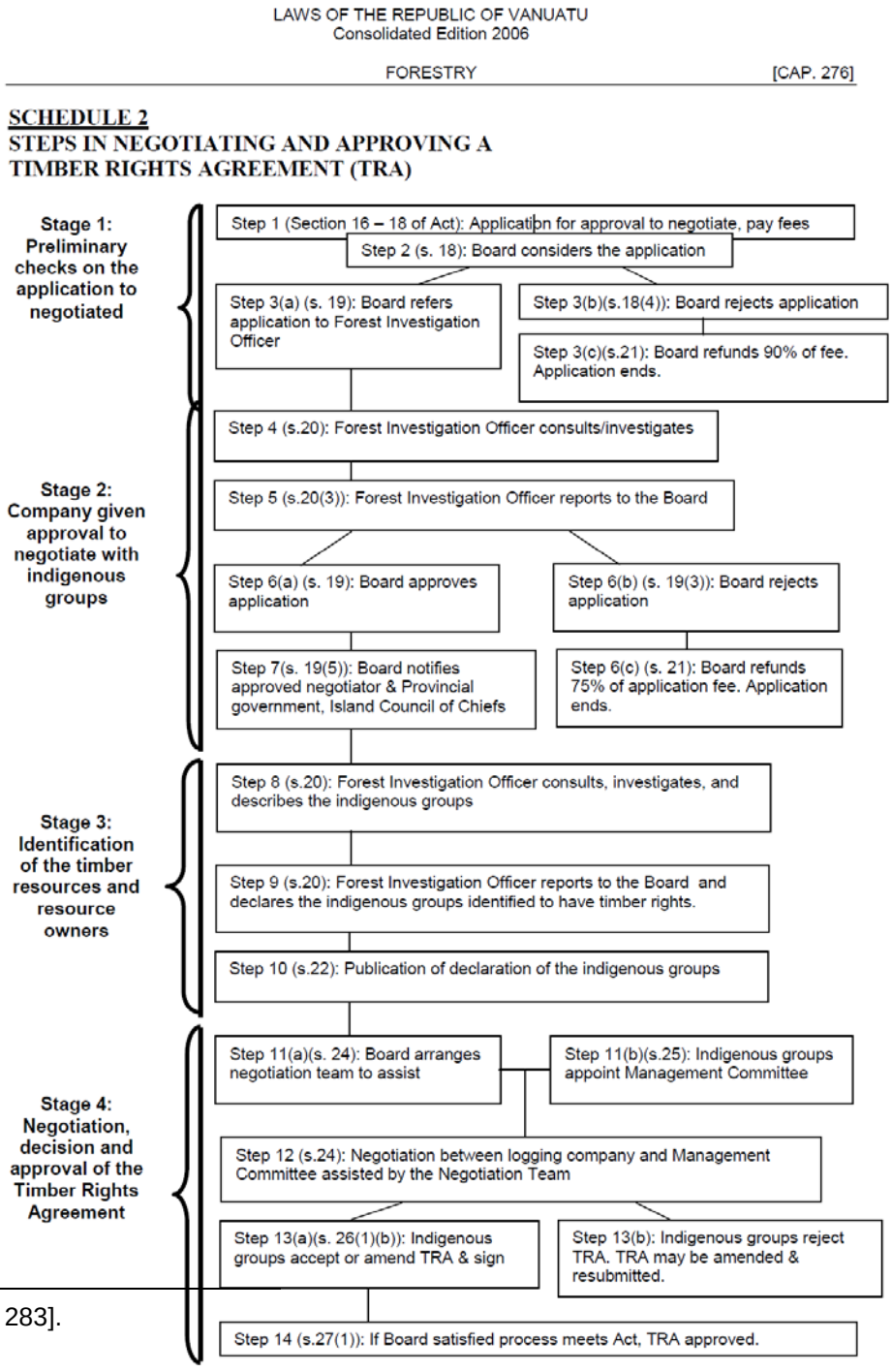
> '(a) have unique ecosystems, genetic resources or physical and biological formation; or
>
> (b) constitute the habitat of threatened species of animals and plants of outstanding value from the point of view of science and conservation; or
>
> (c) have outstanding natural beauty; or
>
> (d) have any archaeological or other scientific or environmental significance;
>
> and for promotion of scientific study and enjoyment thereof by the public.'

After a declaration is made, the Board established by the Act must prepare a management plan in respect of the area.[180] In doing so they should consult with stakeholders including the custom owners or lessors and local chiefs. Factors to be taken into account include the conservation and preservation of native plants, and protection of the area against soil erosion and physical damage.[181] The Minister may also appoint a local management committee to take responsibility for the control and management of the reserve, including a representative of the custom owners.

[178] National Parks Act [Cap 224] ('National Parks Act').
[179] S 2(1).
[180] S 10.
[181] S 10

Interestingly, the provisions of this Act are stated to have effect notwithstanding anything to the contrary in the provisions of any other written law other than the Constitution. However, to date the Act has not been used and there are plans to repeal it and rely solely on the *Environmental Management and Conservation Act*[182] discussed above.

ANNEXURE 1: Extract from the Forestry Act [Cap 276] (Schedule 2)



LAWS OF THE REPUBLIC OF VANUATU
Consolidated Edition 2006

FORESTRY [CAP. 276]

SCHEDULE 2
STEPS IN NEGOTIATING AND APPROVING A TIMBER RIGHTS AGREEMENT (TRA)

Stage 1: Preliminary checks on the application to negotiated

Step 1 (Section 16 – 18 of Act): Application for approval to negotiate, pay fees

Step 2 (s. 18): Board considers the application

Step 3(a) (s. 19): Board refers application to Forest Investigation Officer

Step 3(b)(s.18(4)): Board rejects application

Step 3(c)(s.21): Board refunds 90% of fee. Application ends.

Stage 2: Company given approval to negotiate with indigenous groups

Step 4 (s.20): Forest Investigation Officer consults/investigates

Step 5 (s.20(3)): Forest Investigation Officer reports to the Board

Step 6(a) (s. 19): Board approves application

Step 6(b) (s. 19(3)): Board rejects application

Step 7(s. 19(5)): Board notifies approved negotiator & Provincial government, Island Council of Chiefs

Step 6(c) (s. 21): Board refunds 75% of application fee. Application ends.

Stage 3: Identification of the timber resources and resource owners

Step 8 (s.20): Forest Investigation Officer consults, investigates, and describes the indigenous groups

Step 9 (s.20): Forest Investigation Officer reports to the Board and declares the indigenous groups identified to have timber rights.

Step 10 (s.22): Publication of declaration of the indigenous groups

Stage 4: Negotiation, decision and approval of the Timber Rights Agreement

Step 11(a)(s. 24): Board arranges negotiation team to assist

Step 11(b)(s.25): Indigenous groups appoint Management Committee

Step 12 (s.24): Negotiation between logging company and Management Committee assisted by the Negotiation Team

Step 13(a)(s. 26(1)(b)): Indigenous groups accept or amend TRA & sign

Step 13(b): Indigenous groups reject TRA. TRA may be amended & resubmitted.

Step 14 (s.27(1)): If Board satisfied process meets Act, TRA approved.

[182] [Cap 283].

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