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Papua New Guinea: Legal framework for REDD+



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Papua New Guinea: Legal framework for REDD+

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On behalf of:



of the Federal Republic of Germany

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Executive summary

Papua New Guinea (PNG) is the largest country in the Pacific both in terms of population, estimated at approximately 7.2 million in 2012, and land mass of more than 460,000 km². The natural forests of PNG are extensive, covering approximately 28.7 million hectares, or 63% of the nation's land mass (FAO 2010:9).

As with the other Melanesian countries (Fiji, Solomon Islands and Vanuatu), PNG has a unique land tenure system with 97% of land being held communally as customary land, regulated by customary law. Forest tenure is also strong, with almost all forests being owned by customary owners – a position which is widely recognized under statute. Most people live in rural areas (87%) often in rugged and remote terrain, much of which is not accessible by road, and are highly reliant on subsistence agriculture and rely on the forest for food, water, bush materials for shelter, and medicine.

PNG has opted for a UNFCCC-compliant national approach to REDD+ under which emission reductions and removals from all forests will be measured against a national reference level. While a comprehensive analysis is yet to be done, the main drivers of forest degradation have been identified as logging (48.2%), subsistence agriculture based on shifting cultivation (45.6%), forest fires (4.4%), plantations (1.2%) and mining (0.6%) (Shearman et al 2008:39). Conversion of natural forests under agricultural leases has been identified as the most likely driver of deforestation for the period 2010-2030 (R-PP₂ 33) (see *Section 3.1.3 Leased land (SABLs)*).

PNG does not yet have legislation which specifically deals with the emerging international mechanism for Reducing Emissions from Deforestation and forest Degradation (REDD+) although work to develop a legal framework is underway. As an interim measure, the Office of Climate Change and Development (OCCD) has developed *National REDD+ Project Guidelines* to regulate project-based REDD+ activities which set out an assessment and approval process for REDD+ projects, as well as draft *Guidelines on Free, Prior and Informed Consent (FPIC) for REDD+ in Papua New Guinea* which the PNG Forest Authority is field-testing in its REDD+ pilot project in Central Suau, Milne Bay.

Despite this early activity, it remains unclear as to how PNG intends to develop a comprehensive legal framework for REDD+, as efforts are being hampered by a lack of coordination between the two key government agencies which have shared responsibility for REDD+, namely, the Office of Climate Change and Development and the PNG Forest Authority – with neither having a widely accepted mandate for leadership of REDD+ (see *Section 1.3 Institutional and administrative arrangements*).

While the country is yet to develop its national REDD+ strategy, both project-based approaches and national implementation through national-level policies and programmes are under consideration, although the focus to date has been largely on developing project-based REDD+.

PNG has a complex, well-developed legal system with an independent judiciary on which a national legal framework for REDD+ can be built. It also has a relatively **comprehensive statutory framework for forestry** (*Forestry Act 1991*) which provides the legal basis for forests to be managed sustainably, although implementation and enforcement have been problematic (see *Section 4 Legal framework for forestry*). In collaboration with the PNG Constitutional and Law Reform Commission, the PNG Forest Authority is currently undertaking a review of forest-related policy and legislation which will consider the options for regulating REDD+ activities under the *Forestry Act 1991* (see draft Discussion Paper, LEAF 2014).

This Paper identifies a number of legal mechanisms that could be adopted and strengthened as part of a programme of national-level REDD+ activities:

- Responsibility for forest management in PNG has been decentralised, with **Provincial Forest Management Committees** having significant regulatory functions. The legal framework under which these committees could play an active role in implementing REDD+ activities is thus already largely in place, although to do so they must be supported to develop their capacity (see *Section 4.1 Provincial Forest Management Committees*).

- **Significant potential exists for using provincial and local level laws to facilitate REDD+ activities**, which have rarely been used to date and which should be explored for REDD+. Provinces can make laws in relation to forestry, agroforestry, agriculture and rural development, and local-level government has legislative powers that could be used for local-level land use planning, afforestation and reforestation, and protected areas (see *Box 4: Local-level environment laws in the Almami Rural Local-level Government area, Madang*).
- Timber harvesting practices are reported to be poor, resulting in unnecessary forest degradation. **The out-dated 1996 Logging Code of Practice should be reviewed, with increased support to improve monitoring and enforcement** (see *Section 4.5 Logging Code of Practice*).
- **There is no legal or policy framework in PNG to enable centralised national land use planning**. Development of a Land Use Policy and National Land Use Plan, having regard to PNG's unique customary land tenure, would assist to reduce the multiple pressures on PNGs forests. Improved cooperation and coordination between the various government agencies responsible for agriculture, mining and forestry would also assist (see *Section 6 Land use planning*).

PNG has a number of existing legal mechanisms that are well-placed to support a project-based approach to REDD+, such as:

- **The Forestry Act 1991, which could be used to regulate REDD+ projects, subject to relatively minimal amendments**. For example, clarification is needed to set out when and how new and existing Forest Management Agreements (FMA) can be used to facilitate REDD+ activities, including how matters such as carbon rights and benefit-sharing will be treated under FMAs. A new category of licence could be created under the Act, such as a "REDD+ licence" or "carbon sequestration licence", which could be used to authorise REDD+ projects. In addition, consideration should be given to developing an approval pipeline for community-based REDD+ projects which does not require customary landowners to enter into an FMA with the PNG Forest Authority (see *Section 4 Legal framework for forestry*).
- **Incorporated Land Groups (ILGs)** can be used to help identify landowner groups and land boundaries, facilitate consultation with and consent of customary landowners, and implementing local-level benefit-sharing. However ILGs have often lacked transparency and have been affected by poor governance. Whether ILGs can be used effectively in REDD+ will depend in part on whether important changes made in 2009 to the manner in which ILGs are created and managed can be implemented successfully (see *Section 8.2 Incorporated landowner groups*).

While the right of customary landowners to give or withhold their free, prior and informed consent (FPIC) to activities on their land are generally strong on paper, this does not always translate to strong protection in practice. Common problems include: local communities not having sufficient information to make an informed decision about proposals for forest acquisition and use, and individuals, such as the educated elite from a community purporting to give consent on behalf of their community that they have not properly consulted. Harmonisation is required between the FPIC process set out under the draft *Guidelines on FPIC for REDD+ in PNG* recently prepared by OCCD (version 4, August 2014) and the existing landowner consent processes under the *Forestry Act 1991* (see *Section 9 Free, prior and informed consent*).

In relation to safeguards, the legal framework to ensure gender equity and equality for women in REDD+ activities is particularly poor. Although PNG has ratified the Convention on the Elimination of all Forms of Discrimination against Women, it has not enacted legislation to give effect to its provisions. Discrimination against women at the local-level is not yet prohibited by law. While there is a legal framework which could be used to assess the social and environmental impacts of REDD+ projects (*Environment Act 2000*), this legislation is project-based and does not provide a framework to ensure that gender-differentiated impacts of national-level REDD+ policies and programmes are identified and addressed. The draft *Guidelines on FPIC for REDD+ in PNG* (version 4, August 2014), prepared by the Office of Climate Change and Development, seek to incorporate a gender perspective into every stage of the FPIC process and provide a

strong starting point for incorporating a clear gender perspective into the emerging legal framework for REDD+ (see *Section 10 Safeguards*).

The legal and institutional framework for combating corruption in REDD+ is currently very weak, with transparency in the forest sector being poor. However the PNG Government has recently taken significant steps to improve the country's anti-corruption framework, with proposals to establish a constitutionally-backed Independent Commission against Corruption and proposed Freedom of Information legislation (see *Section 10.3 Anti-corruption framework*).

Unless addressed, the ongoing serious problems of weak institutional capacity and poor governance which have undermined the implementation and enforcement of land and forestry laws in the past threaten to also undermine the effectiveness of the emerging legal framework for REDD+ in PNG. Major improvements are needed in forest governance in PNG if REDD+ is to succeed, including increased training and resourcing of regulatory authorities to enable proper supervision of the sector, effective anti-corruption measures, and a commitment to provide more transparency.

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- **Fiji: Legal Framework for REDD+**, December 2013
- **Solomon Islands: Legal Framework for REDD+**, April 2014
- **Vanuatu: Legal Framework for REDD+**, August 2014

Please note that each reference in this Paper to documents or legislation contains a hotlink to the cited document or law.

¹ Available at: <http://www.spc.int/lrd/spcgiz-qclimate-protection-through-forest-conservation-in-the-pacific-islandsq/reports-and-publications>

Contents

Executive summary	3
Acknowledgements	5
Contents	6
1 Forest sector and REDD+	8
1.1 Drivers of deforestation and forest degradation	8
1.2 Potential REDD+ strategies	9
1.3 Institutional and administrative arrangements.....	10
2 Constitutional framework.....	11
2.1 Provincial and local-level governments.....	11
2.2 Customary land and customary law	12
2.3 Protection of human rights	12
3 Land, forest and carbon tenure	13
3.1 Land tenure	13
3.2 Forest tenure.....	15
3.3 Forest carbon rights	15
4 Legal framework for forestry.....	15
4.1 Provincial Forest Management Committees.....	16
4.2 Forest sector planning.....	16
4.3 Allocation of harvesting rights.....	17
4.4 Plantations, afforestation and reforestation.....	19
4.5 Implementation and enforcement.....	20
5 Dispute resolution framework.....	21
6 Land use planning.....	22
7 Protected area laws.....	22
8 Benefit-sharing	23
8.1 Benefit-sharing provisions in Forest Management Agreements.....	23
8.2 Incorporated landowner groups	23
8.3 Trusts	25
9 Free, prior and informed consent.....	25
9.1 Local level FPIC	25
9.2 FPIC at provincial and national levels.....	26
10 Safeguards	27
10.1 Gender equity and equality.....	27
10.2 Social and environmental impact assessment.....	29
10.3 Anti-corruption framework.....	29
References	32
Legislation.....	32
Papers and reports.....	33
PNG forest sector policies and guidelines.....	35
PNG REDD+ Policy documents and guidelines	35
International treaties, conventions and declarations.....	35

Boxes

Box 1: Central Suau REDD+ Pilot Project	8
Box 2: Are voluntary forest carbon projects still prohibited by the PNG Government?	9
Box 3: PNG's National REDD Project Guidelines.....	10
Box 4: Local-level environment laws in the Almami Rural Local-level Government area, Madang	12
Box 5: Land tenure categories in PNG.....	13
Box 6: Possible amendments to Forestry Act 1991 for REDD+ activities.....	16
Box 7: A brief history of Special Agricultural Business Leases.....	19
Box 8: Model law to enable Local-level Government to facilitate reforestation.....	20
Box 9: PNG and FLEGT	20
Box 10: Investment Promotion Authority and ILGs.....	24
Box 11: Reforms to improve the process for creating and managing Incorporated Land Groups.....	24
Box 12: Maniwa v Malijiwi: Consultation with landowners must be "genuine and meaningful"	26
Box 13: Matrilineal societies and customary land ownership in PNG	27
Box 14: Gender and the draft Guidelines on FPIC for REDD+ in Papua New Guinea	28
Box 15: Could PNG to extend its participation in EITI to include forestry and REDD+?	31

Figures

Figure 1: Levels of government in PNG.....	11
Figure 2: Papua New Guinea's forest resource base.....	18

Tables

Table 1: Summary of protected area laws.....	23
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1 Forest sector and REDD+

Reducing Emissions from Deforestation and forest Degradation (REDD+) is a relatively new mechanism emerging under the United Nations Framework Convention on Climate Change (UNFCCC). PNG has received support for its National REDD+ Programme from a range of multilateral donors and development partners. Since 2011, it has received support from the UN-REDD Programme, a large proportion of which is being used to develop a National Forest Monitoring System and MRV capacity, with assistance from the United Nations Food and Agriculture Organization (PNG 2013 National Programme Annual Report). On 9 December 2013 PNG submitted its final **Readiness Preparation Proposal (R-PP)** to the Forest Carbon Partnership Facility (FCPF). It is expected to enter into a grant agreement with the FCPF by the end of 2014, for which the United Nations Development Programme (UNDP) will be the Delivery Partner.

Capacity to undertake REDD+ activities in PNG is also being strengthened by PNG's participation in the Secretariat of the Pacific Community and Deutsche Gesellschaft für Internationale Zusammenarbeit (SPC/GIZ) Regional Project "*Climate Protection through Forest Conservation in Pacific Island Countries*". Under this project, SPC/GIZ supports both government and non-government personnel engaged in REDD+ in PNG to participate in regional REDD+ capacity building activities. SPC/GIZ is also collaborating with the PNG Forest Authority to design and implement a REDD+ pilot project in Central Suau, Alotau District, Milne Bay (see *Box 1: Central Suau REDD+ Pilot Project*).

PNG has also received support from the Japan International Cooperation Agency and Government of Japan to improve its forest resource monitoring and data management system using remote sensing and GIS/database capabilities (**JICA-PNGFA Project**, March 2011 – March 2014).

Box 1: Central Suau REDD+ Pilot Project

Central Suau, in Milne Bay Province, is home to approximately 6,600 people and has a population growth rate of 2.7%. The REDD+ pilot project covers a total area of 64,000 hectares of which 60% is covered by pristine primary forest, including an extensive mangrove area of nearly 5%. About 18,000 hectares is under shifting cultivation.

The project will seek validation under the Verified Carbon Standard and Climate, Community and Biodiversity Standard based on a logged-to-protected forest methodology.

Source: **Stanley 2013**.

1.1 Drivers of deforestation and forest degradation

Papua New Guinea is the largest country in the Pacific both in terms of population, estimated at approximately 7.2 million in 2012, and in terms of land mass, covering more than 460,000 km² (**R-PP 2013:29**). Its population is growing quickly and is forecast to be 10.2 million in 2030 with an annual estimated growth rate between 2010-2015 of 2.2% (**UNDP 2013:196**). About 87% of people live in rural areas often in rugged and remote terrain, much of which is not accessible by road. Rural communities are highly reliant on subsistence agriculture and rely on the forest for food, water, bush materials for shelter, and medicine.

PNG has many development challenges, ranking only 156 out of 187 countries on UNDP's Human Development Index. It is categorized as a "low human development" country (**UNDP 2013:146**). Although almost all of the population in PNG is indigenous, the country is still quite ethnically diverse with some 815 indigenous languages being spoken. The official languages are English, Tok Pisin (pidgin) and Motu.

Estimates of PNG's annual deforestation rates vary widely from between -0.5% for the 2000-2010 period (**FAO 2011:117**), to -2.6% in 2002 (**Shearman et al 2008:7**). Shearman has estimated (p. 7) that of the commercially accessible forest available in 1972, by 2021, 83% will have been cleared or degraded if current trends continue.

While a comprehensive analysis is yet to be done, the main drivers of forest change have been identified as logging (48.2%), subsistence agriculture based on shifting cultivation (45.6%), forest fires (4.4%), plantations

(1.2%) and mining (0.6%) (Shearman et al 2008:39). Logging in PNG is largely based on large-scale export-oriented logging operations run by foreign companies. In 2011, PNG exported about 3.5 million m³ of logs, with most (about 93.7%) going to China in 2009 (Scheyvens and Lopez Casero 2013:34-36).

Conversion of natural forests to agriculture under agricultural leases has been identified as the most likely driver of deforestation for the period 2010-2030 (R-PP: 33). Large-scale land clearing is permitted under Special Agricultural Business Leases (SABLs) and Forest Clearing Authorities for the purpose of converting land to industrial agricultural, such as oil palm, cocoa and rubber.

In addition to these direct drivers of deforestation and forest degradation, regulation of the forest sector is also affected by corruption and poor governance, which inhibits the effective implementation of laws and policies (ITTO 2007; Babon and Gae 2013, R-PP:49).

1.2 Potential REDD+ strategies

PNG has opted for a UNFCCC-compliant national approach to REDD+ under which emission reductions and removals from all forests will be measured against a national reference level. The country is yet to develop its national REDD+ strategy, with both a programmatic approach (using national programmes and policies) and project-based options being possible. Potential REDD+ strategies that have been proposed (R-PP 2013:56) include:

- Using reduced impact logging
- Secondary forest management
- Afforestation and reforestation
- Encouraging community REDD+ schemes
- Encouraging commercial agriculture development on degraded land.

Possible programmatic REDD+ strategies might include using REDD+ finance to achieve improved governance in the forest sector, such as better implementation of the PNG Logging Code of Practice and increased support for Provincial Forest Management Committees (see Section 4.1 Provincial Forest Management).

The role of market-based forest carbon projects as a permissible REDD+ strategy remains unclear. Clarification is required as to whether such projects are legally permitted given the National Executive Council's decision in 2010 to prohibit voluntary carbon market projects (see Box 2: Are voluntary forest carbon projects still prohibited by the PNG Government?).

Box 2: Are voluntary forest carbon projects still prohibited by the PNG Government?

Uncertainty remains as to whether project-based REDD+ is currently permitted in PNG. In response to reports that carbon project developers were approaching landowners to buy their carbon rights in 2008-2009, the National Executive Council issued a decision prohibiting forest carbon projects aimed at the voluntary market until appropriate regulatory structures could be put in place to protect landowners (NEC Decision 55/2010).

More recently however, the National Executive Council has authorised the PNG Forest Authority and some development partners to develop a number of demonstration activities to explore how REDD+ might work within a national REDD+ framework, testing different approaches. The PNG Forest Authority has been approved to carry out five REDD+ pilot projects (Milne Bay, East Sepik, Eastern Highlands, West New Britain, West Sepik), one of which has now been registered under the Verified Carbon Standard (the April Salumei REDD+ Project, East Sepik: see April Salumei REDD+ Project, VCS Project No. 112).

Notwithstanding these State-sponsored market-based projects, the original NEC decision prohibiting engagement with voluntary carbon projects remains in force. Clarification is required as to the Government's policy regarding carbon trading, and whether or not REDD+ projects are formally supported.

Source: Filer and Wood 2012; R-PP 2013:65.

PNG does not yet have any specific legislation dealing with REDD+ or the approval of REDD+ projects and activities. In the interim, it has prepared the following guidelines:

- *National REDD+ Project Guidelines*, prepared by OCCD, March 2012, which set out an approval process for REDD+ projects (see *Box 3: PNG's National REDD Project Guidelines*).
- *Guidelines on Free, Prior and Informed Consent for REDD+ in Papua New Guinea* (most recent draft, Version 4, August 2014 – not yet available online). These Guidelines have been prepared by OCCD.

This Paper does not analyse these Guidelines but instead seeks to identify the underlying legal framework on which a national REDD+ legal framework might be built.

Box 3: PNG's National REDD Project Guidelines

PNG does not yet have legislation which sets out a process for assessing and approving REDD+ projects. As an interim measure adopted in November 2011, the National Climate Change Committee and National Executive Council endorsed the *PNG National REDD+ Project Guidelines* for the purpose of trialling them in REDD+ demonstration and pilot projects. As such, the Guidelines are not legally binding as they have not been adopted into law and are yet to be fully operationalised.

Step	Approval stage	Document required	Process and approval authority
	Early Feedback stage	Project Concept Note	Proponent discusses draft concept note with Office of Climate Change and Development. Technical Review Panel: decides whether Project Concept Note can be developed further; and gives advice to Proponent on how to conduct FPIC.
	Initial Assessment Stage	Initial Project Design Document	Technical Review Panel decides whether to grant Approval in Principle.
	Final Assessment Stage	Final detailed Project Design Document	National Climate Change Committee (since disbanded by NEC Decision No. 137/2012 on 27 November 2012) decides whether to approve or reject REDD+ project, based on a recommendation from the Technical Review Panel.

The Technical Review Panel has 10 members and is chaired by the Director REDD+ and Mitigation. The members are drawn from government (OCCD REDD+ Director, PNG Forest Authority, Department Agriculture and Livestock, Department of Environment and Conservation); two non-government organisations; two development partners; and two private sector or industry experts.

The Guidelines are intended to apply to all REDD+ projects (landowners, NGOs, private developers or government), whether or not they are occurring under a Forest Management Agreement. However it does not appear that the Guidelines are currently being used by the PNG Forest Authority in its various REDD+ pilot projects, which instead are applying the 33 step process under the Forestry Act 1991 used to acquire timber rights from landowners. Harmonisation is required between these two approaches.

1.3 Institutional and administrative arrangements

The bodies that will play key roles in the development and implementation of REDD+ in PNG are established under a decision of the National Executive Council (Dec. NG 137/2012) and include:

- The **Office of Climate Change and Development (OCCD)**. OCCD is the coordinating entity for all climate change policy in PNG. Through its REDD+ and Mitigation Division, OCCD leads policy development on REDD+ and acts as a coordinating body for all other government agencies engaged with REDD+ who should report to the OCCD regarding the activities they have undertaken. OCCD does not have responsibility for implementing REDD+ programmes.

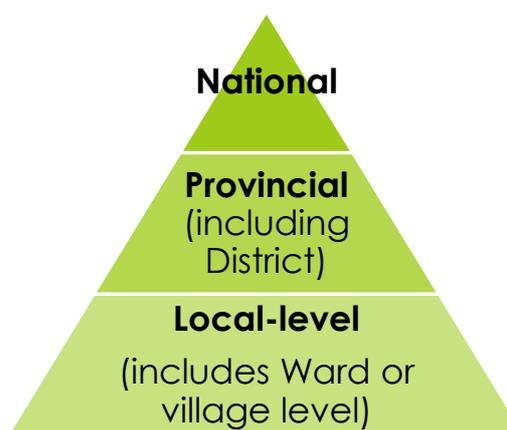


Figure 1: Levels of government in PNG

- The **REDD+ Technical Working Group (TWG)** operates within the OCCD and provides REDD+ technical knowledge and guidance for the implementation of REDD+. Since 2010, the TWG has operated with multi-stakeholder participation, including NGOs, civil society and church representatives.
- The **OCCD Executive Director** reports to the Minister of Forestry and Climate Change, who reports directly to the National Executive Council, the highest decision making body in the country.
- The **PNG Forest Authority (PNGFA)** is responsible for implementing the **Forestry Act 1991** and Regulations. PNGFA is undertaking up to 5 REDD+ pilot projects and has operational responsibility for driving REDD+ initiatives on the ground.
- The **Department of Environment and Conservation** is responsible for assisting with the implementation of environmental safeguards for REDD+.

Although the National Executive Council (Dec. NG 137/2012) has appointed OCCD to take the lead on REDD+ policy development, the division of responsibility for REDD+ between the various government departments remains unclear and is still under discussion within government (**LEAF 2014:16-20**). Efforts to develop a comprehensive legal framework for REDD+ are being hampered by a lack of coordination between the two key government agencies with responsibility for REDD+, namely, the Office of Climate Change and Development, and the PNG Forest Authority – with neither having a widely accepted mandate for leadership of REDD+ (**Babon and Gowae 2013:33**).

2 Constitutional framework

PNG gained political independence from Australia in 1975. It is a parliamentary democracy, modelled on the Westminster system of Great Britain. It has a constitutional monarchy, with the Queen of the United Kingdom as Head of State, governed by a Prime Minister and National Parliament.

2.1 Provincial and local-level governments

In 2006, the **Constitution** was amended to give effect to a policy of decentralisation through the creation of three levels of government: National, Provincial / District; and Local / ward level (see *Figure 1: Levels of government in PNG*) (ss. 187A-G, **Constitution**).² PNG has 22 provinces (19 provinces, plus the National Capital District and the Autonomous Region of Bougainville), all with provincial government assemblies, each led by a governor.

² This Paper does not include a consideration of the Autonomous Region of Bougainville, which operates under a separate constitution and autonomy arrangement from the rest of PNG following an eight year civil conflict.

Since 1998, both Provincial and Local-level Governments have been empowered to make their own laws so long as their laws are not inconsistent with national legislation. For provincial legislatures this includes the power to make laws in relation to forestry, agroforestry, agriculture and rural development. Local-level government has power to make laws relating to the local environment, flora and fauna, and village communities (ss. 40-44, *Organic Law on Provincial Governments and Local-level Governments Act 1998*).

There is thus significant potential for provincial and local-level governments to make their own laws in relation to forest management and REDD+ activities, which could cover things such as small-scale forest use, local-level land use planning, and local-level protected areas (see *Box 4: Local-level environment laws in the Almami Rural Local-level Government area, Madang*).³

Box 4: Local-level environment laws in the Almami Rural Local-level Government area, Madang

Local-level government powers to make laws concerning the local environment laws were used for the first time in PNG by the Almami Rural Local-level Government, Madang Province. The *Environment and Conservation Law 2003*, allows landowners to enter into Conservation Agreements (now called Land Use Management Agreements) with the LLG which sets out how they will protect and manage their natural resources, including areas of conservation value. It is an offence to cut or damage trees, or take or kill fauna, in the area, unless permitted under a management plan: penalty corporation K 10,000, individual K 1,000.

Since the law was adopted, nine of the 22 villages in the Almami LLG have completed land-use management plans and signed conservation agreements covering 18,000 hectares (including 4,360 hectares of core conservation areas).

The initial project to develop the Environment and Conservation Law 2003 was supported by The Nature Conservancy (TNC). In 2007, the project also prepared a model Forest Protection Bill which was written for the Madang Provincial Government. The USAID LEAF program is now supporting the use of the *Environment and Conservation Law 2003* to support REDD+ activities in the Almami LLG.

The local-level laws are now being replicated in other conservation projects on Manus Island, West New Britain (TNC), and in New Ireland Province where the Lavongai Rural Local-level Government has recently adopted the *Marine Environment Management Law 2013* (with support from the Wildlife Conservation Society).

Sources: **Gilmour, Hurahura and Agar** 2013; Brown, S., and Mayer, E. (2009). *Conservation and Sustainable Resource Management in Papua New Guinea: A Clan Based Approach*, The Nature Conservancy (not available online); **Menazza** 2010; and Grace Dom, Wildlife Conservation Society, PNG Programme.

2.2 Customary land and customary law

Contrary to the oft-cited position that the *Constitution* enshrines the right to customary land, the *Constitution* does not in fact specifically state who owns the land. Rather, customary ownership of land is recognised under the *Land Act 1996*, which is governed by customary law (s. 132).

Customary law forms a significant part of the law of PNG. Along with English common law before 1975, custom is recognised as part of the underlying law of PNG (s. 9(f), *Constitution*). Customary law must be applied by the courts so long as the custom is not inconsistent with the *Constitution*, legislation, or with the rights guaranteed by the *Constitution* (see also *Underlying Law Act 2000*, and the *Customs Recognition Act 1963*).

2.3 Protection of human rights

As with many other modern constitutions, the *Constitution* protects a range of human rights (ss. 32-56), including the right to property (s. 53). The State cannot take property except for a public purpose (forestry is declared to be such a purpose: s. 1(3), *Forestry Act 1991*), and if property is taken (such as land, forests or carbon rights), the State must pay fair compensation. In a case in 2014, the National Court ruled that the creation by the State of a Special Agricultural Business Lease over customary land which was granted without

³ It is very difficult to access provincial and local-level legislation. Due to lack of access, this Paper does not include consideration of the effect of provincial laws on the legal framework for REDD+ in PNG.

proper consent from landowners constituted a taking of property in breach of the Constitution (see *Fehler! Verweisquelle konnte nicht gefunden werden.*).

Despite the inclusion of human rights in the Constitution, there is currently no human rights commission in PNG. In 1997 the National Executive Council gave in-principle approval for the establishment of a commission, and a Draft Organic Law on the Establishment of the Human Rights Commission was prepared, but the legislation is yet to be passed (Human Rights Council 2011).

3 Land, forest and carbon tenure

Should PNG wish to adopt a project-based approach to REDD+ as part of its overall REDD+ strategy, it will be necessary to address the legal framework for land, forest and carbon tenure.

Almost all land in PNG (97%) is held under customary tenure, whilst the remaining 3% is alienated land, being either state-owned land or freehold (see *Box 5: Land tenure categories in PNG*). Approximately 99% of forested land in PNG is owned by customary landowners (Scheyvens and Lopez -Casero 2013:17)

Box 5: Land tenure categories in PNG

Land tenure	Proportion of land in PNG			Sub-category	Limitations on title
	%	Hectares	%		
CUSTOMARY LAND	97%	40,400,000	85%	Unregistered customary land	Cannot be sold, leased or otherwise disposed of except to other PNG citizens in accordance with custom.
		5,000,000	12%	Special Agricultural Business Lease (SABLs)	Usually leased for 99 years. Note: moratorium on issue of new leases
		-	Very little	Registered clan land	Title held by Incorporated Land Group
ALIENATED LAND	3%	600,000		State owned	
				Freehold	Can only be owned by a PNG citizen.

Source: Adapted from O'Brien 2012

3.1 Land tenure

3.1.1 Customary land (unregistered)

Customary land is a form of collective land title which is vested communally in a clan or extended family, and is governed by customary law (s. 132, *Land Act 1996*). Customary land is unregistered and has unsurveyed boundaries. Disputes between clans and individuals as to land ownership and land boundaries are common. It can therefore often be difficult (for outsiders) to identify who are the proper landowners of an area, and who are the legitimate representatives of the landowning groups. Where an ILG has already been formed, it may be easier to identify landowners and boundaries, but it is important to note that creation of an ILG is not evidence of, and does not confer, a land title, unless the ILG has taken the additional step of registering its land as Clan Land (see *Section 3.1.2 Registered clan land*).

It is very difficult for customary land to be used for any type of development because under the *Land Act 1996* customary land and customary rights over land are inalienable. Land and interests in land cannot be sold, leased or otherwise disposed of except to other PNG citizens in accordance with custom, and any contract or agreement which seeks to sidestep this provision can be declared void (s. 132). A report commissioned by SPC/GIZ concluded that this provision may present a difficulty for project-based REDD+ because it would prohibit customary landowners from entering into land management agreements which may

restrict their customary right to manage land, unless the project is carried out under an FMA (O'Brien 2012).

There are a limited number of ways that customary land can be “released” for development, with the main options being: use of a Special Agricultural Business Lease; conversion to Registered Clan Land; or conversion to freehold title under the *Land (Tenure Conversion) Act*. In practice, very little customary land has been registered.

3.1.2 Registered clan land

In 2009 Parliament passed a law to allow customary landowners to register their customary land, known as “registered clan land” (Ogle and Tararia, 2010; *Land Registration (Customary Land) (Amendment) Act 2007*). The main purpose of the new law is to enable landowners release certain parts of their customary land for development (*Land Registration (Amendment) Act 2009*) (CLRC Report 2008). Only an incorporated land group (ILG) can apply for registration, following which a certificate of title is issued in the name of the ILG. Once the land has been registered, the land ceases to be bound by customary law (except for the purpose of inheritance) (s. 34N). In 2012 the CLRC produced a **Training Manual** which sets out the steps necessary to register clan land.

Although not designed with REDD+ in mind, registered clan land could be used to facilitate REDD+ on a project basis. Registration would clarify who the landowners are of a particular parcel of land and would also identify land boundaries. However, requiring landowners to form an ILG and to register their customary land as a precondition for participation in REDD+ activities, as has been suggested (R-PP 2013:49), may also have some disadvantages. Registration takes time and money - for example, landowners must pay for survey of land boundaries. More significantly, registration breaks the customary connection that communities have with their land as customary law ceases to apply to the land.

In any event, registration of clan land may not be popular as customary landowners are often concerned that it can be a precursor to losing their land (through mortgage, lease or sale), either intentionally or through fraud and corruption. The creation and operation of registered clan land is still largely untested as there are very few parcels of land that have been registered since the legislation came into force on 1 March 2012.

3.1.3 Leased land (SABLs)

The main way that customary land has been released for development is under a Special Agricultural Business Lease (SABL). SABLs are granted by the Ministry of Lands and Physical Planning (ss. 11 and 102, *Land Act 1996*). The term of a SABL is usually 99 years, during which time all customary rights in the land are suspended (s.11 (2), 102). Most types of agricultural development, such as oil palm, cocoa, coffee and rubber plantations, take place under a SABL.

In 2007 the *Forestry Act 1991* was amended to make it easier for proponents to obtain a Forest Clearing Authority to authorise the clear felling of forests to facilitate the development of large-scale agricultural projects. Since this time, SABLs have been granted over an estimated 12% of customary land, or more than 5 million hectares, mostly to foreign companies or entities for periods of up to 99 years (Numapo 2013:12). In response to the findings of a 2013 Commission of Inquiry into SABLs which was highly critical of the poor administrative process used to grant SABLs, the National Executive Council has recently directed that the provisions of the *Land Act 1996* relating to SABLs be repealed to prevent further SABL dealings (12 June 2014, **Decision No. 184/2014**) (see *Box 7: A brief history of Special Agricultural Business Leases*). If the repeal takes place as directed, SABLs will not be able to be used for REDD+ activities.

In any event, there are strong arguments against allowing the SABL to be used for REDD+. The process set out in the *Land Act 1996* for obtaining the free, prior and informed consent of landowners to a SABL is clearly inadequate, with the Act simply stating that landowner signatures on the lease provides “conclusive evidence” that the State has good title to the land (s. 11(2)). The National Court has recently been highly critical of the process used to obtain the consent of landowners to SABLs (see *Box 12: Maniwa v Malijiwi:*

Consultation with landowners must be "genuine and meaningful"). The suspension of all customary rights in the land also carries significant risks for those local communities who rely on their forests for subsistence. Under the Act, there is no legal requirement for the State or the lessee to pay any rent to the customary landowners (s. 11(3), 102(5)). There are also legal doubts as to whether the SABL mechanism can be used, as under the *Land Act 1996* it would be necessary to establish that the particular REDD+ activity involved constituted an "agriculture or business purpose" (O'Brien 2012).

3.2 Forest tenure

Unlike minerals, oil and petroleum which in PNG are owned by the State (*Mining Act 1992; Oil and Gas Act 1998*), there is no reservation of forest ownership to the State. There is no specific reference in the *Constitution* to ownership of forests, which is determined by legislation and custom (O'Brien 2012). Where customary land is concerned, the forest resource will generally be owned by the customary owners of that land. However, land and forest tenure do not always coincide as most customs in PNG permit multiple groups (individuals, family groups or clans), to hold different rights to use land or forest resources (usufructs), such as the right to establish food gardens or use timber for housing. This means that rights to forest ownership and use can often be fragmented and unclear.

In accordance with the general position that forests are owned by the customary landowners, under the *Forestry Act 1991* the consent of the customary owners of a forest resource is always required before any form of approval for forest use or timber extraction can be granted, with the notable exception of Forest Clearing Authorities (s. 90A(3)(f)).

3.3 Forest carbon rights

PNG does not have legislation which specifically addresses forest carbon rights. In the absence of such legislation, ownership can be derived through existing law. It thus appears clear that if customary landowners own the land and the forests, then by implication they must also own the carbon rights (O'Brien 2012). The position becomes more complex however where multiple groups hold rights to land and forest use, thus potentially fragmenting ownership of carbon rights.

Ownership of carbon rights is also unclear where customary landowners have entered into a Forest Management Agreement with the PNG Forest Authority. Under an FMA, the Forest Authority can acquire timber rights from customary landowners which it can then assign to a logging company under a timber permit (*Forestry Act 1991*, s. 56, 60), but it is unclear whether "timber rights" includes "carbon rights" as REDD+ and carbon rights are not referred to in the Act. The issue is of particular importance given that about 12 million hectares, or 80% of PNG's production forest has already been acquired by the PNG Forest Authority under FMAs, with logging companies holding timber rights over 10 million hectares of these forests (Turia 2010). Legislative clarification is required as to how carbon rights will be dealt with under existing FMAs (including the circumstances under which FMAs must be renegotiated), how new FMAs will address carbon rights, and how carbon rights will be addressed under both new and existing forest use approvals (i.e. timber authorities, timber permits, and forest clearing authorities).

A more detailed consideration of the issues surrounding forest carbon rights can be found in a report commissioned by GIZ in 2012 entitled, "*REDD+ and Forest Carbon Rights in Papua New Guinea*", prepared by S. O'Brien (2012), as well as "*Review of forest and REDD+ related policy and legislation in Papua New Guinea: Draft for Consultation*", published by LEAF (draft 2014).

4 Legal framework for forestry

The main law regulating forest use in PNG is the *Forestry Act 1991*. The Act was introduced to address the widespread problems of poor forest governance in the forest sector that were exposed in the 1989 Barnett Inquiry.

The legal framework established by the *Forestry Act 1991* (with its regulations and supporting guidelines) is generally considered to be quite strong and would provide a clear statutory framework to enable the sustainable management of PNG's forests, if fully implemented and enforced (Scheyvens and Lopez Casero 2013).

However the Act has been weakened over the years by a number of amendments (2000, 2005, twice in 2007, and 2010). There is no consolidated version of the *Forestry Act 1991* available, making analysis of the legislation cumbersome. The various amendments have made it easier for timber concessions to be granted, the most notable of which was the 2007 amendments which enabled Forest Clearing Authorities to be used in conjunction with Special Agricultural Business Leases, thus permitting the large-scale clear felling of primary forest.

The *Forestry Act 1991* does not yet incorporate any specific provisions relating to REDD+, although it could be used to facilitate REDD+ activities with relatively minimal amendments (see, for example, *Box 6: Possible amendments to Forestry Act 1991 for REDD+ activities*). In this regard, the PNG Forest Authority, in collaboration with the PNG Constitutional and Law Reform Commission, OCCD and civil society, is currently undertaking a review of forest-related policy and legislation, including options to regulate REDD+ activities under the *Forestry Act 1991* (see draft Discussion Paper, LEAF 2014).

Box 6: Possible amendments to Forestry Act 1991 for REDD+ activities

To create a clear legal pipeline for authorising project-based REDD+ activities under the *Forestry Act 1991*, consideration should be given to amending the Act to:

- clarify whether, and under what conditions, a Forest Management Agreement can be used for REDD+ activities, setting out how additional matters such as forest carbon rights and benefit-sharing will be treated under Forest Management Agreements
- create a new category of forest permit, such as a "REDD+ licence" or "carbon sequestration licence", identifying which bodies or persons are entitled to hold such a licence, and establishing the conditions that must be met for a REDD+ licence to be granted.

Notwithstanding any legislative changes that might be made to the *Forestry Act 1991*, the main challenge for establishing an effective legal framework for REDD+ in PNG would appear to be that of governance and whether the relevant state agencies will have the administrative capacity to implement a new legal framework.

4.1 Provincial Forest Management Committees

Responsibility for forest management in PNG is decentralised, with each province having a **Provincial Forest Management Committee** whose functions include: assisting the Provincial Government to prepare a provincial forest plan (s. 49); recommending the issue or refusal of timber authorities; overseeing the distribution of benefits due to landowners; and carrying out such other functions as required by law (s. 21-31, *Forestry Act 1991*). The legal framework under which provincial forest management committees could play an active role in implementing REDD+ activities is thus already largely in place, although to do so they must be supported to develop their capacity, as is recognised in PNG's R-PP (2013:17).

4.2 Forest sector planning

PNG already has a legal mechanism which would enable it to undertake national and provincial level forest sector planning for REDD+ activities, and to set a sustainable harvest yield. The *Forestry Act 1991* requires the PNG Forest Authority to prepare and maintain a National Forest Plan to guide how National and Provincial Governments intend to manage and use the country's forest resource (s. 47). Each Provincial Government must also prepare its own Provincial Forest Plan in conformity with the National Forestry Development Guidelines (s. 49, *Forestry Act 1991*).

In 2013 the PNG Forest Authority prepared a **draft National Forest Plan** to replace the existing 2008 National Forest Plan. The 2013 draft Plan includes a brief reference to climate change and REDD+ (para. 10.5), and notes that the PNG Forest Authority shall, among other things:

- “identify areas within the country where possible to initiate REDD+ ... projects”. It would be of assistance if the draft plan gave further detail on how this will be done, including the criteria for identifying potential REDD+ project areas, as well as a mechanism to avoid the potential for REDD+ activities (which require forest conservation) and timber harvesting operations to be approved in the same land area.
- “encourage landowners and the timber industries (sic) to undertake afforestation and reforestation activities on grassland and degraded sites”. Again, further detail is required in the draft Plan on how this strategy will be operationalised.

The *Forestry Act 1991* also contains a legal mechanism for setting a sustainable harvest yield (s. 47(2) (c)). To ensure that forests are harvested on a sustained yield basis, the Act requires the National Forest Board to prepare an annual statement of the allowable cut volume from each province for the following year.

4.3 Allocation of harvesting rights

Commercial harvesting of timber is regulated under the *Forestry Act 1991*. Approval is not required for small scale harvesting of timber of less than 500 m³/year for non-commercial use (s. 2, definition of ‘forest industry participant’, *Forestry Act 1991*).

There are four types of forest use approval under the *Forestry Act 1991*:

	Type of approval	Land and forest tenure	Purpose	Comments on process
1.	Timber licence	Customary land	Short term logging (up to 12 months)	Simple.
2.	Timber authority	Customary land	Small-scale clearing up to 5,000 m ³ /year; or agriculture under 50 ha; or road less than 12.5 km	Simple. Can be granted without need for Development Options Study, advertisement or project agreement as for FMA/timber permit
3.	Timber permit	Forest Management Agreement	Large scale selective logging	Complex 33-step process involving consultation with government agencies and public hearings for securing landowner consent
4.	Forest Clearing Authority	Special agricultural Business Lease (SABL)	Large scale clear-felling and conversion of natural forest to agriculture (more than 50 ha)	Less rigorous process than required for FMA/timber permit. Since 2007, landowner consent no longer required. Does not need to comply with Logging Code of Practice.

4.3.1 Timber authorities

Timber authorities are used for small scale clearing of up to 5,000 m³, agricultural developments up to 50 ha, or roads of less than 12.5 km (s. 87). The proposed use must be consistent with provincial development guidelines. Timber authorities are granted by the Chairman of the relevant Provincial Forest Management Committee.

4.3.2 Timber permits and Forest Management Agreements

Most large scale logging concessions are approved under timber permits based on Forest Management Agreements. Under the Act, the PNG Forest Authority can acquire the timber rights to an area by entering into a Forest Management Agreement with the customary owners of the forest resource (s. 56). Landowner consent is usually obtained by creating one or more Incorporated Land Groups (ILGs) who sign the FMA (s. 57). The PNG Forest Authority then acts as the “middle man” and, after consultation with the relevant Provincial Forest Management Committee and landowners, assigns those rights to a third party under a timber permit (ss. 60-77). The term of an FMA is generally 50 years with timber permits usually being issued for 35 years.

Approximately 12 million hectares, or 80% of production forest, has already been acquired by the PNG Forest Authority under Forest Management Agreements (see *Figure 2: Papua New Guinea's forest resource base*). There has been widespread criticism of the manner in which the allocation of timber rights takes place in PNG, including the process for obtaining landowner consent. For example, in 2007, ITTO observed that the ILG and FMA mechanism “appears to be functioning with serious structural flaws” due to ILGs having undefined land boundaries, a lack of pre-informed consent, and a failure by government agencies to follow statutory procedures (ITTO 2007:11-13).

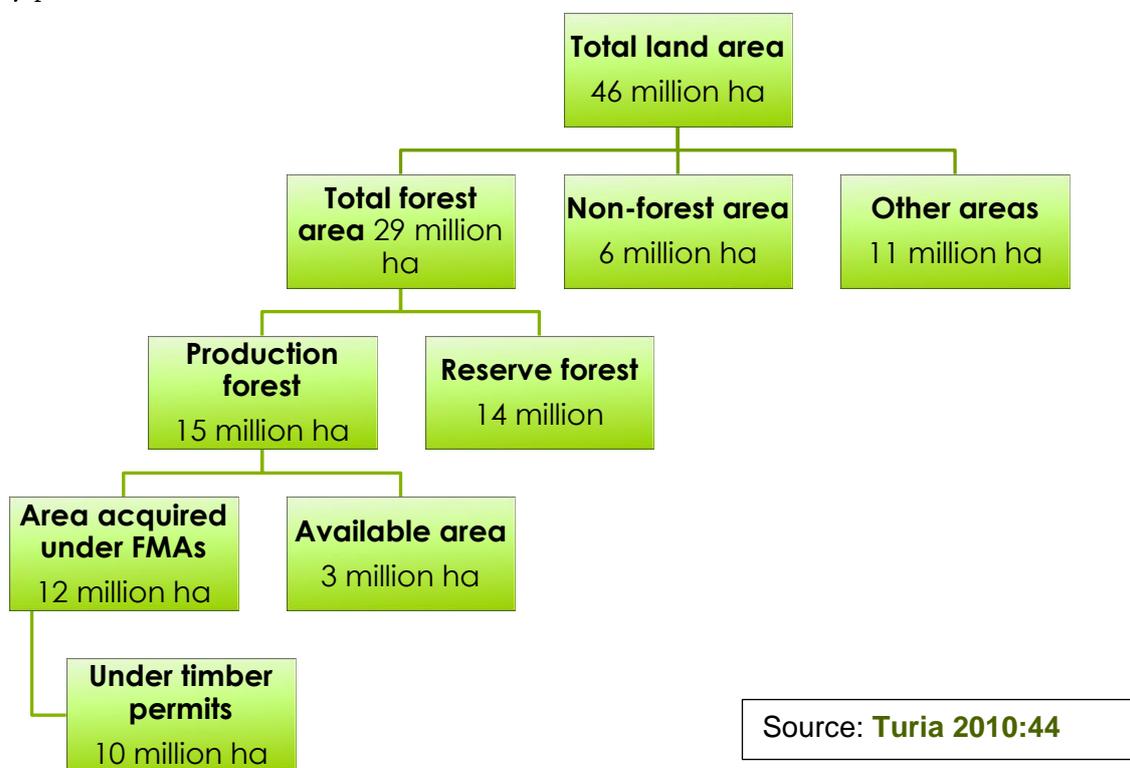


Figure 2: Papua New Guinea's forest resource base

Under the *Forestry Act 1991*, an FMA can be used to facilitate a broad range of uses including “other forestry related land use options”, which could presumably cover project-based REDD+ activities if desired (s. 58; clause 14 Forest Management Agreement standard form). This approach is currently being trialled by the PNG Forest Authority in its April Salumei REDD+ Pilot Project covering an area of 603,713 hectares (*April Salumei REDD+ Project, VCS Project No. 112*).

However, where an FMA is already in existence, the FMA would presumably need to be renegotiated in accordance with the principles of free, prior and informed consent to reflect any new arrangements on permitted land use and benefit-sharing, etc. Renegotiation of an FMA may not be possible where a timber permit has already been granted as the timber rights will have already been assigned to a third party, unless the timber permit is surrendered.

Although the emerging framework for project-based REDD+ in PNG appears to be developing based on the use of FMAs, consideration should also be given to developing a clear approval pipeline by which landowners can undertake REDD+ activities without the need to enter into an FMA with the PNG Forest Authority, but which is nevertheless clearly authorised under some form of REDD+ permit or approval (see *Box 6: Possible amendments to Forestry Act 1991 for REDD+ activities*).

4.3.3 Forest Clearing Authorities and SABLs

Forest Clearing Authorities (FCAs) were introduced in 2000 to cater specifically for the SABL scheme. FCAs allow the large scale clearing of natural forest for agricultural projects (such as oil palm) and road construction

(s. 90A-D). FCAs are issued by the PNG Forest Authority once a SABL is in place, which are granted by the Department of Lands and Physical Planning. A FCA can be granted without the need to follow the complex 33-step process, involving extensive consultations with government agencies and public hearings to obtain landowner consent, required for a Forest Management Agreement and timber permit. FCAs are exempt from the Logging Code of Conduct (Reg. 241, **Forestry Regulation 1998**). In 2007, **amendments** to the *Forestry Act 1991* removed the requirement for landowner consent, allowing consent to be given instead by the National Forest Board or SABL lessee. The 2013 Commission of Inquiry into SABLs recommended that this provision be repealed immediately as it fails to safeguard the interests and ownership rights of landowners (**Numapo 2013:256**).

The Forest Clearing Authority and SABL mechanism has been widely discredited over the past decade resulting in a recent decision by the National Executive Council that no more SABLs or FCAs be issued (see *Box 7: A brief history of Special Agricultural Business Leases*).

Box 7: A brief history of Special Agricultural Business Leases

The Special Agricultural Business Lease (SABL) mechanism was created in 1996 to facilitate the development and harvesting of commercial crops such as cocoa, coffee, rubber and oil palm on customary land. SABLs were intended to provide certainty of land tenure for an agricultural investor, also allowing customary landowners to raise finance for an agricultural activity by using the lease as security.

From 2003 – 2011, SABLs were granted over more than 5 million hectares of customary land, representing 11% of the country's total land area and 16% of its commercially accessible forests. By 2012, 31% of all of PNG's log exports from natural forests (almost 2.5 million cubic metres) were originating from forest conversion under SABLs, representing a 25% increase in total log exports between 2007 and 2011. In March 2011, academics raised concerns over the rapid rise in the use of SABLs (**Filer 2011**), and whether landowners had given their free, prior and informed consent to these leases which effectively alienated their land for 99 years. They argued that SABLs were being used to clear-fell forests on the pretext of carrying out agroforestry projects.

In July 2011, Acting Prime Minister Sam Abal called a Commission of Inquiry to investigate and report on whether proper legal processes had been followed in the granting of 42 SABLs, issuing an immediate moratorium prohibiting the granting of any new SABLs, FCAs or Environment Permits pending the outcome of the Inquiry.

In June 2013 the Inquiry found that of the 42 SABLs it examined, only four had secured proper landowner consent and had a viable agricultural project being undertaken. The Inquiry found "widespread abuse, fraud, lack of coordination between agencies of government [including the Department of Lands and Physical Planning, Department of Agriculture and Livestock, PNG Forest Authority] failures and incompetence of government officials to ensure compliance, accountability and transparency within the SABL process ... [and that] statutory compliance with respect to process and procedures and effective monitoring and oversight [was] seriously lacking (**Numapo 2013:235**). Of the 46 SABLs reviewed, the Inquiry recommended that 30 of them be revoked, surrendered or suspended.

On 12 June 2014, the National Executive Council (**NEC**) confirmed that no further SABLs or FCAs should be issued, and approved action to revoke those SABLs that the Commission of Inquiry recommended should be revoked (**Decision No. 184/2014**). However despite this NEC decision, as at August 2014, it is reported that the defective SABLs and FCAs are yet to be cancelled and that logging is continuing to take place under them (**PNG Exposed blog, 1 August 2014**).

Sources: **Lawson 2014**; **Filer 2011**; **Numapo 2013**; and **Statement by the Prime Minister Hon. Peter O'Neill on the Report on the Commission of Inquiry into SABLs**

4.4 Plantations, afforestation and reforestation

Although one of the objectives of PNG's 2008 National Forest Policy and the National Forest Development Guidelines is to achieve forest resource replacement through the establishment of forest plantations, the area of planted forest remains low, at about 62,000 hectares. A significant constraint to the development of an industrial scale plantation sector has been the difficulty in securing long term land tenure where customary land is concerned. If the recent decision of the National Executive Council in June 2014 (**Decision No.**

184/2014) to abolish the SABL mechanism is implemented, SABLs will no longer be available to secure long term land tenure for plantations.

A legal mechanism which does not appear to have been used to date to support afforestation and reforestation is to enable local-level governments to facilitate these activities using their power to make laws regarding the local environment (s. 44(p), *Organic Law on Provincial Government and Local-level Government 1998*). A model law to permit this was drafted for use in the Almami LLG, Madang Province (see *Fehler! Verweisquelle konnte nicht gefunden werden.*).

Box 8: Model law to enable Local-level Government to facilitate reforestation

In 2002, a model law was drafted for the Almami Rural Local-level Government to enable it to facilitate reforestation activities in its local government area, although it does not appear that the law was ever passed. Under the draft Environment Law 2002, the LLG can initiate reforestation programmes in areas which are degraded, subject to obtaining the consent of traditional landowners.

The draft law also allows the LLG to enter into written agreements with traditional landowners to determine how any benefits which are generated by the harvesting of timber on maturity will be distributed.

Source: Environment Law 2002, Almami Rural Local-level Government (not available online).

4.5 Implementation and enforcement

4.5.1 Forest governance

Despite PNG's comprehensive forestry laws, implementation and enforcement of these laws have often been poor (ITTO 2007, ODI 2007, Scheyvens and Lopez Casero 2013, Babon and Gowae 2013:21). Common problems have been identified as: a failure to follow due process in the acquisition, allocation and extension of timber rights; shortcomings in the landowner consent process, because ILGs are not properly formed or managed, landowners lack sufficient information to make an informed decision, or the consent process is driven by a small group of elites who have vested interests in a development and thus purport to give consent on behalf of their community; and a failure by logging companies to deliver community benefits such as clinics and roads as required under Development Agreements (Scheyvens and Lopez Casero 2013:39). A recent survey of forestry experts in PNG conducted by Chatham House found that corruption was felt to be the most common form of illegality in the forest sector (Lawson 2014:20).

The *Forestry Act 1991* contains a wide range of enforcement powers, including power to suspend or cancel licences and the power to impose fines of up to Kina 1 million or imprisonment of up to 5 years for breaching an approval (s.122). Detection of breaches of the *Forestry Act 1991*, the Code of Logging or timber permit conditions, can often be difficult due to the remoteness of many logging sites and because of the size of many concessions, which average 100,000 hectares (Turia 2010:146). Prosecution of breaches of approvals or the Act are rare, with most prosecution cases being settled out-of-court, primarily to avoid prolonged court battles (Turia 2010:147).

Unless addressed, the serious problems which currently undermine the implementation and enforcement of forestry laws also threaten to undermine the effectiveness of any legal framework for REDD+. Major improvements are needed in forest governance in PNG if REDD+ is to succeed, including an increase in resourcing of regulatory authorities to enable proper supervision of the sector, effective anti-corruption measures, and an improved preparedness by regulatory authorities to share information to provide transparency in the forest sector (see *Section 10.3 Anti-corruption framework*).

Box 9: PNG and FLEGT

PNG has not been active in the European Union's Forest Law Enforcement, Governance and Trade initiative to date but has expressed initial interest in commencing negotiations on developing a Voluntary Partnership Agreement.

4.5.2 Logging Code of Practice

Timber harvesting operations are regulated under the **1996 PNG Logging Code of Practice** which sets minimum standards for buffer zones, forest roads and felling techniques, including a requirement for annual logging plans and set up plans. The Code is legally enforceable (Reg. 243, **Forestry Regulation 1998**). It is noted that the Code does not apply to logging which takes place under a Forest Clearing Authority (Reg. 241).

Despite the Code, timber harvesting practices are reported to be poor, often resulting in extensive collateral damage and damage caused by poorly constructed roads, leading to increased forest degradation through loss of forest canopy causing increased risk of fire and allowing weed invasion, such as *Merremia* sp. The Code does not require revegetation and there is virtually no restoration of damaged land or rehabilitation or replating of forest (**Shearman et al 2008:51**).

A review of the Code commissioned by the PNG Forest Authority in 2013 noted that the Code, which was introduced in 1996, is overdue for review and requires updating. Improvements are required in its technical content, particularly in the areas of silviculture (including forest regeneration), the avoidance of damage to residual stand, road construction, catchment management and conservation of biodiversity, e.g. through reduced frequency of timber harvests (**Wilkinson 2013**).

Implementation and enforcement of the Code has been constrained by the limited capacity of the PNG Forest Authority (and its operational arm, the National Forest Service) to undertake monitoring and enforcement activities. These institutions are severely under-resourced and often lack the human resources and equipment (e.g. vehicles) necessary to carry out their tasks over large and remote areas, with officers sometimes having to rely on logging companies to provide transport, communications and accommodation (**ITTO 2007:14, R-PP 2013:16**). There has been no general training on the Code since it was first introduced in 1996 (**Wilkinson 2013:37**).

Improvements to the **Logging Code of Practice**, as well as training programmes and improved monitoring procedures and implementation, could constitute an important REDD+ activity to assist in reducing forest degradation.

5 Dispute resolution framework

Most local disputes are dealt with informally at the village level, either by local chiefs or leaders according to custom, or in some cases the church will help to resolve disputes. Village Courts also operate throughout PNG and generally provide an accessible and economical means of resolving local level disputes (**Village Courts Act 1989**). Village Courts apply customary law which has precedence over all other law except the **Constitution** (s. 57). Village Courts attempt to reach a settlement through mediation before exercising their formal jurisdiction.

Disputes over customary land are common in PNG, particularly if major development projects are proposed (**Babon and Gowae 2013:21**). Where disputes relate to customary land, such as disputes over interests in customary land or customary land boundaries, these are dealt with under a separate framework established under the **Land Disputes Settlement Act 1975** (s. 3). This Act adopts an informal approach, providing for disputes to be resolved initially through on-site hearings which are attended by a Land Mediator. If the dispute is not resolved, the matter can be appealed to a Local Land Court. There is a final avenue of appeal to a Provincial Land Court. In practice, there are often long delays in resolving land disputes, with land mediators and the court system often not receiving adequate financial support to carry out their tasks.

Disputes between members of an Incorporated Land Group concerning property or the management of revenues are dealt with under a different process. On registration, ILGs must nominate their preferred dispute settlement authority (a person, position or office) and can require that person to consult with elders (*Land*

Groups Incorporation Act 1974, as amended in 2009). If the authority cannot resolve the matter, it can be referred to a Local Court or Village Court.

6 Land use planning

A legal framework for national land use planning which allows for the integration of sectoral policies such as agriculture, forestry, urban development areas and protected areas can play an important role in assisting a country to successfully undertake REDD+ activities.

At present, there is no legal or policy framework in PNG to enable centralised national land use planning. PNG lacks a Land Use Policy and National Land Use Plan. Furthermore, coordination between the various government agencies responsible for regulating different land uses, such as agriculture, mining and forestry, is particularly poor, creating significant challenges for forest conservation (LEAF 2014:31). In this regard, the 2013 Commission of Inquiry into Special Agricultural Business Leases highlighted the lack of consultation, dialogue and co-operation between the government agencies responsible for SABLs (including Department of Lands and Physical Planning, Department of Agriculture and Livestock, PNG Forest Authority and Department of Environment and Conservation), noting that they “were operating in total isolation from each other”. A key recommendation of the Inquiry was that the government urgently develop an overarching National Land Policy, to be followed by legislation to give effect to it (Commission of Inquiry 2013:5, 253).

In designing the most appropriate legal mechanism to facilitate land use planning it is important to appreciate the nature of customary land tenure in PNG – where local control of land is paramount. In this context, a bottom-up approach to land use planning is likely to be the most effective in which land use planning is initiated at the clan/community level, identify how their land will be allocated between various land uses, such as forestry, commercial agriculture and subsistence agriculture. The process should be guided by national legislation which sets out criteria for prioritising resource development.

There is a legal mechanism already in place which permits Local-level Governments to regulate village-level land use planning (s. 44(1), *Organic Law on Provincial and Local-level Government 1998*.) The power has been successfully used in the Almami LLG in Madang Province (see *Box 4: Local-level environment laws in the Almami Rural Local-level Government area, Madang*).

7 Protected area laws

Protected area laws can play an important role in establishing an effective national legal framework for REDD+ by providing long-term legal protection for forest areas which are set aside for conservation. However PNG does not yet have comprehensive legislation which establishes a national protected areas system, and at present there is no agreed legal definition of protected areas. The Department of Environment and Conservation has recently commissioned an options paper to assist it to draft a policy to establish a national protected areas network (Leverington *et al.* 2013, *PNG Policy on Protected Areas: Options Paper*).

PNG currently has about 52 protected areas, covering approximately 101,722 hectares, or 4% of its land area (Leverington *et al.* 2013:64), and has a target of having 20% of land and coastal waters under some form of conservation management.

There are three existing laws under which protected areas can be created (

Table 1: Summary of protected area laws). All protected areas legislation is administered by the Department of Environment and Conservation.

Table 1: Summary of protected area laws

	Legislation	Allows for community management?	Observations
1.	National Parks Act 1982	No. Land transferred to the state.	Loss of land to community
2.	Fauna (Protection and Control) Act 1966	Yes, through a Wildlife Management Committee which is responsible for administering a Wildlife Management Area.	Only protects declared fauna, not flora. Not useful for regulating broader land use.
3.	Conservation Areas Act 1978	Yes, land managed by a management committee, but Minister retains ultimate control over area.	Only one area declared: YUS

Shearman has observed that these formal conservation mechanisms have not been effective in protecting the forest resource, with subsistence activities and logging occurring in some protected areas (Shearman et al 2008:93). The main shortcoming with all of these laws is that customary land is effectively alienated as control over the land is largely transferred to the State. This may make using them an unattractive option for many local communities. Such top-down approaches are not conducive to facilitating Community-based Forest Management, which the PNG R-PP (p. 42) recognises as an important REDD+ strategy.

A new legal mechanism which is being explored in some areas, and which could work for community-based REDD+ activities, is the potential to use local-level laws to establish village-level protected areas: see Box 4: *Local-level environment laws in the Almami Rural Local-level Government area, Madang*. Fehler! Verweisquelle konnte nicht gefunden werden.. As environmental functions are likely to be increasingly decentralised, it appears that the use of local-level laws to regulate environmental matters may increase, particularly given that the Department of Environment and Conservation will soon adopt a more limited regulatory role when it transforms into the Conservation and Environment Protection Authority.

8 Benefit-sharing

PNG does not yet have designated legislation to regulate how international REDD+ funds will be managed at the national level, or for distributing REDD+ benefits at the sub-national level. Some of the existing legal mechanisms which could be used to distribute benefits to landowners are described below.

8.1 Benefit-sharing provisions in Forest Management Agreements

The *Forestry Act 1991* allows the PNG Forest Authority to purchase the timber rights in forests from customary landowners under a Forest Management Agreement (see Section 4.3.2 *Timber permits and Forest Management Agreements*). Each FMA must “specify the monetary and other benefits, if any, to be received by the customary owners in consideration for the rights granted...”, with benefits being paid to ILGs or landowner companies (s. 58(b), *Forestry Act 1991*). Where REDD+ activities take place under an FMA, it would thus be possible to use an FMA to facilitate REDD+ payments to local communities.

8.2 Incorporated landowner groups

Under the *Land Groups Incorporation Act 1974*, customary landowners can form an incorporated body which allows them to enter into agreements and contracts concerning their land. Incorporated Land Groups (ILGs) are the main mechanism used to facilitate landowner consent to for resource development projects, and to distribute benefits to landowners from forestry, oil and mining projects.

However ILGs have not always operated in an open and transparent manner. Complaints have frequently been made that benefits are not distributed fairly within ILGs, often being captured by the educated or elite members of clans. A recent report by Transparency International on corruption risks for REDD+ in PNG

identified corrupt behaviour in the creation and management of ILGs as being one of the highest corruption risks (Nakmai 2013).

Box 10: Investment Promotion Authority and ILGs

On 12 June 2014, the National Executive Council (**Decision No. 184/2014**) directed that responsibility for administering ILGs be transferred from the Department of Lands and Physical Planning to the Investment Promotion Authority (IPA), a statutory body that is responsible for promoting and facilitating investment in Papua New Guinea (*Investment Promotion Act 1992*). The reason for this decision to transfer responsibility is not clear but may be aimed at assisting landowners to cooperate more closely with government to enter into joint ventures for large scale agriculture developments.

ILGs are likely to play an important role in REDD+ implementation as they provide a mechanism for facilitating landowner consent and benefit-sharing. If responsibility is transferred to the IPA, adequate funding support will need to be provided to ensure the IPA has capacity to carry out its newly acquired responsibilities.

The *Land Groups Incorporation Act 1974* established a very lax process for incorporation, and the process has been poorly administered by the Department of Lands and Physical Planning. Suggestions have been made that the practice of giving bribes to facilitate ILG registration is widespread (Nakmai 2013:12). In some instances, the PNG Forest Authority/National Forest Service, and even logging companies, have taken on the responsibility of incorporating ILGs to facilitate the signing of FMAs because of a lack of capacity within the Department of Lands and Physical Planning – a practice of some concern given the potential for conflict of interest (ODI 2007:17; Scheyvens and Lopez Casero 2013:39–40). In June 2014 the National Executive Council directed that administrative responsibility for ILGs be transferred to the Investment Promotion Authority, although as at September 2014 the transfer had not yet taken place (see *Box 10: Investment Promotion Authority and ILGs*).

In an attempt to remedy these problems, in 2009 the PNG Parliament passed a raft of reforms to the *Land Groups Incorporation Act 1974* intended to tighten the requirements for incorporation and to improve the management of ILGs (see *Box 11: Reforms to improve the process for creating and managing Incorporated Land Groups Fehler! Verweisquelle konnte nicht gefunden werden.*).

ILGs are very familiar to people in PNG and could potentially be used to distribute REDD+ revenues (with or without a Forest Management Agreement being in place). Benefit-sharing under an FMA is currently being trialled by the PNGFA in its April Salumei REDD+ Pilot Project (**April Salumei REDD+ Project, VCS Project No. 112**).

Transparent and equitable benefit-sharing through ILGs will be largely contingent upon whether adequate government financing, training and support are provided to the government agency responsible for administering ILGs. Adequate support will also need to be given to the members of ILG Management Committees to assist them to fulfil their new management responsibilities.

Box 11: Reforms to improve the process for creating and managing Incorporated Land Groups

In 2009 the PNG Parliament introduced new requirements to improve the process by which ILGs are created and managed (the *Land Groups Incorporation (Amendment) Act 2009*). These changes came into force in 2012. The main changes are summarised below.

All members of an ILG must now be clearly identified

In an attempt to reduce the proliferation of ILGs, it is no longer possible for a person to be a member of more than one ILG (s. 5(2)). An application for incorporation must now contain a list of all proposed members of the ILG (which was previously optional), and must include the original birth certificate (or a certified copy) of each person who claims membership of the group (s. 5(2) (c)).

Land boundaries must now be clearly identified

The ILG must also declare all the land over which it claims ownership by providing a sketch of the boundaries of the land (not previously required), which must highlight any areas of dispute (s. 5(2) (e)). This is a significant improvement on the previous arrangements which did not require an ILG to identify its land boundaries, thus giving rise to many disputes. While boundaries must be *generally* identified in an application, the creation of an ILG *does not* provide evidence of land ownership, which can only be achieved by the ILG

taking the further (voluntary) step of registering customary land as Clan Land under the *Land Registration (Amendment) Act 2009*.

New management obligations for ILGs

The Management Committee of each ILG must now:

- hold an Annual General Meeting each year
- have between six to ten people on its Management Committee, at least two of whom must be women
- have at least 60 percent of members in attendance at meetings to form a quorum in order for business to be transacted, with at least 10 percent present being of the other gender
- keep bank accounts, which must be open to inspection at all times by the Registrar, the dispute-settlement authority, or any ILG member
- maintain an up to date register of its members
- comply with a detailed Code of Conduct for members of the Management Committee, which expressly prohibits “self dealings”.

The new Act provides for 5-year transition period starting from 1 March 2012. During this period existing ILGs can choose to reapply for incorporation in accordance with the new provisions, failing which they will cease to exist in 2017 at the expiry of the five year period (s. 22).

Source: Ogle and Tararia 2010; CLRC 2012 Training Manual.

8.3 Trusts

A further option for distribution of REDD+ benefits which has not been widely discussed to date is the possibility of using a trust structure, either private or statutory. Trusts are widely used in PNG in the mining and petroleum sectors to distribute immediate benefits to affected communities while retaining some investments for future generations: e.g. *Oil and Gas Act 1998*. The success or failure of these trusts is generally attributable to whether the trustees effectively discharge their duties to manage the funds in the trust (O’Brien 2012). A trust to manage REDD+ benefits could be operated at the local level, and if successful, could be scaled up to the provincial or national level.

9 Free, prior and informed consent

9.1 Local level FPIC

As almost all forests (99%) in PNG are located on customary land (Scheyvens and Lopez Casero 2013), the free, prior, informed consent (FPIC) of the customary owners of land and forest will be required as both a legal and practical requirement for most project-based REDD+ activities.

PNG does not have overarching legislation which guides FPIC processes for obtaining landowner consent at the local level, and the term “FPIC” does not yet appear in any legislation. Rather, specific consent requirements have been incorporated into sectoral legislation, such as the *Oil and Gas Act 1998*, the *Land Act 1996* (for SABLs), and the *Forestry Act 1991*. The *Forestry Act* requires landowner consent for the PNG Forest Authority to acquire timber rights under a Forest Management Agreement and for all forest use approvals (with the notable exception of Forest Clearing Authorities which under controversial amendments made in 2007 allow consent to be given instead by the National Forest Board or SABL lessee (s. 90A(3)(f)).

While the right of customary landowners to give or withhold their free, prior and informed consent (FPIC) to activities on their land are generally strong on paper, in practice protection is weak. Common problems include: local communities not having sufficient information to make an informed decision about logging proposals; and individuals, such as the educated elite from a community (sometimes referred to as “big men”), purporting to give consent on behalf of their community that they have not properly consulted or purporting to represent communities that they do not legitimately represent (ITTO 2007:16; ODI 2007).

In a recent case involving similar problems, the National Court held that consultation must be “genuine and meaningful” in order for landowner consent to be valid (see *Box 12: Maniwa v Malijiwi: Consultation with*

landowners must be "genuine and meaningful" (*Fehler! Verweisquelle konnte nicht gefunden werden.*), an approach which is consistent with the emerging international approach to FPIC (UN-REDD 2013a).

Box 12: *Maniwa v Malijiwi*: Consultation with landowners must be "genuine and meaningful"

In a recent case, customary landowners in East Sepik Province challenged the validity of a 99-year Special Business Agricultural Lease granted over their land in 2008 for oil palm development. The landowners argued that consent to the SABL was given fraudulently by a small and selected group of people who had vested interests in the development. Only one landowner meeting was held at a local primary school, lasting 50 minutes, which was attended by individuals and representatives of 56 Incorporated Land Groups. The landowners' purported written consent to the SABL had been signed by three directors of the landowner company involved in the development and one director of an ILG, and was witnessed by three representatives from the Department of Lands and Physical Planning.

The National Court declared the SABL (and forest clearing approval) null and void, holding that proper landowner consent had not been given. The judge stated that:

"There was no awareness conducted by the representatives of the State ... to sufficiently inform and educate [the landowners] of the intentions of the Government regarding [the] SABL ... **[awareness-raising] should have been done over a period of time, say six or twelve months or even more** so that people were made aware of and understood what [the] SABL is about, its benefits, advantages and disadvantages and so on. To me, this is the true Papua New Guinea way of consulting with people in the villages, especially where new projects are introduced in their areas ...

In introducing projects such as this which would have [a] permanent and long term effect on their land, **genuine and meaningful consultation with the landowners must be carried out ...**

... the [landowner companies and Department] needed to go to the villages in the SABL areas and talk to the landowners, in their families clans and tribes ... if [the landowners] did [not] understand English, Pidgin or Motu, then **use interpreters to interpret things in their own languages.**"

Source: *Maniwa v Malijiwi*, [2014] PGNC 25 (4 July 2014): paras 21 – 24.

ILGs have been widely used throughout PNG as a legal mechanism to obtain landowner consent for resource development, such as for industrial-scale logging, despite their poor record for transparency (see *Section 8.2 Incorporated landowner groups*). If ILGs are used to obtain consent for REDD+ activities, additional safeguards, such as verifying that ILG boundaries are correct, that membership is in order and that ILG meetings have been held correctly (e.g. with a quorum being present), should be considered to ensure that the FPIC process is open and transparent. Where an ILG has not been formed, landowner consent will need to be sought directly from each clan. In practice, this approach is likely to involve significant time and money as it will be necessary to map clan boundaries, to identify the legitimate landowners (which may include multiple clans), and to identify those who are empowered to represent them. There is no legislation in place which sets out the prescribed process by which this can be done.

9.2 FPIC at provincial and national levels

At provincial and national levels, PNG does not have clearly established representative bodies of customary leaders which could facilitate consultation and consent processes for legislative and administrative proposals (see, for example, the National Council of Chiefs ("*Malvatumauri*") established under the **Constitution in Vanuatu**). The closest approximation to a representative body is the requirement that three (or in some cases, four) paramount chiefs be appointed to each Provincial Assembly where the chieftancy system is in existence in a province, (s. 10, **Organic Law on Provincial Governments and Local-level Government 1998**).

The PNG Office of Climate Change and Development has developed **Guidelines on Free, Prior and Informed Consent for REDD+ in Papua New Guinea** (most recent draft, Version 4, August 2014, not yet available online). The Guidelines set out processes for FPIC at the local, sub-national and national levels. The PNG Forest Authority has recently undertaken to test these draft FPIC Guidelines at its REDD+ pilot project site in Central Suau, Milne Bay (*Stanley 2013*). At some stage, the FPIC process set out under draft Guidelines should be harmonised with the existing consent process under the *Forestry Act 1991*.

10 Safeguards

Papua New Guinea is still selecting and developing its nationally-appropriate safeguards for REDD+. In May 2013 it established a multi-stakeholder REDD+ sub-technical working group on Social and Environment Safeguards which is working to prepare National Guidelines on Social and Environmental Safeguards, based on a “Gap analysis of existing policies, laws and regulations” (not available online) undertaken by OCCD with support from UNDP (R-PP 2013:73-78).

Pending the development of these National Guidelines on Social and Environmental Safeguards, the social and environmental impacts of proposed REDD+ activities are currently assessed through the approval process established under PNGs *National REDD+ Project Guidelines*, (see *Box 3: PNG’s National REDD Project Guidelines*).

The following sections describe the existing legal framework for some potential safeguards.

10.1 Gender equity and equality

Promoting and enhancing gender equality, gender equity and women’s empowerment is an important safeguard for REDD+ and represents a significant challenge for PNG.

UNDP’s Gender Inequality Index ranks PNG at 134 out of 148 countries, indicating that women in PNG experience a very high level of discrimination (UNDP 2013:158). The UN-based Committee on the Elimination of Discrimination against Women has recently stated that, in relation to PNG, “it is particularly concerned about the situation of rural women, particularly in view of their precarious living conditions and lack of access to justice, health care, ownership of land, inheritance, education and community services, as well as their lack of participation in decision-making processes at the community level”, and has urged PNG to make the promotion of gender equality an explicit component of its national development plans and policies (CEDAW Committee 2010:paras 45-46).

The current legal framework in PNG for protecting and promoting women’s rights generally, and by implication for REDD+ activities, is poor. Although PNG ratified the *Convention on the Elimination of all forms of Discrimination against Women* (CEDAW) in 1995, the provisions of the Convention are not enforceable as they have not yet been enacted into domestic law. An Organic Law on Gender Equality, which would give effect to CEDAW, has been proposed but has not yet been considered or adopted by the National Parliament.

Similarly, although the **Constitution** guarantees equal rights to men and women (s. 55), neither the **Constitution** nor any other law prohibits discrimination on the ground of sex, thereby permitting lawful discrimination against women (CEDAW 2010:Para.13). In the rural context, this is of particular concern where traditional customs may be discriminatory. Customary law is applied by the Village Courts, which is often the first recourse for women experiencing human rights violation (s. 57, Village Courts Act 1989). The CEDAW Committee, while noting that customary law is subordinate to the **Constitution** and statutory laws, has recently urged PNG to ensure that the Village Courts also apply the principles of equality and non-discrimination (s. 4, *Underlying Law Act 2000*; and CEDAW 2010:para.18).

Women also have very limited access to decision-making forums in PNG. PNG’s traditional social systems often control women’s ability to speak out within their family or in public settings (PNG CEDAW 2009:95). In some places, such as parts of Manus Province, women are excluded from traditional decision-making institutions in the villages such as the men’s house (*haus-boi*) where decisions relating to land are often made (Ogle and Yong 2013:22). Women they may have a greater say in land matters in matrilineal societies (see *Box 13: Matrilineal societies and customary land ownership in PNG*).

Box 13: Matrilineal societies and customary land ownership in PNG

Papua New Guinea has both patrilineal and matrilineal societies whose main asset – land – is passed down through the male and female line, respectively. While most land in PNG is owned communally, decision-making processes and the status of women differ greatly between these two societies.

About 75% of communities in PNG are patrilineal, and in such communities it is generally not accepted for women to speak out in public on land issues as men own the land and are therefore responsible for making decisions regarding their land. Matrilineal societies are mainly found in the coastal areas of the New Guinea islands (East and West New Britain, New Ireland, and Bougainville), and in Milne Bay Province.

In some matrilineal societies women may have a relatively higher status in their community compared to women in patrilineal societies, and they may have greater decision-making power of land ownership and land use, although this is not always the case as they may be controlled by their brothers and husbands. For example, in Bougainville, a woman's decisions are conveyed through a brother or an uncle who speaks on her behalf and is trusted to convey her decisions at meetings, which are attended only by men.

Source: Koian 2010:27; Banks 1993.

Some legislative steps have been taken to improve women's visibility and representation on decision-making bodies. For example, recent amendments to ILGs (see *Box 11: Reforms to improve the process for creating and managing Incorporated Land Groups*) stipulate that of the 6-10 members on a Management Committee, there must be at least two women (s.14B, *Incorporated Land Groups (Amendment) Act 2009*). Similarly, amendments made in 1995 require at least one woman to be appointed to each Provincial Assembly, and in rural areas at least two women's representatives must be appointed to each local-level government (*Organic Law on Provincial Governments and Local-level Government 1998*).

As women in rural communities generally have different roles to men – for example, they usually have primary responsibility for managing food gardens and fetching water – it is important that safeguards are in place to identify and address the likely impacts of REDD+ policies, programmes and activities on women. However there is no legislation currently in place to ensure that the differentiated gender impacts of REDD+ activities are assessed and addressed. The *Environment Act 2000* only refers to the need for a “social assessment” to be undertaken as part of an EIA, but the Act does not require that this include a gender impact assessment. The *Forestry Act 1991* does not contain any provisions which refer to women and contains no safeguards to ensure that women are included in consultation and decision-making processes. In relation to benefit-sharing, there are no legal safeguards to ensure that women are treated fairly and in a non-discriminatory manner. The draft Guidelines on FPIC for REDD+ in PNG seek to address this deficiency by incorporating a gender perspective into every stage of the FPIC process (see *Box 14: Gender and the draft Guidelines on FPIC for REDD+ in Papua New Guinea*).

Box 14: Gender and the draft Guidelines on FPIC for REDD+ in Papua New Guinea

The draft Guidelines on FPIC for REDD+ in PNG (version 4, August 2014), prepared by the Office of Climate Change and Development, seek to incorporate a gender perspective into every stage of the FPIC process.

For example, the draft Guidelines encourage each proponent to:

- identify women and women's groups as stakeholders;
- identify how the proposed REDD+ activity might affect women in particular, and
- identify appropriate measures to include women in the consultation and participation plan.

While the draft Guidelines do not give women the right to give or withhold their consent to a REDD+ activity (rather, consent is to be given by clan and village representatives), proponents are “strongly encouraged [to ensure] that women from affected local communities or clans, are represented in the decision-making process”.

While it is unclear whether these draft Guidelines are intended to become legally binding in the future, they do provide a strong starting point for developing a legal framework for REDD+ which incorporates a clear gender perspective.

10.2 Social and environmental impact assessment

PNG has a modern **Environment Act 2000** which provides a comprehensive legal framework for assessing and regulating the environmental impacts of development projects (although its provisions have been weakened slightly by amendments made in 2010: see *Environment (Amendment) Act 2010*). Under the Act, timber permits (for small-scale operations) and timber licences require an Environment Permit, while timber permits for large scale logging operations (over 70,000 m³ per annum) and Forest Clearing Authorities must have both an Environment Permit and an Environment Impact Assessment (s. 7; and **Environment (Prescribed Activities) Regulation 2002**). The Act requires an assessment of “the physical and social environmental impacts” of an activity, but gives no further guidance (e.g. it does not specify that land tenure or gender-differentiated impacts be assessed).

The Department of Environment and Conservation (DEC) is responsible for assessing the environmental impacts of forestry operations under the Environment Act and for ensuring compliance with approvals. However DEC lacks sufficient qualified field staff, financial resources and logistical support to carry out its statutory responsibilities (**Scheyvens and Lopez Casero 2013:43**), with the 2013 Commission of Inquiry into SABLs noting that enforcement capacity within the DEC to ensure compliance with the Act is “seriously lacking” (**Numapo 2013:49**).

At present, REDD+ activities would not require assessment under the *Environment Act 2000* – a position which could be easily remedied by amending the Regulations which list the activities which require an Environment Permit. Alternatively, some provisions of the *Forestry Act 1991* could be used which require the proponent of a logging project to investigate the “possible social and environmental impacts” of a proposed forest project as part of a Development Options Study before obtaining a timber permit – although similarly these provisions would not apply to REDD+ activities without amending the Act (s. 62).

In any event, both Acts are structured to regulate individual projects and do not provide a suitable mechanism for assessing the social and environmental impacts of broader policies, plans or programmes, which may be more appropriate if PNG adopts a programmatic approach to REDD+.

10.3 Anti-corruption framework

Corruption is a serious problem in PNG. Transparency International’s 2013 report on perceived levels of public sector corruption in the world ranks Papua New Guinea as 144 out of 177 countries (**Transparency International 2013**). A 2013 report on corruption risks in REDD+ in PNG by Transparency International identified a range of risks, with the most severe risks being: policy design risks (the process for allocating carbon rights and designing social and environmental safeguards); financial risks (misuse of REDD+ funds by ministries and agencies, and exploitation of vulnerable landowners in the sale of carbon); and implementation risks (manipulation of the process of creating ILGs, and in the grant of forestry/REDD+ permits and concessions) (**Nakmai 2013**).

While the legal and institutional framework to combat bribery and corruption in PNG is currently very weak, the Government of PNG has recently taken steps to address this, beginning with the adoption of a National Anti-Corruption Strategy 2010-2030 in 2011 and the subsequent creation of the National Anti-Corruption Strategy Taskforce. In 2014 two important reforms have been initiated, namely, the creation of an Independent Commission Against Corruption (see *Section 10.3.1 UNCAC and the Independent Commission against Corruption*) and PNG’s engagement with the Extractive Industries Transparency Initiative (see *Box 15: Could PNG to extend its participation in EITI to include forestry and REDD+?*) which, if implemented, could provide important anti-corruption mechanisms for REDD+ activities.

10.3.1 UNCAC and the Independent Commission against Corruption

PNG became a party to the 2003 *United Nations Convention Against Corruption* (UNCAC) in 2007 and in recent years has taken steps to implement its provisions. In February 2014 the National Parliament unanimously approved an amendment to the **Constitution** to provide for the creation of a permanent anti-

corruption agency, as required under UNCAC (Art. 6). This new agency will be known as the Independent Commission against Corruption (ICAC), and is intended to eventually replace the interim anti-corruption investigative team known as “Taskforce Sweep”. Further legislation (a proposed Organic Law on the Independent Commission against Corruption) is now required to formally create the ICAC and to establish the machinery for its operation. As an independent body with constitutional backing, ICAC will be able to receive and consider complaints regarding corruption and empowered to conduct investigations, complementing the ongoing work of the Ombudsman’s Commission.

10.3.2 Ombudsman Commission

The Ombudsman Commission is established as an independent, permanent body under the *Constitution* (Arts. 217-220; *Organic Law on the Ombudsman Commission*). The Commission is empowered to investigate, on its own initiative or in response to a complaint by an affected person, the wrongful conduct of any Minister or government body, or any defect in any law or administrative practice (s. 219) However upon making any adverse findings, the Commission’s powers are relatively limited to issuing directives to public officials where there has been a breach of the Leadership Code such as misconduct in office (s. 27-28, *Constitution*), publishing its findings and reporting to the relevant Minister or to Parliament (s. 22, *Organic Law on the Ombudsman Commission*). The Ombudsman has no power to take enforcement action or to bring a prosecution, which is generally the responsibility of the relevant Minister or the Public Prosecutor. While the Ombudsman Commission has provided some level of external review in the forest sector where it has investigated complaints in response to concerns raised by NGOs and customary landowners, it tends to operate on an *ad hoc* basis rather than undertaking systemic reviews.

10.3.3 Transparency and access to information

Transparency in the forest sector is very poor. Very little regulatory data is publicly available despite clear statutory rights to information. The **PNG Constitution** guarantees every citizen the “right of reasonable access to official documents” (Art. 51), but there are no comprehensive laws or regulations which give effect to this right, such as a Freedom of Information Act.

More specifically under the *Forestry Act 1991*, the PNG Forest Authority must maintain a public register of certain documents including summaries of all decisions made by the National Forest Board, details of timber permit and forest clearing authorities, and copies of Forest Management Agreements (s. 103A). In practice however, it can be difficult to access these documents with landowners sometimes being forced to take legal action to compel disclosure of timber approvals or forest management agreements which relate to their own land (**ODI 2007**), although the PNG Forest Authority has an informal policy of permitting each ILG Chairman, on behalf of his ILG, to have access to the FMA that relates to their land.

The *Forestry Act 1991* does not require the disclosure of certain categories of key operational documents, such as five-year harvesting plans, annual logging plans, data on harvesting, processing and trade, and enforcement, which would enable much greater scrutiny of the performance of the sector. Nor is there any statutory obligation for enforcement action to be publicly reported.

Papua New Guinea’s national programme document for the REDD+ programme demonstrates an awareness of the importance of freedom of information, stating that “a legal act to empower the REDD+ Information System to collect and publish data should be considered, including aspects such as freedom of information and other supporting mechanisms” (p. 38). The Prime Minister recently announced (**statement on 26 November 2013**) his Government’s intention to prepare freedom of information legislation, as well as whistle-blower legislation (Corrupt Conduct Disclosure (Protection) Bill) to protect those who report suspected corruption.

In addition, there is an opportunity for PNG to use the Extractive Industry Transparency Initiative, an international initiative intended to improve transparency in the mining sector, to improve transparency for REDD+ should PNG choose to do so (see *Box 15: Could PNG to extend its participation in EITI to include forestry and REDD+?*).

Box 15: Could PNG to extend its participation in EITI to include forestry and REDD+?

On 19 March 2014, PNG was accepted as a candidate country under the Extractive Industries Transparency Initiative (EITI) (**PNG EITI Application Form**).

EITI is a global voluntary initiative which aims to improve the governance of natural resources in all countries. **The EITI Standard** requires countries to publish annual reports on their extractive industries, including a reconciliation of payments made by resource companies against the revenues received by government, and any discrepancies must be explained. The annual report must describe the distribution of revenues, whether to the national budget, sub-national governments or other entities. Countries must maintain a public register of all licenses including how they were allocated. The EITI in each country must be overseen by a multi-stakeholder group which includes government, companies and civil society organisations.

PNG now has until September 2016 to implement the requirements of the **EITI Standard** in order to become EITI compliant, a process which will be led by the PNG Treasurer. The National Executive Council Decision (No. 90/2013) authorizing the establishment of the PNG EITI only applies the scheme to the mining and petroleum (oil and gas) sectors. However it is possible for a country to extend its national EITI scheme to its forest sector, as Liberia has done (**Liberia Extractive Industries Transparency Initiative Act 2009**).

There is thus an opportunity for the PNG EITI to be extended to cover forestry and REDD+. This would require the publication and reconciliation of payments made to and received by government from forestry operations, as well as for REDD+ payments and receipts at both national and sub-national levels, thus providing an important safeguard to assist in the transparent management of REDD+ revenues.

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As for provincial and local-level government laws, these are very difficult to access. There is no publicly accessible online database for these. Copies can only be accessed by personal request directly from the relevant government office.

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PNG forest sector policies and guidelines

Except for the draft National Forest Plan 2013 (which is available on an NGO website), none of the policy documents below are available online. Hard copies of these documents can be obtained, for a fee, directly from the PNG Forest Authority.

1991 National Forest Policy

1996 National Forest Plan, updated in 2008

2009 National Forest Development Guidelines

1995 Planning, Monitoring and Control Procedures for Natural Forest Logging Operations

1995 Key Standards for Selective Logging in Papua New Guinea

1996 Logging Code of Practice

PNG Forest Authority (draft) **National Forest Plan 2013**

PNG REDD+ Policy documents and guidelines

Guidelines on Free, Prior and Informed Consent for REDD+ in Papua New Guinea, June 2013, (draft, Version 2), prepared by the Office of Climate Change and Development.

Papua New Guinea: National REDD+ Project Guidelines 2012, prepared by the Office of Climate Change and Development.

PNG R-PP (2013). **Papua New Guinea Readiness Preparation Proposal (Final)**, dated 9 December 2013

International treaties, conventions and declarations

Treaty or convention	Date of ratification
1992 United Nations Framework Convention on Climate Change	1993
2003 United Nations Convention Against Corruption	2007
2007 United Nations Declaration on the Rights of Indigenous People	PNG absent from vote in UN General Assembly
Convention on Protection of Tribal Peoples (ILO 169)	No

