INTERNATIONAL CLIMATE INITIATIVE

Regional project

Climate Protection through Forest Conservation in Pacific Island Countries

On behalf of

Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

of the Federal Republic of Germany

Vanuatu:

Legal Framework for REDD+

SPC Secretariat of the Pacific Community

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

Vanuatu:

Legal Framework for REDD+

January 2013

SPC Secretariat of the Pacific Community

giz Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH

On behalf of
Federal Ministry for the Environment, Nature Conservation and Nuclear Safety
of the Federal Republic of Germany

Prepared by: Lisa Ogle

Environmental Law Consultant

On behalf of: SPC/GIZ Regional Project
'Climate Protection through Forest Conservation in Pacific Island Countries'

P.O. Box 14041, SUVA, Fiji

Email: karl-peter.kirsch-jung@giz.de

Contents

1 Background

Vanuatu began preparing for REDD+ in 2006 with the Vanuatu Carbon Credits Project. Vanuatu has recently submitted its REDD+ **Readiness Preparation Proposal** (R-PP) (7 October 2013) to the FCPF (implementation period of 2014 – 2018) and expects to sign a REDD+ Readiness Preparation Grant with the FCPF in May 2014. The R-PP sets out how Vanuatu intends to develop its REDD+ programme, which it refers to as the "National REDD+ Scheme". Further details on the development of REDD+ in Vanuatu is available on the Global Canopy Programme's REDD Desk website **here**.

As is the case for all Melanesian countries, Vanuatu does not yet have a specific legislative framework for REDD+, with the **National Forest Policy 2013-2023** (p. 26) identifying the need to develop national REDD+ policies, strategies and legislation as part of its REDD+ initiative.

2 Vanuatu's approach to REDD+

2.1 Project-based approach

Unlike Papua New Guinea and Solomon Islands, Vanuatu already has a relatively suitable legal framework that could be used to facilitate a project-based approach to REDD+, if it so wished. For example, the system for the leasing of customary land could be used to identify landowners and land boundaries, with benefit-sharing taking place under the leasing structure. However, early consultations with customary landowners indicate that an approach to REDD+ that relies on land leasing is unlikely to be acceptable due to the widespread concern over the improper use of leases in the past. For more information regarding concerns regarding land reform efforts and land leasing in Vanuatu, see **Daley 2010**, and **Stefanova 2012**. In addition to concerns regarding unfair lease dealings, land leasing has a similar effect to land registration in that customary landowners, who often rely on their land for subsistence, can lose the use of their land for up to 75 years.

2.2 Programmatic approach preferred

While REDD+ projects will still be permitted (**National Forest Policy 2013-2023**:26), Vanuatu is likely to implement its National REDD+ Scheme primarily on a programmatic basis, in part due to the constraints posed by its customary land tenure system (see Land Tenure below). An activity-based approach will use land use planning and sectoral policies to incentivise the required changes in behaviour, in a manner that does not involve cash payments to landowners. REDD+ programmes and activities will be developed at the national level, in close consultation with each of the six provinces who will administer the REDD+ activities. Possible strategies include: in-kind support, investment and extension services from national government to provinces to encourage sustainable land use activities such as afforestation and reforestation; responding to requests from landowners for assistance for forestry and agriculture projects which affect the carbon balance; and encouraging landowners to enter into conservation agreements (see Community Conservation Areas below) (**R-PP 2013**, 66-72).

3 Constitutional framework

Formerly known as the New Hebrides, Vanuatu gained independence in 1980, after being jointly ruled by the British and French. It has a democratic parliamentary system of government, governed by a Prime Minister with a President as Head of State.

The **Constitution** also establishes a National Council of Chiefs (the "*Malvatumauri*"), who are elected by District Councils of Chiefs (Ch. 5). While the Council does not have a legislative role, it may be consulted on any question of tradition and custom arising from any bill before Parliament, although this is not mandatory (Art. 30). Current proposals for land reform foreshadow a greater consultative role with the *Malvatumauri* on

land matters. The National Council of Chiefs could play an important role when it comes to consultation and seeking and obtaining free, prior and informed consent of ni-Vanuatu (Vanuatu's indigenous peoples) at the national level for legislative and administrative measures under the National REDD+ Scheme.

The national language is Bislama (a form of Pidgin English) spoken by about 95% of people, and the official languages are Bislama, English and French.

On independence, freehold land was abolished and all land in Vanuatu was restored to "the indigenous custom owners and their descendants" (Art. 73). Consequently, almost all land in Vanuatu (99%) is held as customary land. Only Ni-Vanuatu can have perpetual ownership of land (Art. 75). Government consent is required for all land transactions between ni-Vanuatu and non-indigenous citizens or non-citizens (Art. 79).

The Constitution allows three legal systems to operate concurrently: common law (British law); civil law (French law); and customary law (Art. 95(2)). However, in relation to land, the Constitution expressly states that the rules of custom apply to land ownership and use in Vanuatu (Art. 74). The Constitution also protects a broad range of human rights (Art. 5). Of particular relevance to REDD+ is the right to protection of property and from unjust deprivation of property, the right to protection against discrimination on the ground of sex, and the right to equal treatment under the law. The Constitution also imposes a fundamental duty on every person to "safeguard the national wealth, resources and environment in the interests of the present generation and of future generations" (Art. 7(d)).

4 Forest sector and REDD+

Vanuatu has reported a nil rate of deforestation over the 2000-2010 period (**FAO 2011**:117), although the accuracy of this figure is unclear as Vanuatu is still relying on data from a single National Forest Inventory carried out in 1989-1992. Vanuatu has some natural forests that are still largely intact on its smaller islands, and also on the inland and mountainous areas of the larger and more densely populated islands. In the 1980s and 1990s, useful timber species were over-harvested and today Vanuatu imports most of its timber and no longer has a significant forest product export industry (**Mele 2011**: 44) (see **Box** 1 for a brief history of logging in Vanuatu).

At present there are no timber concessions in Vanuatu, with most timber extraction taking place on a small scale using mobile sawmills, resulting in annual harvests of approximately 10,000 m3.

Box 1 A brief history of logging in Vanuatu

Vanuatu experienced high levels of unsustainable logging in the mid-1990s which severely depleted its forests. In 1993, the Government issued several large-scale logging licences (timber rights agreements) to foreign companies, allowing a total harvest of over 300,000 m3 per year, despite the Department of Forests having previously identified a sustainable yield of only 52,000 m3 per year. This logging has led to severe degradation of the forest. In mid-1994, landowners on Erromango disrupted a planned log shipment because of their concerns over the process used to obtain landowner consent for the logging operation. Subsequently, the Government of Vanuatu banned the export of logs in 1993, and, subject to limited exceptions, the ban remains in place today (***Forestry Act***, s. 61).

Processing facilities were then established in Vanuatu so that higher value wood products could be exported instead. Between 1990 and 2004 an average of just over 30,000 m3 of wood was harvested each year, of mainly Whitewood and milk tree. In 2004 the industry was scaled back because of dwindling timber supplies, and many of the major logging companies ceased activities.

Source: Livo Mele, (2011). ***Forests of the Pacific islands: Foundation for a sustainable future****, Vanuatu chapter, p. 46).*

4.1 Forest definition and forest cover

Vanuatu is an archipelago of more than 80 islands and has a land area of 1,219,000 hectares, with its six largest islands each forming a province. About 36%, or 440,000 hectares of Vanuatu has forest cover (FAO 2011:117), although this figure could be as high as 74% of land area, or 900,000 hectares, if different forest types such as areas of agroforestry, fruit plantations, mangroves, bamboos and palms are included in the definition of forests (R-PP: 50). "Forest" is defined under the *Forestry Act* as "any area … predominately covered by trees, and includes areas planted with trees except where such trees are for agricultural purposes" (s. 3). Vanuatu is considering adopting a more appropriate legislative definition of "forest" which reflects its national circumstances, and on which its National REDD+ Scheme can be based (R-PP: 50).

4.2 Administrative arrangements

The Ministry of Agriculture, Forestry and Fisheries (MAFF) has overarching responsibility for coordinating land use and productive sector strategies, including forestry. Under this Ministry, the Department of Forests has administrative responsibility to manage the forestry sector in Vanuatu, which includes: administration of the ***Forestry Act 2001***, its regulations and orders; ensuring compliance with the Code of Logging Practice; and implementation of the **Vanuatu Forest Policy 2013-2023**.

The Department of Forests is the national REDD+ focal point and will have day-to-day responsibility for the implementation of Vanuatu's National REDD+ Scheme. The Director of Forests is the head of the Department of Forestry, although this position has been vacant since 2012.

4.3 Drivers of deforestation and forest degradation

Vanuatu's R-PP (pp. 51-53) has identified the main drivers of deforestation as being:

a. land clearance for coconut plantations and the conversion of land for cattle-grazing, and

b. small-scale shifting subsistence agriculture, compounded by infrastructure and tourism development and agriculture which is forcing more people to move inland and to convert forest for subsistence living.

The main drivers of forest degradation are:

a. invasion by introduced invasive vines such as *Merremia* spp, which has taken over large areas of logged-over forests and abandoned agriculture areas, impeding the natural regeneration of the logged forest; and

b. timber harvesting with the use of portable sawmills in areas close to urban centres.

5 Land and forest tenure

Vanuatu has a population of approximately 245,000, of which about 75% live in rural areas (UNOHCHR, 2012: 43).

5.1 Land tenure

All land in Vanuatu belongs to the indigenous 'custom owners'. Almost all land is held under customary tenure (99%), being either leased (9.3%) or un-leased (89.7%), whilst the remaining 1% is state-owned land (see **Table 1**). There is no freehold land in Vanuatu, which was abolished on Independence, the closest thing to freehold being leased customary land.

Table 1: Land tenure categories in Vanuatu (source: **Corrin, 2012**: 31)

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%); commercial / tourism (9%); industrial (1%); residential (4%); special (4%)	Max. term: 75 years Registration confers indefeasible title
				Public land	Max. term: 75 years
Public land	1%			Land vested in Government at independence : public roads, etc.	Government can acquire public land from land 'owners', but must pay compensation

5.1.1 Un-leased customary land

This is by far the largest category of land tenure in Vanuatu (89.7%). There is no mechanism for the registration of un-leased customary land. This has implications for REDD+ activities which are project-based as it is likely to be difficult to identify the land 'owners' and the land boundaries with sufficient certainty (see **Box 2** on the concept of customary land 'ownership' in Vanuatu). In addition, disputes between and within communities when trying to identify the true and correct custom owners are common in Vanuatu, which may be exacerbated if the value of these resources increases under REDD+ (see Dispute resolution mechanisms below).

Box 2: The concept of customary land 'ownership' in Vanuatu

It is important to understand that the Western legal concept of land 'ownership' does not sit easily with the reality and prevalence of customary land tenure in Vanuatu.

Under the *kastom* view of land, land is not a commodity that is 'owned' and can be bought and sold, but is held communally by the tribe or clan, on trust for present and future generations. There is often no single landowner group. Rather, different groups often hold multi-layered rights to the ownership and use of land and forest resources (sometimes referred to in legal terminology as 'usufructs'). However those holding use rights under custom can also be difficult to identify as, unlike Solomon Islands which has the ***Customary Land Records Act*** [Cap. 132], Vanuatu does not have legislation which allows for customary rights or interests to be recorded over land.

Source: Corrin 2012.

The Minister is empowered to manage customary land, including the power to lease land, if it is neglected, not adequately maintained, or if ownership is in dispute (*Land Reform Act*, s. 8). In response to widespread concern that the power to approve leases over disputed land has been abused, with the **2006 National Land Summit (Resolution 9)** calling for the removal of this power (**Daley 2010**, and **Stefanova 2012**).

5.1.2 Restrictions on un-leased customary land

Customary land cannot be transferred to foreigners (**Constitution**, Art. 75), except by lease (*Land Leases Act*). Customary land cannot be alienated (sold, mortgaged or otherwise burdened) except to other ni-Vanuatu, and only if customary law permits, and the transfer must be done in accordance with customary law (Art. 74). Therefore, in the context of REDD+, a contract or agreement which requires particular land management activities to be carried out or which purports to deal with carbon rights, is likely to constitute an 'alienation' of un-leased customary land in breach of the Constitution, *unless* the contract is negotiated between ni-Vanuatu and is negotiated according to custom (and not British or French law) (**Corrin 2012**: 32).

5.1.3 Leased customary land

The only way that customary land can be 'released' from its constraints against alienation (sale, mortgage or some other restriction) and made available for a (non-customary) planned use is through the creation of a lease. Consequently, most development takes place on leased land. All leases require the consent of the government (*Land Reform Act*, ss 6-7).

Leasing of customary land occurs under the *Land Leases Act* [Cap. 163] which allows for the creation and transfer of leases for up to 75 years (s. 32). About 9.3% of customary land in Vanuatu is leased, with leases being classified as either agricultural, commercial/tourism, industrial, residential or special (**World Bank, 2012a**).

The process for creating a lease is as follows (as set out under the *Land Reform Act*):

- The applicant for the lease **must apply to the Minister** for a certificate as a registered negotiator, although the Minister cannot issue the certificate without the **consent of the custom owners;**
- A lease agreement must then be reached with the customary 'owners' and registered in the Land Records office;
- The boundaries of the land are then surveyed and the 'proprietors' of the lease **registered with the Land Records Office.**

The legal effect of creating a lease over customary land is very similar to land registration in that the person (or people) named as lessor and lessee take control of the land, removing control of the land from the custom owners for up to 75 years. Since independence, the leasing process in Vanuatu has become problematic and subject to abuse, leading to widespread dissatisfaction by customary landowners (**Stefanova 2012**). Consequently, customary landowners have indicated during consultations that a REDD+ mechanism that requires the leasing of land is unlikely to be acceptable (**R-PP**: 51). Land reform efforts, including the need for a clear land use policy, remain high on Vanuatu's policy agenda (**Box 3**).

Box 3: Ongoing process for land reform in Vanuatu

Land is a highly sensitive issue in Vanuatu. Under the *kastom* view of land, land defines identity and is part of the web of life that holds together custom, culture, history and community beliefs (Loode 2008:118).

The movement for Independence, which took place in 1980, was driven in part by concerns over the extent to which land had been alienated to foreigners. The Constitution consequently abolished freehold land and returned all land to the custom owners, stating that there should be 'a national land law' to implement these provisions. The *Land Reform Act* [Cap. 123] was passed as an interim measure, allowing custom owners to lease their land to foreigners. However the Act remains in place today as, due to the sensitivity and complexity of the issue, a comprehensive land scheme is yet to be adopted.

By 2005, land alienation (through leasing) had again emerged on a scale that threatened the subsistence livelihoods of many ni-Vanuatu, particularly on the main island of Efate. This led to a National Land Summit in 2006 which adopted 20 resolutions on which a National Land Policy could be based, which called for more transparent processes for recognising and regulating customary land ownership, the need to ensure fair

dealings in leases, the removal of the power of the Minister to approve leases over disputed custom land (not yet implemented), and the need for a zoning and land use policy.

According to one recent newspaper report, the Government plans to introduce legislative reforms to the Parliament in 2014 implement the recommendations from the National Land Summit which will include:

- A new lease-making process, including changes to the power of the Minister to issue leases over disputed land
- A Customary Land Management Act to replace the existing *Customary Land Tribunal Act*, allowing for the resolution of disputes by customary processes at the local level
- Enhancement of the role of the Malvatumauri National Council of Chiefs and a requirement that they be consulted in land matters.

The proposed land reforms are summarised in a booklet: ***Plan blong ol jenis***, Septemba 2013 (Bislama).

Source: ***Lunnay 2008****, and* ***'Consultations with Land Minister on proposed changes to land laws'****, in Vanuatu Daily Post, 9 October 2013.*

5.2 Dispute resolution mechanisms for customary land

Disputes relating to issues of ownership, use or boundaries of customary land are initially resolved through custom processes at village level, outside the formal court hierarchy. If these are not successful, then disputants may commence proceedings before a Customary Land Tribunal, which will determine the rights of parties in accordance with custom (*Customary Land Tribunals Act* [Cap. 271, s. 28]). All members of the Tribunal are appointed from the custom area in which the land is situated by the appropriate chiefs. Appeals can be made to the Supreme Court, but only on points of procedure (s. 39). Land disputes are more regularly being referred to the courts as the authority of the chieftain system is slowly being eroded over time. Land disputes which are processed through the Customary Land Tribunals can take many years to resolve.

If a dispute relates to non-custom issues, such as the term of a lease, then the Supreme Court will determine the matter (**Loode 2008**:122-124).

5.3 Mangroves

Vanuatu has about 2,500 hectares of mangroves (**FAO 2010**:8), 90% of which are found on the island of Malekula. Mangroves are valued for timber for housing, canoes and fuel wood, and providing habitat for crabs and fish that generate income and improve food security. Vanuatu is mapping mangroves as part of its National Forest Inventory and intends to include mangrove forests under its National REDD+ Scheme. The main anthropogenic drivers of deforestation for mangroves are overharvesting of timber as firewood and for building houses and boats, overfishing, and encroachment of leased land for conversion to housing and agriculture (**MESCAL 2013**: 18).

In accordance with the **Constitution** which vests all land in the indigenous custom owners (Art. 75), mangroves on the foreshore in Vanuatu, and the carbon in them, are generally owned by the indigenous custom owners of the land. This position reflects a recent decision in which the Courts have held that 'land' under Art. 75 of the Constitution includes the waters below low water mark and includes the seabed (**Terra Holdings Ltd v Sope**, 2012).

Vanuatu does not currently have a dedicated legal framework for the protection and management of mangroves. However, mangroves can be protected under the following Acts:

- all development on foreshore land (land below mean high water mark) requires the written consent of the Minister (**Foreshore Development Act** 1976 [Cap. 90], s.2).
- in accordance with amendments to the Foreshore Development Act in 2010, all development on foreshore areas must now be assessed and approved under the Environmental Impact Assessment provisions of the *Environmental Protection and Conservation Act* 2003, s. 12A).

6 Forestry Act 2001

The main law regulating forest use in Vanuatu is the *Forestry Act* [Cap. 276] (2001). The *Forestry Act* only regulates 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 customary usage is expressly excluded from the Act [s. 3 "commercial forestry operations"], and is regulated instead by customary law.

6.1 Forest sector planning

Although Vanuatu's *Forestry Act* contains a requirement to prepare a Forestry Sector Plan, these provisions have not been used due to the difficulties of consulting with, and obtaining the consent of, custom owners across large forest areas. Consequently, Vanuatu does not have an area defined as permanent forest estate or production forests.

6.2 Approvals for forest use

All commercial forestry operations require both an agreement and a licence (except for sawmill, sandalwood and special licences).

There are three kinds of **agreements**:

- Timber rights agreement
- Timber permit
- Forestry lease

There are four kinds of **licence**:

- Timber licence (s. 44)
- Mobile sawmill licence (s. 46)
- Sandalwood licence (s. 47)
- Special licence (s. 48)

6.3 Timber agreements (logging concessions)

The *Forestry Act* establishes the Forests Board of Vanuatu whose main task is to supervise negotiations for **Timber Rights Agreements** (s. 7). The maximum period for a timber rights agreement is 10 years and is renewable. The Act sets out a complex process for entering into a timber rights agreement (Sch. 2) which involves obtaining approval from the Board to negotiate, the appointment by the Board of a Forest Investigation Officer to consult with the custom owners, and the appointment by landowners of a Management Committee to monitor the logging agreement and recording of payments.

Where the value of timber does not justify the expense of a timber rights agreement, a **Timber Permit** can be issued for up to one year (s. 29).

A third alternative for large scale logging is a **Forestry Lease**. Under the *Forestry Act*, custom owners can grant a forestry lease for up to 75 years which entitles the lessee to 'establish, maintain and harvest timber from a crop of trees' (s. 30). This process follows the usual leasing process under the *Land Reform Act* (e.g. approval needed to negotiate, and Minister must approve lease) and would be registered under the *Land Leases Act*.

At present, there are no logging concessions in Vanuatu, with the last large scale logging operation ceasing in 2004. Timber harvesting is mostly done on a small scale using mobile sawmills. For the last 3 – 4 years, the Department of Forestry has only issued mobile sawmill licences. Plantations are being harvested as well, but a legal framework for plantations is only now being introduced in 2014 with the proposed introduced of the *Plantation Forestry Act*.

6.4 Licences

Commercial forestry operations must not be conducted without a licence (s. 31). All licences are subject to the Code of Logging Practice and to certain environmental protection provisions, such as refraining from logging protected species of plants and not logging in buffer zones around watercourses or on land with a slope of more than 30 degrees (s. 33(1), Part 6).

Most licences issued today are for mobile sawmills (s. 46). A mobile sawmill licence must not exceed 5 years. The maximum annual volume of logs which can be cut under a mobile sawmill licence is 500 cubic metres. Mobile sawmill operations are further regulated under the **Forestry (Control of Mobile Sawmills) Regulations** [Cap. 276] made under Order No 9 of 1996. The Forestry Department keeps a register of Mobile Sawmilling Licences. However, the register is not accessible by the public without the permission of the Director of Forestry.

A Special Licence can be issued for forestry operations where the use of the other forms of licence is not practicable or desirable. Special licences are used to authorise the clearing of land for agricultural or other development purposes, and for hazard removal. While a Special Licence could theoretically be used to authorise REDD+ activities, this would not be practicable as the licence cannot be issued for more than one year (s. 48(3)(a)).

6.5 Plantations

Forest plantations cover a relatively small area (approximately 4,800 hectares) and are found on several of the larger islands and include sandalwood, whitewood, canarium nut, tropical almond and mahogany, although these are relatively small given the amount of timber owned by customary landowners. Commercial plantations are usually located on leased land.

6.6 Reforestation and afforestation

Although Vanuatu has significant potential to take advantage of the "+" part of REDD+ through reforestation and afforestation given the large areas of cleared land - both degraded farmland and under-utilised pasture land – available, it lacks a clear legal framework to facilitate these activities, particularly if they are to take place on un-leased customary land. At present, reforestation requirements are generally included as conditions in timber agreements or timber licences. The **National Forest Policy 2013-2023** sets a target to establish 20,000 hectares of planted forests by 2020.

6.7 Customary rights to forest use

The felling of trees or removal of timber or other forest products by custom owners for sale to other ni-Vanuatu is excluded from the *Forestry Act* and instead is governed by the customary laws relating to the land in question (*Forestry Act*, s .3; **Constitution**, Art. 78(2)).

7 Implementation and enforcement

7.1 Code of Logging Practice 1998

The *Forestry Act* (s. 54) contains mandatory restrictions on commercial forestry operations not to log near watercourses, within 100 metres of the coast, and on land with more than 30 degrees slope. In addition, the Code of Logging Practice 1998 (Vanuatu Code of Logging Practice Order No. 26 of 1998) applies to all commercial forestry operations in Vanuatu and is legally enforceable (s. 43).

7.2 Enforcement powers

It is an offence to carry out commercial forestry operations without the required agreement and/or licence (s. 70). Licences can be cancelled for non-compliance with the terms of the licence or a provision of the Act (s

37(2)). The Director can suspend a licence if there is a serious dispute between the custom owners of land and the conduct of the commercial forestry operations for up to 3 months (s. 38).

Since the islands of Vanuatu are widely scattered, it is very expensive to monitor the operation of sawmills given the limited budget of the Department of Forestry (FAO 2010:18). There are not enough forestry officers to monitor the saw mill operations, and their fuel budget is extremely very limited.

8 Forest carbon rights

The **Constitution** guarantees the right to protection from deprivation of 'property of any description' and of any 'interest or right over property …" (s. 8(1)), a provision which is likely to include carbon rights as a property right attracting compensation. Allocation of carbon rights and benefits under the national REDD+ Scheme will therefore need to be done equitably to avoid breaching this provision.

Vanuatu is the only country in Melanesia which already has a statutory framework for forest carbon rights (***Forestry Rights Registration and Timber Harvest Guarantee Act 2000***), although the Act has never been used.

8.1 Un-leased customary land

Vanuatu does not have any laws which specifically address the ownership of carbon rights on un-leased customary land. Given that nearly 90% of land and forest is owned by customary owners and is governed by customary law, the ownership of carbon rights will be determined by the customary laws relating to the land in question. As customary laws vary from place to place and are not written down, it will be unclear (to outsiders) who owns the forest carbon on any particular area of un-leased customary land without undertaking a thorough study of genealogy and customary law.

8.2 Leased customary land

Where a standard form lease is in place the carbon rights are likely to remain with the lessor (see **Corrin 2012**). However, this situation can be varied under the *Forestry Rights Registration and Timber Harvest Guarantee Act* 2000, which expressly deals with carbon rights, but only on leased land. Under this Act, the carbon rights on leased land can be separated from the underlying land title and granted to a third party. No such rights have yet been granted. The Act follows the carbon rights model used in many states in Australia.

For a comprehensive review of forest carbon rights in Vanuatu (from which the material for this section is drawn) see **Corrin 2012.** This paper was commissioned by SPC/GIZ and identifies how the ownership of carbon rights can be derived from existing law, and includes recommendations for law reform.

9 Land use planning

The main law in Vanuatu for land use planning is the ***Physical Planning Act 1986***. Under this Act, local councils can declare an area to be a 'Physical Planning Area', and can then make a plan which specifies when planning permission is required for certain types of development. 'Development' is defined broadly to include 'the carrying out of … operations in, on, over or under the land', and so theoretically the Act could be used to achieve REDD+ objectives by requiring landowners to obtain local council permission for the keeping of live-stock, agriculture and forestry (s. 1, Sch. 1.6). However, this approach is unlikely to work in practice as the Act is not linked to customary decision-making processes. In the particular context of Vanuatu where customary control of land is very strong and external attempts to control or regulate land use are often ignored, land use plans made under the Act are unlikely to be followed by local communities unless a 'bottom-up' approach to development is adopted.

In any event, since Vanuatu intends to implement REDD+ at a provincial scale using a programmatic approach, it will be important to have a more comprehensive legislative framework in which forest

management is integrated with other land use sectors, such as agriculture. Vanuatu does not yet have any national land use legislation (the *Physical Planning Act* is only focussed on local planning processes and does not allow for land use planning and zoning to be carried out at the provincial or national level), and land has not yet been classified according to functions or land capability classes.

Policies which are currently being developed by the Department of Physical Planning within the Ministry of Lands, in accordance with Vanuatu's ***Land Sector Framework 2009 – 2018***, may provide a useful entry point for REDD+ planning, with the Land Sector Framework focusses 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.

10 Benefit-sharing

Vanuatu does not have legislation which specifically addresses benefit-sharing for REDD+ activities. Where leased land is concerned, Vanuatu already has some experience that it could draw on for distributing benefits to landowners for leased land, although the leasing has been subject to widespread criticism.

Given that Vanuatu intends to adopt a programmatic approach to REDD+ which does not involve cash transactions it may not be necessary to develop a legal framework to manage benefit-sharing at a local level. However, care will need to be taken to ensure that the programmatic approach, which is likely to see REDD+ revenues paid by the national government to provincial governments, or delivered in the form of subsidies, do not breach the Constitutional protection enjoyed by custom landowners against the 'taking' of property (i.e. land, forest and carbon) without fair compensation (Arts. 55(1)(j) and 77). To ensure that this does not occur, Vanuatu's Measurement, Reporting and Verification (MRV) system will need to have the capacity to demonstrate that benefits are being fairly returned to the provinces (and landowners) where the emission reductions and removals are occurring.

Of relevance to benefit-sharing at the local level is a decision by the courts in Vanuatu which held that men and women are equally entitled to a share in the proceeds from land, which customary law did not allow (**Noel v Toto**, [1995] VUSC 3). This is based on the provision in the **Constitution** which prohibits discrimination on the basis of sex (Art. 5). The design of the benefit-sharing system for REDD+ in Vanuatu will need to be consistent with this decision.

11 Protected areas

Protected area laws can play an important role in achieving emission reductions and removals from the forest sector by providing long-term legal protection for forest areas that are set aside for conservation. While there is only about 3% of forest area currently protected, Vanuatu has set a target of actively managing and protecting 30% of Vanuatu's natural forests (**National Forest Policy 2013-2023**:24).

There are three legal mechanisms under which land can be set aside for conservation:

- the National Parks Act,
- the Forestry Act, and
- the Environmental Protection and Conservation Act.

11.1 National Parks Act

While Vanuatu has had a *National Parks Act* [Cap. 224] since 1993 under which areas can be declared as a national park or nature reserve, the conservation area provisions of this Act are not well-suited to the customary land tenure found in Vanuatu and consequently have never been used. There are plans to repeal the Act.

11.2 Conservation Areas (Forestry Act)

Under the Forestry Act, the custom owners of a forest area can request the Minister to declare an area to be a Conservation Area (ss. 50-52). Before making such a declaration, the Minister must consult the relevant local government council and Island Council of Chiefs or Area Council of Chiefs. A declaration can be cancelled by the Minister on the request in writing of the custom owners of the land. Under the Act, commercial forestry operations are prohibited in a Conservation Area, which would provide an element of protection for land which is set aside for REDD+ activities. In practice, the Conservation Area provisions of the *Forestry Act* are not widely used, with many communities preferring to use the conservation mechanism under the Environmental Protection and Conservation Act (Hecht, B., 2014 *pers. comm*).

11.3 Community Conservation Areas (Environmental Protection and Conservation Act)

This Act provides the most workable option for enabling conservation of forests and forest carbon on un-leased customary land. Landowner communities who wish to conserve their land as part of a REDD+ activity can request that their land be declared as a Community Conservation Area under the *Environmental Protection and Conservation Act* (2003). Indeed the Act was amended extensively in 2010, including a provision to clarify that Community Conservation Areas could be created for the specific purpose of providing ecosystem services, including climate mitigation (s. 35(ba)), and it is intended that this provision be used to support REDD+ activities (**National Forest Policy, 2013-2023**:24).

Community Conservation Areas are administered by the Department of Environmental Protection and Conservation. The process for declaring a Community Conservation Area is as follows: the Director can register a site as a Community Conservation Area on the request of an applicant, but only after obtaining the consent of the custom land owners (ss. 35 – 40). Once the boundaries are identified, a management plan is developed, the area is registered in the Environmental Registry, and a certificate of registration is issued to the landowners. The Director can provide technical or financial support to landowners to implement the management plan. A landowner can apply to cancel the registration, or the Director can deregister the area if the management plan is not implemented within the agreed time.

There is currently only one registered conservation area, the Erromango Kauri Reserve (3,205 hectares of Kauri rainforest at South Erromango), with another five areas being considered for registration. The Vatthe Conservation Area, which was established in 1994, was deregistered in 2006 due to a landowner dispute **(see Box 4).**

Box 4: Revocation of the Vatthe Community Conservation Area

The experience in Vatthe Conservation Area provides an important example of the need to resolve underlying land disputes in order to ensure the sustainability of conservation areas.

The Vatthe Conservation Area was established in 1994 as Community Conservation Area under the Environmental Protection and Conservation Act, with a management committee and management plan which included eco-tourism activities. It is located in Big Bay on Santo, the largest island in Vanuatu and covers the only remaining extensive area of alluvial and limestone forest (2,720 hectares). However, shortly after the project was proposed for the area, it was realised that the area had been subject to an on-going land dispute for more than a decade between various claimants, including the Sara and Matantas communities. Although the Supreme Court had previously declared the two communities to be the rightful owners of the area, this result had not been widely accepted. The effect of the conservation project was to re-ignite the simmering land dispute, resulting in loss of some infrastructure for the eco-tourism project. Consequently, Vatthe's Conservation Area status was revoked in 2006. As at early 2014, the area is currently being reconsidered for re-registration.

Source: ***McIntyre 2008****: 147-169; and Hecht, B., 2014 pers. comm.*

12 Safeguards

12.1 Indigenous people's rights

Given that nearly 90% of land is owned by ni-Vanuatu and is regulated by custom (Constitution, Art. 74), this provides a clear legal basis for requiring the free, prior and informed consent (FPIC) of ni-Vanuatu to all REDD+ activities. In all islands of Vanuatu, and at the national level, there is an existing hierarchical system of customary governance by councils of chiefs which could be used to facilitate the FPIC process at local, provincial and national levels (see Box 5).

Box 5: Statutory framework for chieftain system

The Constitution establishes the National Council of Chiefs (referred to as the *Malvatumauri*) whose operation is regulated under the *National Council of Chiefs Act 2006*. The Act also establishes Island Councils of Chiefs, which consist of custom chiefs elected by area councils. The function of an Island Council of Chiefs include resolving disputes according to local custom, and promoting sustainable social and economic development (s. 13). Island Councils do not resolve land disputes, which are determined under the *Customary Land Tribunals Act*.

12.2 Gender inclusion and non-discrimination

Vanuatu has been a party to the *Convention on the Elimination of All Forms of Discrimination against Women* since 1995. In reviewing Vanuatu's compliance with the Convention, the Committee on the Elimination of Discrimination against Women has expressed concern about "the persistence of adverse cultural norms, practices and traditions, as well as patriarchal attitudes and deep-rooted stereotypes, regarding the roles, responsibilities and identities of women and men in all spheres of life … [and noted] that such customs and practices perpetuate discrimination against women, and are reflected in women's disadvantageous and unequal status in many areas, including in public life and decision-making..." (Para. 22, CEDAW/C/VUT/CO/3, 11 June 2007). Members of the Committee have also noted that women are discriminated against because under the Constitution land ownership is governed by customary law (Para. 6, CEDAW/C/SR.779, 18 July 2007).

In accordance with Vanuatu's international treaty obligations, and Vanuatu's **Constitution** which prohibits discrimination on the basis of sex, an important safeguard will be that design and implementation of the national REDD+ scheme must include a gender perspective to ensure that indigenous women can fully participate in the REDD+ decision-making and the FPIC process. In this regard, the courts in Vanuatu have held that customary laws giving men preferential rights over customary land are unconstitutional because they are inconsistent with the provision in the Constitution (Art. 5) that guarantees the right to freedom from discrimination (**Noel v Toto**, [1995] VUSC 3). In that case, the Supreme Court held that men and women were equally entitled to a share in the proceeds from land, which customary law did not allow.

12.3 Environmental impact assessment

Vanuatu has comprehensive legislation which requires the environmental impacts of most development to be assessed, and this could potentially extend to REDD+ projects (***Environmental Protection and Conservation Act 2002***, formerly referred to as the *Environmental Management and Conservation Act* [Cap. 283], ss. 11-28).

Under this Act, all developments (except for residential or custom structures) must be submitted to the Director, who will then undertake a preliminary environmental assessment to determine whether a full environmental impact assessment is required. Projects that cause or are likely to cause significant environment, social and/or custom impacts, will require an EIA. Under these provisions, REDD+ projects or programmes may require an EIA if they are likely to affect important custom resources, such as forest resources. A flowchart showing the steps in the Environmental Impact Assessment process can be found **here**.

12.4 Biodiversity protection

Although Vanuatu has ratified the *Convention on Biological Diversity*, it does not have a comprehensive legislative framework for the protection of biodiversity or vulnerable and threatened species and their habitat.

It does, however, have the following laws which relate to biodiversity:

- Under the ***Forestry Act*** (s. 53), the Minister can prescribe species of plants as protected species which must not be logged unless expressly authorised by a licence.
- ***Wild Bird (Protection) Act*** [Cap. 30] (1962). This Act prohibits the killing, wounding, capturing or taking of eggs of certain listed bird species without a permit to do so, but the Act does not contain any provisions requiring the habitat of the listed species to be protected.
- I***nternational Trade (Fauna and Flora) Act***. This Act enacts the provisions of the Convention on International Trade in Endangered Species, to which Vanuatu is a party.

References

Vanuatu laws and regulations

[Note: The laws of Vanuatu are not readily available. Although some legislation and case law is available in hard copy or online, there is no comprehensive collective available. Some legislation for Vanuatu is available on PacLII, although these laws are not consolidated beyond 2006. Where possible, amending Acts after 2006 are listed below. An alternative source for legislation can be found at FAO LEX, **the legislative database for the FAO Legal Office.** While the author has taken all due care to identify up-to-date legislation, it is not possible to guarantee that all amending and subsidiary legislation has been cited.]

Constitution of the Republic of Vanuatu 1980

Customary Land Tribunals Act [Cap. 271] (Act No. 7 of 2001)

Customary Land Tribunals (Amendment) Act, No. 2 of 2011

Environmental Management and Conservation Act [Cap. 283] (2002): **English / Bislama**

Statute Law (Miscellaneous Provision) Act, No 2 of 2010

Environmental Management and Conservation (Amendment) Act, No 28 of 2010

Environmental Impact Assessment Regulations Order No. 175 of 2011

Environment Impact Assessment Regulations (Amendment) Order No. 102 of 2012

Foreshore Development Act [Cap. 90]

Foreshore Development (Amendment) Act No. 17 of 2013

Forestry Act [Cap. 276] (No. 26 of 2001)

Forestry (Amendment) Amended by Statute Law (Miscellaneous) Provisions Act, No. 17 of 2012

Forestry Regulations [Cap. 276]

Forestry (Control of Mobile Sawmills) Regulations [Cap. 276]

Ban on Log Exports 1993 Forestry (Control of Mobile Sawmills) Order, No 9 of 1996

Forestry (Amendment) and (Control of Sandal Wood Trade and Exports) Order No. 3 of 1997

Forestry (Vanuatu Code of Logging Practice) Order No. 26 of 1998

Forestry (Restriction on Felling of Sandal Wood) Order No. 84 of 1999

Forestry (Setting of Minimum Price for Sandal Wood) Order No. 85 of 1999

Forestry Regulations Order No. 46 of 2003

Forestry (Control of Mobile Sawmills)(Amendment) Order No. 21 of 2004

Forestry (Amendment) Regulations Order No. 41 of 2004

Forestry (Management and Control of Sandalwood Trade and Exports) Amendment Order No. 46 of 2004

Forestry (Amendment) Regulations Order No. 41 of 2004

Forestry (Maximum Annual Quantity for Harvesting Sandalwood)(Repeal) Order No. 24 of 2006

Forestry (Restriction on the Felling of Sandalwood)(Repeal) Order No. 25 of 2006

Forestry (Management and Control of Sandalwood Trade and Exports) Order No. 62 of 2008

Forestry Rights Registration and Timber Harvest Guarantee Act, No. 28 of 2000

Forestry Rights Registration and Timber Harvest Guarantee (Amendment) Act No. 8 of 2012

International Trade (Fauna and Flora) Act [Cap. 210]

International Trade (Fauna and Flora) Regulations [Cap. 210]

Land Leases Act [Cap. 163] (No. 38 of 1989)

Land Leases (Amendment) Act No. 11 of 2004

Land Leases (Amendment) Act No. 35 of 2006

Land Leases (Amendment) Act No. 5 of 2007

Land Leases Prescribed Forms

Land Leases General Rules [Cap. 163]

Land Leases General Rules (Amendment) Order No. 49 of 2009

Full Rental Value of different classes of Leases Order No. 86 of 2009

Land Reform Act [Cap. 123] (1980)

Land Reform (Rural Alienated Land) (Regulations) [Cap. 123]

Mines and Minerals Act [Cap. 190] (No. 11 of 1986)

National Council of Chiefs Act 2006

Physical Planning Act [Cap. 193] (No. 22 of 1986)

National Parks Act [Cap. 224] (1993)

United Nations Convention Against Corruption (Ratification) Act 2010

Wild Bird Protection Act [Cap. 30] (1962)

Papers and reports

Committee on the Elimination of Discrimination against Women: **Consideration of reports submitted by States parties under Article 18 of [CEDAW]: Vanuatu** (30 November 2005), CEDAW/C/VUT/1-3.

Committee on the Elimination of Discrimination against Women, **Concluding comments of the Committee: Vanuatu**, 11 June 2007 (CEDAW/C/VUT/CO/3)

Committee on the Elimination of Discrimination against Women, **Concluding comments of the Committee: Vanuatu**, 18 July 2007 (CEDAW/C/SP.779)

Corrin, J., (2012). **REDD+ and Forest Carbon Rights in Vanuatu: Background Legal Analysis**, SPC/GIZ Project "Climate Protection through Forest Conservation in PICs", Suva.

Daley, L. (2010). "Hijacking development futures: 'Land development' and reform in Vanuatu", in **In Defence of Melanesian Customary Land**, AidWatch, Sydney.

FAO (Food and Agriculture Organization of the United Nations). 2010. **Global Forest Resources Assessment 2010 Country Report: Vanuatu**, Rome.

FAO (Food and Agriculture Organization of the United Nations). 2011. State of the World's Forests, Rome.

Loode, S., Nolan, A., Brown, Dr. A., and Clements, Prof. K. (2008). **Conflict Management Processes for Land-related conflict**, Land Management and Conflict Minimisation Sub-Project 4.1, Pacific Islands Forum Secretariat, Suva, Fiji.

Lunnay, C., Fingleton, J., Mangawai, M., Nalyal, E., and Simo, J. (2007). **Vanuatu Review of National Land Legislation, Policy and Land Administration**, Department of Foreign Affairs and Trade, Australian Government.

McIntyre, M. (2008). **Environmental Causes of Conflict**, Land Management and Conflict Minimisation Sub-Project 2.4, Pacific Islands Forum Secretariat, Suva, Fiji.

Mele, Livo. (2012) "Vanuatu", in **Forests of the Pacific Islands: Foundation for a sustainable future**, (edited by Anne Moorhead), Secretariat of the Pacific Community, pp. 44-50.

MESCAL (2013). **Impacts of Projected Climate Change on Mangrove and Coastal Ecosystems and Community Livelihoods in Solomon Islands, Vanuatu, Fiji, Tonga and Samoa**, published by Mangrove Ecosystems for Climate Change Adaptation and Livelihoods, September 2013.

Stefanova, M., Porter, R., and Nixon, R. (2012). **Towards More Equitable Land Governance in Vanuatu: Ensuring Fair Land Dealings for Customary Groups**, Justice for the Poor Discussion Note, World Bank.

UNOHCHR (2012). **Human Rights in the Pacific – Country Outlines 2012**, Office of the High Commissioner for Human Rights, Regional Office for the Pacific.

World Bank, (2012a). **Vanuatu National Leasing Profile: A Preliminary Analysis**, Briefing Note by Sue Scott, Milena Stefanova, Anna Naupa, and Karaeviti Vurobaravu, Justice for the Poor.

World Bank, (2012b). **Towards More Equitable Land Governance in Vanuatu: Ensuring Fair Land Dealings for Customary Groups**, by Milena Stefanova, Raewyn Porter and Rod Nixon, Justice for the Poor.

Policy documents and action plans

Department of Forests, Vanuatu Code of Logging Practice 1998

Department of Forests, **Vanuatu National Forest Policy 2013 – 2023**. Republic of Vanuatu.

Department of Forests, Vanuatu REDD+ **Readiness Preparation Proposal** (7 October 2013)

Ministry of Lands and Natural Resources, **Land Sector Framework 2009 – 2018.**

Government of Vanuatu (2013. Plan blong ol jenis: long ol loa blong graon folem ol Resolusen blong 2006 Nasonal Lan Samit 2006. (**2013 Land Law Booklet** in Bislama).

Secretariat of the Pacific Community, 2012. **Pacific Islands Regional Policy Framework for REDD-Plus.**

Case law

Noel v Toto, unreported, Supreme Court, Vanuatu, Kent J, 19 April 1995

Terra Holdings Ltd v Sope [2012] VUCA 16.

International treaties, conventions and declarations ratified by Vanuatu

Convention on Biological Diversity (1992 1993)

Convention on the Elimination of All Forms of Discrimination Against Women (1979 1995)

United Nations Framework Convention on Climate Change (1992 1993)

United Nations Convention Against Corruption (2004 2011)