

REDD+ and Forest Carbon Rights in Fiji

Background Legal Analysis



On behalf of



Federal Ministry for the Environment, Nature Conservation and Nuclear Safety

of the Federal Republic of Germany

2013

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on behalf of SPC/GIZ

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Executive summary

Who owns the carbon in the forest? This is a question of great importance for all developing countries preparing to engage with REDD+, including Fiji.

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

The purpose of this Discussion Paper on forest carbon rights in Fiji is to describe the relevance of carbon rights for REDD+ and to identify the options for the ownership of forest carbon rights. A forest carbon right is the legal right of a person or group in relation to forest over which the person or group has control or owns, to exploit the economic benefits of the carbon stored and sequestered in the forest.

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

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

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

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

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

A specific illustration of this option, modelled on the forest concession licence and having regard to the likely need to aggregate parcels of land for carbon credits to be of sufficient volume to attract an emissions reduction purchaser is the following: a group of landowners would form an incorporated landowning entity, which leases the lands (through TLTB or the Land Bank), obtains an ecosystem restoration licence and contracts with another person (e.g., an NGO) to manage the provision of services (the service provider) to fulfil the purpose and conditions of the ecosystem restoration licence. The service provider would be bound to employ and train members of the landowning units that comprise the landowning entity where it includes iTaukei landholders. The landowning entity would sell the verified emission reductions to a purchaser for value.

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

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

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

There is merit in adopting the simplest and most easily understood approach, with clear rights and duties set out in legislation, to avoid costly legal fees.

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Note:

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

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

Purpose of this Paper

The purpose of this Paper is to:

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

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

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

Abbreviations and technical terms

CBD	Convention on Biodiversity
CCBS	Climate, Community and Biodiversity Standard
CDM	Clean Development Mechanism of the Kyoto Protocol
COP	Conference of the Parties
DNA	Designated National Authority
FCPF	Forest Carbon Partnership Facility of the World Bank
FAO	Food and Agriculture Organization of the United Nations
FPIC	Free, Prior and Informed Consent
GHG	Greenhouse Gas
ILO	International Labour Organisation
IPCC	Intergovernmental Panel on Climate Change
MRV	Measurement, Reporting and Verification
PICs	Pacific Island Countries
REDD	Reduced Emissions from Deforestation and forest Degradation
REDD+	REDD, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks (“+”)
SFM	Sustainable Forest Management
tCO ₂ e	Tonnes of CO ₂ equivalent (a measure of greenhouse gases)
UNDRIP	United Nations Declaration on Rights of Indigenous Peoples (2007)
UNFCCC	United Nations Framework Convention on Climate Change (1992)
UN-REDD	United Nations Collaborative Programme on Reducing Emissions from Deforestation and forest Degradation

1 Introduction

1.1 Country context

Fiji is part of Melanesia. Melanesia is a sub-regional grouping of five countries – Fiji, New Caledonia, Papua New Guinea, Solomon Islands and Vanuatu – located in the South Pacific (Map 1.1).¹

Fiji has a population of approximately 844,000, of which 48% live in rural areas. It has a land area of 1,827,000 hectares, with a forest area of 1,014,000 hectares, being 56% of its land area. While there is a small amount of commercial logging in Fiji, one of the main drivers of deforestation is clearing for agricultural use.

1.2 Overview of REDD+ readiness in Fiji

Deforestation and forest degradation account for approximately 17% of global greenhouse gas emissions – more than the entire global transport sector. Since 2005, this has prompted the development of a new mechanism

known as Reducing Emissions from Deforestation and forest Degradation (REDD+), under the 1992 United Nations Framework Convention on Climate Change (UNFCCC).⁴ The purpose of REDD+ is to provide developing countries with a financial incentive to reduce their levels of deforestation and forest degradation, and to increase their forest carbon stocks.

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

The purpose of this paper is to identify options for clarifying forest carbon rights in the context of REDD+. Carbon rights are not presently defined or referred to in any legislation in Fiji. The main reason for clarifying carbon rights is to reduce transaction costs in forest carbon projects in Fiji. It could also create a basis for benefit-sharing, if Fiji wishes to go down this path.



Map 1.1 Location of Fiji in the South Pacific

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

²All country statistics are from FAO, State of the World's Forests, 2011, Rome, pp. 108, 117.

³IPCC Fourth Assessment Report, 2007.

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

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

1.2.1 Fiji National REDD+ Programme

The development of Fiji's National REDD+ Programme has been supported by the SPC⁶/GIZ⁷ Regional Programme – Coping with Climate Change in the Pacific Island Region.

Fiji is taking a phased approach in its REDD-plus national programme. It is currently in Phase 1 which includes the development of policy and institutional frameworks for the implementation of REDD+.

The key policy documents developed to date is the Fiji REDD-Plus Policy, formally adopted by Cabinet in January 2011. The Fiji REDD-Plus Policy has as its ultimate objective to get Fiji to a state of REDD+-readiness by the end of 2012.

Fiji has established a multi-stakeholder REDD+ National Steering Committee whose overarching function is to “coordinate and facilitate the implementation of the Fiji REDD+ programme.”⁸ It is developing a *Fiji REDD+ Strategy*.

The REDD+ Steering Committee is responsible for preparing a set of National REDD+ Guidelines for each of the following categories:

1. REDD+ Governance Guidelines
2. REDD+ Activity Guidelines
3. REDD+ Financing Guidelines – [the current draft of these guidelines is version 4, dated December 2011. A reference in this Paper to the draft Guidelines is a reference to this version.]
4. REDD+ MRV Guidelines
5. REDD+ Safeguard Guidelines
6. REDD+ Legal and Regulatory Guidelines
7. REDD+ Distribution Guidelines
8. REDD+ Education, Training and Research Guidelines
9. REDD+ International Engagement Guidelines.

1.2.2 Scale of REDD+ activities: Fiji's hybrid approach

Fiji's REDD-Plus Policy aims to provide a framework to facilitate access to all available financing instruments for

Explanation of terms

Forest carbon refers to the physical amount of carbon that is stored in trees and the carbon that will be sequestered in them over time.

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

Carbon sequestration is the process by which forests absorb carbon.

Carbon sink refers to the natural features of the forest and soil that absorb carbon from the atmosphere.

REDD+ from both market and fund-based sources. Fiji is therefore taking a 'hybrid' approach to REDD+ financing which will enable both national and sub-national or project-scale activities to be adopted.⁹

The adoption of a 'hybrid' scale approach means that Fiji is likely to engage in carbon markets in the following ways:

- on a national scale through participation in the international UNFCCC REDD+ mechanism, if it is decided to adopt a market-based approach to REDD+ financing, and assuming that one will become operational (which is not yet clear)
- on a sub-national scale through participation in voluntary carbon markets.

1.2.3 Scope of REDD+ activities

Fiji's REDD-Plus Policy states that the following activities are eligible for inclusion under Fiji's national REDD+ programme:¹⁰

- a) Reducing emissions from deforestation via forest protection and improved forest management
- b) Reducing emissions from degradation via forest protection and improved forest management
- c) Afforestation/reforestation
- d) Forest/energy sector linkages (biomass electricity generation)
- e) Forest/agriculture linkages (biomass residue/biochar)

⁶Secretariat of the Pacific Community.

⁷Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH.

⁸Fiji REDD+ National Steering Committee, Terms of Reference, February 2012

⁹Fiji REDD-Plus Policy, p 7.

¹⁰Fiji REDD-Plus Policy, p. 7. Note: these activities cover a slightly broader range of activities than those which are presently specified under the UNFCCC framework in the Cancun Agreements, which are: reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests; and enhancement of forest carbon stocks (Dec. 1/CP.16, para. 70).

- f) Combination linking afforestation/reforestation with REDD.

Fiji participates under the Clean Development Mechanism of the Kyoto Protocol. It is therefore possible that afforestation/reforestation projects may be developed in Fiji under the CDM, for which clarification of forest carbon rights would also be of assistance.

1.3 Pacific Islands Policy Framework for REDD+

Fiji is also participating in the development of a Pacific-wide regional framework for REDD+ in the Pacific. On 28 September 2012, Forestry Ministers from the Pacific Islands endorsed the Pacific Island Regional Policy

Framework for REDD+. The Regional Framework calls on countries to develop their REDD+ policies, strategies, action plans, guidelines, and legislation to define forest carbon rights [and] forest carbon financing and benefit-sharing arrangements...".¹²

In particular, Para. 4.6.3 of the Regional Framework provides that:

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

¹¹The Pacific Islands Regional Policy Framework for REDD+ was prepared with support from the Secretariat of the Pacific Community and GIZ, and was adopted by the Heads of Agriculture and Forestry Services at its Fifth Regional Meeting in Nadi, Fiji, 24-27 September 2012.

¹²Pacific Island Regional Policy Framework for REDD+ (September 2012), p. 8, para. 4.3.2.

2 What are ‘forest carbon rights’?

Trees absorb and store carbon and therefore act as a ‘sink’ for carbon dioxide in the atmosphere. The international community has now recognized the importance of keeping the carbon in the forests and of encouraging increased carbon sequestration by forests. Consequently, the carbon sequestered in forests has now become of value and ‘carbon rights’ are emerging as a new component in the ‘bundle of rights’¹³ that constitute property rights over forest and land.

At present, there is no clear or commonly accepted definition of carbon rights under international law or the international policy framework for REDD+, with REDD+ commentators using different definitions throughout the literature on REDD+.¹⁴ The current UNFCCC framework for REDD+ makes no mention of carbon rights, although it does ‘request’ State Parties to address land tenure issues when developing their national REDD+ strategies.¹⁵

Box 2.1 What is the difference between “carbon rights” and “carbon credits”?

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

“**Carbon credits**” are the financial instruments that are issued once it is verified that emission reductions and removals from a project (or country) have been achieved. For example, under the Verified Carbon Standard, Verified Emission Units (VEUs) are issued. These are held in an account in the name of the Project Proponent, in a carbon registry, such as the Markit carbon registry in New York. Fiji’s draft REDD+ Carbon Financing Guidelines describe carbon credits as a “commodity”, which can be sold in a market place.¹⁶

Carbon credits are equal to one metric tonne of carbon dioxide equivalent (tCO₂e) and are issued with a unique serial number so they can be tracked through carbon registries.

For the purposes of this Paper, the term ‘forest carbon rights’ is used to refer to the right of an individual or group

to exploit and enjoy the legal and/or economic benefits concerning:

- **The carbon already stored (or sequestered) in forests and soil (called ‘stored forest carbon’):** It is the act of ‘avoiding’ the emission of this carbon into the earth’s atmosphere, e.g. by avoiding logging or other activities that degrade the forest, that entitles the holder of the carbon rights to receive benefits under REDD+; and
- **Carbon sequestration:** This is the carbon that will be absorbed by the trees and the soil in the future. Sequestration is the process by which trees absorb carbon through photosynthesis, thus ‘removing’ it from the atmosphere (also referred to as ‘removals’).

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

- That they own or have legal control over the **land**
- That they own or have legal control over the **forest resource** (to the exclusion of all other competing interests, such as forestry rights, mining rights or leasehold interests, or through having reached agreement with those who hold competing interests)
- That they can **maintain their control** over the land and forest for the required period of time (e.g. 30-50 years, depending on the duration of the contractual or legal obligation that is undertaken) in order to demonstrate that they can manage and protect the forest resource.

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

2.1 Carbon pools

Forest carbon can be divided into five carbon pools.

¹³Ownership of land is usually described as ‘a bundle of rights’, including the right to sell or dispose of the land, the right to lease it, the right to mortgage it, the right to sell or dispose of the fruits of the land, and the right to the reversion of the leasehold, etc.

¹⁴For a detailed discussion of the different types of carbon rights that can exist, see Takacs, D. 2009. Forest Carbon: Law and Property Rights. Conservation International. pp. 13 – 17.

¹⁵UNFCCC, COP Decision 1/CP.16 (Cancun Agreements), para. 72.

¹⁶Draft Fiji REDD+ Carbon Financing Guidelines, paras 2.1 and 3.2.

Box 2.2: Extracts of provisions on carbon rights in selected voluntary carbon standards

Verified Carbon Standard (VCS)

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

Plan Vivo

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

Climate, Community & Biodiversity Standard (CCB)

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

The five carbon pools specified under the IPCC 2006 Guidelines are:¹⁷

- above-ground biomass
- below-ground biomass
- dead wood
- litter
- organic soil carbon.

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

2.2 What are the benefits of carbon rights ownership?

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

¹⁷The UNFCCC has requested that REDD+ countries estimate and report emissions and removals from five forest carbon pools when preparing their national greenhouse gas inventories. The UNFCCC has asked countries to use the most recent IPCC guidelines, as adopted or encouraged by the COP, as a basis for estimating anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks (Dec. 4/CP. 15, para. 1(c)). see IPCC 2006 Guidelines for National Greenhouse Gas Inventories, Vol. 4 on AFOLU, Ch. 1, Table 1.1 (<http://www.ipcc-nggip.iges.or.jp/public/2006gl/vol4.html>). The five carbon pools specified by the IPCC 2006 Guidelines also apply to mangroves.

It is beyond the scope of this Paper to fully explore the links between ownership of forest carbon rights and benefit-sharing. However, in principle, where the owner/s of carbon rights can show that they will or have generated verified emission reductions/removals, this will entitle the holder to:

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

Note that under a national approach, clarification of carbon rights is not a pre-condition for benefit-sharing, as a benefit-sharing scheme incorporate a variety of forms, such as returning benefits to those who are actively engaged in land management or directing incentives to forest carbon emission reduction activities that the government wishes to encourage. This is subject to the qualification that where the national approach incorporates a project-based approach which directly generates carbon credits, the value of some of those credits must be returned to landowners as otherwise it would constitute a ‘taking’ of property.

In Fiji, the manner in which the ownership of forest carbon rights will be linked to benefit-sharing, and in what form will the benefits will be distributed, will be determined under Fiji’s Guidelines on Benefit Distribution. These are currently being developed and are schedule to be released by the end of 2012.

2.3 What are the risks and obligations associated with owning carbon rights?

Ownership of carbon rights also carries obligations and risks.

The **obligations** (sometimes referred to as ‘permanence obligations’) attached to carbon rights relate to the need for the owner of the carbon rights to ensure that the forest carbon will remain sequestered in the forest for a long period of time, such as 30-50 or more years. This means that the owner of the carbon rights will need to give undertakings (promises) to the REDD+ project developer (either the Government or a private project developer) or the purchaser of carbon credits (where the landowner is the REDD+ developer) that they will manage the land in a certain way so as to protect the forest over the long

term (e.g.: that they will not permit or that they will regulate logging, to clear the area of scrub to reduce wildfire risk, to monitor the area, etc).¹⁸

There are also risks involved if the carbon stored in the forests is released into the atmosphere during the life of the project, reversing the environmental benefits of the REDD+ project.¹⁹ This is known as ‘loss of permanence’ or a ‘reversal’. Loss of permanence might occur through intentional release (such as by legal or illegal logging), unintended release (as a result of negligence), or through natural causes (such as a cyclone, wildfire or insect attack).

Where the forest carbon is released, the owner of the carbon rights may lose some or all of the benefits of the REDD+ project (e.g. carbon credits), and/or they may have to pay an additional penalty, depending on the terms of any carbon contract they have entered into, or depending on the structure of the REDD+ regulatory scheme.²⁰

To insure against the possibility that the forest carbon might be released, voluntary forest carbon accreditation schemes (e.g. the Verified Carbon Standard) require the project proponent or the central administrator to set aside a certain number of carbon credits from the project into a buffer account in order to manage these risks (‘a reversal buffer’).²¹

In Fiji, the REDD+ Financing Guidelines, scheduled to be released by the end of 2012, will determine the rules for protecting permanence, setting buffers aside, and imposing penalties for substantial non-performance or non-delivery of emission reductions or removals.

2.4 Why define forest carbon rights?

Although it is possible to determine who currently owns the forest carbon by looking carefully at a country’s existing laws on land, property and natural resources to work out who owns the land, who owns the forest, and by implication, who must own the carbon (see the legal analysis of this for Fiji in Section 3 of this Paper), this can be a costly and time-consuming process, particularly where customary land is concerned. If forest carbon rights can be formalized within a clear policy and legislative framework, this is more

likely to provide regulators, investors and landowners with clarity and certainty they require, and hopefully will reduce transaction costs in REDD+ projects.

2.4.1 Forest carbon rights must be clear for carbon trading to occur

A country should define carbon rights if it wishes to adopt a project-scale approach to REDD+ which involves direct crediting to projects. This is because it is necessary to clearly identify the underlying asset that is being traded – the carbon emission reductions and enhanced carbon removals (sequestration), and to ensure that the carbon from that project area is not sold or counted twice.

In particular, clarification is required to identify:

- who owns the carbon, e.g. an individual or a landowner clan or group, and
- the boundaries of the land that will form the project area.²²

The COP under the UNFCCC is still exploring financing options for REDD+. Incentives are likely to be paid directly to the national governments of participating nation states, and it is then up to each country to determine its own benefit-sharing mechanism internally, which may or may not be based on the ownership of or entitlement to carbon rights. For those countries that only intend to participate in the emerging REDD+ mechanism under the UNFCCC framework, it is not necessary, at least at present, for the country to clarify carbon rights as a pre-requisite to participation, because a decision has not yet been made as to whether the UNFCCC REDD+ framework will include a market-based financing mechanism.

However, for REDD+ countries that wish to participate in the carbon market, as Fiji does, it is highly desirable that they develop a clear policy and legislative framework for identifying and regulating carbon rights. This is because carbon project developers and investors want to know exactly who owns and controls the carbon in the forest, which is the underlying resource that will be traded. Project developers and investors want an assurance that the

¹⁸For example, the Draft Fiji REDD+ Carbon Financing Guidelines foreshadow a commitment period of 10 years, while the VCS AFOLU framework requires a minimum commitment period (crediting period) of 20 years, with project proponent to reassess baseline every 10 years: see VCS Standard, Version 3.3, 4 October 2012, para. 3.8.1. AFOLU Requirements, Version 3.3, 4 October 2012, para. 3.1.10.

¹⁹Under the UNFCCC framework, the environmental safeguards listed in Annex I to the Cancun Agreements require countries to address the risk of reversal (loss of permanence) in their national REDD+ programme.

²⁰For example, under the forest carbon scheme in Australia, if carbon is released through an intentional or negligent action by the project proponent, the proponent can be ordered to buy back an amount of carbon credits up to the total number of credits that the forest carbon project would have earned: see Carbon Credits (Carbon Farming Initiative) Act 2011, (Cth) s 90.

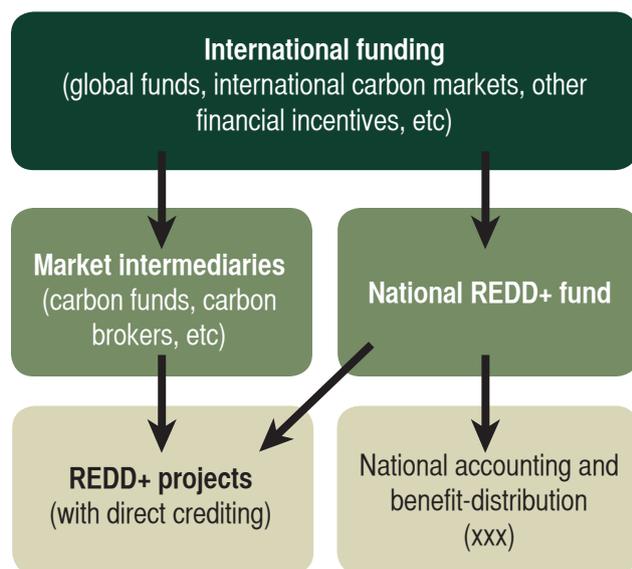
²¹For example, the Verified Carbon Standard requires credits to be placed into an AFOLU Pooled Buffer Account. This is a single account which contains non-tradable AFOLU buffer credits for all projects in order to cover the risk of unforeseen losses in carbon stocks across the VCS AFOLU project portfolio: VCS Program Definitions, Version 3.

²²For example, the VCS AFOLU Requirements require a project proponent to provide a map of the project area, the coordinates of the project area and boundary, the total size of the project area, and details as to its ownership: VCS AFOLU Requirements: Version 3, para. 3.4.1.

carbon has not already been sold to someone else, and that it will not be sold to someone else in the future once they have 'bought' it (known as 'double-counting').

It is not necessary for a country to clarify carbon rights for all aspects of a national REDD+ programme. Only those which involve project-based activities and market funding through direct crediting require carbon rights to be clear (see the arrows in bold in **Figure 2.2**).

Figure 2.1 Relevance of carbon rights to various REDD+ funding modalities²³

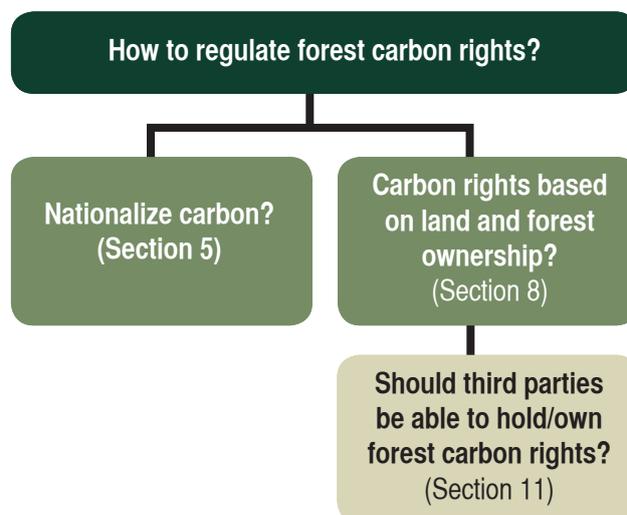


2.5 Overarching principles for defining carbon rights

2.5.1 Key decisions

When designing a system to clarify and regulate forest carbon rights, countries need to make some key decisions, such as whether to nationalize carbon rights or base them on land and forest ownership, and whether to allow third parties (such as REDD+ project developers or carbon brokers) to hold or own forest carbon rights. Each of these key decisions is analysed in more detail in the sections of this Paper below. **Figure 2.3** below contains a decision tree illustrating this process.

Figure 2.2 Decision-making tree for forest carbon rights



2.5.2 Consistency with Fiji's constitutional framework

The framework for forest carbon rights that is adopted should be consistent with Fiji's constitutional and international obligations. Presently Fiji is without a constitution, although a process is in place for the preparation and adoption of a new constitution. The new Constitution is to be in accordance with certain specified non-negotiable principles and values²⁴ and 'must be premised on the fundamental values and principles set out in the *Peoples' Charter for Change*'²⁵. The Charter articulated values and principles which infer that there should be no change to the present land tenure arrangements.

According to Fiji's former Constitution²⁶ a person could not be deprived of property by the State except in accordance with the law, for public purposes and upon payment of just and equitable compensation²⁷. That principle continues to be reflected in the *State Acquisition of Lands Act*, which provides that adequate compensation must be paid for the taking of possession or acquisition of any property, once a Court has made an order for acquisition under the Act.²⁸

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

²⁴Decree 58 Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012.

²⁵The Preamble to Decree 58 Fiji Constitutional Process (Constituent Assembly and Adoption of Constitution) Decree 2012.

²⁶Abrogated in 2009.

²⁷S40 Constitution (Amendment) Act 1997.

²⁸S7(2) State Acquisition of Lands Act (Cap 135).

2.5.3 Consistency with Fiji's international legal obligations

Both Fiji's REDD-Plus Policy and the Pacific Islands Regional Policy Framework for REDD+ establish safeguards which provide that REDD+ implementation must be in line with international instruments to protect the rights of indigenous peoples.²⁹

In particular, the Fiji REDD-Plus Policy states that it will ensure that all REDD-Plus initiatives and projects in Fiji will ensure:

“the protection of and respect for the knowledge and rights of indigenous peoples (as stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the United Nations Convention for the Safeguarding of the Intangible Cultural Heritage (UNCSICH) and other international instruments”.

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

- The United Nations Framework Convention on Climate Change (1992), under which the Cancun Agreements are established. The Agreements request developing countries to follow a number of safeguards when developing and implementing national REDD+ strategies, which include respect for the knowledge and rights of indigenous people, and specifically notes the importance of the United Nations Declaration on the Rights of Indigenous Peoples.³⁰
- The United Nations Declaration on the Rights of Indigenous Peoples (2007), which acknowledges the right of indigenous peoples to own, use, develop and control lands and resources which they have traditionally owned and the obligation of States to give legal recognition accordingly,³¹ and which incorporates the right of landowners to give or withhold

their free, prior and informed consent to legislation, administrative measures and projects that may affect their land, territories and other resources³².

- The Indigenous and Tribal Peoples Convention, (1989) (ILO 169) which requires State Parties to safeguard the rights of indigenous peoples to the natural resources of their lands and to participate in their use, management and conservation (Art. 15). Fiji is one of only 22 countries to have ratified this treaty.

The effect of these international instruments is that Fiji's framework for forest carbon rights should protect the property rights of indigenous peoples and be developed in accordance with the principle of free, prior and informed consent.

2.5.4 Guiding policy principles for developing a legal framework for forest carbon rights

In analysing the Options presented for developing a framework for forest carbon rights, the author has been guided by the following principles:

- **Simplicity:** to develop a carbon rights framework that is easily understood by everyone, including customary landowners
- **Transparency:** to identify options that minimize the risk of forest carbon rights being affected by fraud and corruption
- **Effectiveness:** to ensure that carbon rights are held by those who control the forest resource, in order to incentivize those people to maintain the forest
- **To build on existing legal mechanisms, where possible:** e.g. the system for leasing iTaukei land
- **To establish clear rules for all types of land tenure,** without creating complicated exceptions for some types of land tenure.

²⁹Pacific Islands Regional Policy Framework for REDD+, para. 4.6.4.

³⁰The Cancun Agreements were made at COP 16 in 2010, and are set out in Dec. 1/CP.16. Para. 69 affirms that countries should promote and support the safeguards set out in Appendix I (para. 2), when developing their national REDD+ strategies or action plans.

³¹Art 26.

³²United Nations Declaration on the Rights of Indigenous Peoples (2007), paras. 19 and 32. Of direct relevance to forest carbon rights is Article 26.2 which provides: 'Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'

3 Land tenure in Fiji

In order to understand how a framework for forest carbon rights might be developed in Fiji, it is first necessary to understand the system of land tenure.

It is also relevant to know that work is underway to establish a National Land Register which will contain “information about land ownership, right of possession or any other rights recorded, geographic position, areas and value”³³.

All information concerning a land parcel will be linked and accessible through a single databank or Register³⁴.

Land falls into three main categories in Fiji – iTaukei (indigenous or customary) land, freehold land and State land. Table 3.2 below represents an approximate summary of the areas and percentages of land in the specified categories of tenure.

Table 3.1 Land tenure statistics in Fiji

Land tenure		Areas in Hectares	% of total land area	
			% of iTaukei land ³⁵	% of total land area ³⁶
iTaukei land	iTaukei land (bare)	277,150*	18%	15.8%
	iTaukei timber concessions	270,759*	17%	14.9%
	iTaukei leases	456,628*	29%	25.5%
	iTaukei reserves	566,908*	36%	31.6%
iTaukei land total		1,571,445	87.9%	
State land		69,934	3.91%	
Private Freehold land		141,872	7.94%	
Rotuma land		4,478	0.25%	
Total		1,787,730	100%	

Source: iTaukei Lands Trust Board 2011

*these figures are approximate only³⁷

The areas of forest cover on land, by category of tenure, are set out below in Table 2.

Table 3.2 Forest Cover across various land tenure systems

LAND TENURE	FOREST (Hectares)		Total Forest Area	%Total Area of Forest
	Closed Forest ³⁸	Open Forest ³⁹		
iTaukei Land	528,100	326,268	854,368	89.94%
State Land	27,737	12,756	40,493	4.26%
Private Freehold Land	31,958	23,172	55,130	5.80%
	587,795	362,196	949,991	

Source: FAO 2010 Global Forest Resources Assessment 2010- Fiji Country Report⁴⁰

³³See Ministry of Lands and Mineral Resources website at: <http://www.lands.gov.fj/index.php/projects/national-land-register> accessed 17/10/12.

³⁴Ibid.

³⁵The accuracy of the figure in the ‘% of iTaukei land’ column is dependent on the accuracy of the relevant area figure* in the adjacent column.

³⁶The accuracy of the figure in the ‘% of total land area’ column is dependent on the accuracy of the relevant area figure* in the adjacent column. Due to the approximate nature of the figures, there is a slight discrepancy in the total percentages.

³⁷Sourced 13 Sep 2012 from the iTaukei Land Trust Board website pages at: http://www.tltb.com.fj/index.php?option=com_content&task=view&id=41&Itemid=72 and http://www.tltb.com.fj/index.php?option=com_content&task=view&id=43&Itemid=74.

³⁸Closed Forest: Natural forest with State cover by trees and / or ferns 40-100% and ground coverage by, palm and / or bamboo over 20%

³⁹Open Forest: Natural forest with State cover by trees and / or ferns 10-40% and ground coverage by, palm and / or bamboo 50-80%

⁴⁰An area of approximately 40 000 hectares of mangroves is not included in the total forest area. The reason for exclusion is that the area of mangroves is not included in the total land area.

3.1 iTaukei land (customary land)

Approximately 88% of land in Fiji is owned by *iTaukei* (the indigenous people) and is held as customary land.⁴¹ The social structure of iTaukei is as follows: the *vanua* (tribe; numbering 215⁴²), the *yavusa* (clan; 13,90⁴³), the *mataqali* (sub-clan; 5,280⁴⁴) and the *itokatoka* (extended family unit; 9,979⁴⁵). iTaukei land is land which is 'the rightful and hereditary property of native owners, whether of *mataqali* or in whatever manner or way or by whatever divisions or subdivision of the people the same may be held'.⁴⁶ The *mataqali* are not the only landowning unit; other traditional landowning or proprietary units include the *yavusa* and *itokatoka*. However, for a long time the *mataqali* has been 'legally entrenched as the central proprietary unit'.⁴⁷ There are 5,280 landowning units.⁴⁸

3.1.1 Registration of customary land

Almost all iTaukei land is registered under the provisions of the *iTaukei Lands Act* [Cap 133]. The iTaukei Land and Fisheries Commission (TLFC) was originally established as the Native Land Commission in 1880, primarily to identify and register ownership of iTaukei lands. iTaukei lands are registered in the *Register of iTaukei Lands* (RTL) after the land has been topographically surveyed and charted on the iTaukei Land Commission map.

The Registrar of Titles maintains the *Registrar of iTaukei Lands*. As the ownership of land is vested in the *mataqali* or other landowning unit (as registered in the RTL) no individual titles are issued. Individual members of the *mataqali* are however recorded in the *Vola ni Kawa Bula* (VKB). All leases on iTaukei land are recorded against the land title by the Registrar of Titles in the *Register of iTaukei Leases* whilst iTaukei licences are kept by the TLTB in the *Register of iTaukei Licences*.

The TLFC can determine disputes relating to customary headships or titles and land boundaries. These disputes are mediated by the TLFC in the first instance and a decision following an enquiry may be appealed to the iTaukei Lands Appeals Tribunal (TLAT). There are occasional disputes over boundaries, and in the few pockets of iTaukei land not yet surveyed, where a 'Deeds System of Registration' was used for its leases⁴⁹. Once a boundary dispute is lodged, a proper survey of boundaries must be carried out. Actual figures for 2010 reveal that there were 10 title and boundary disputes (not differentiated) dealt with by the TLFC, and 10 title and boundary disputes (not differentiated) determined by the TLAT⁵⁰. Current figures reveal that there are approximately 250 title and boundary disputes in the system.⁵¹

Unlike the other Melanesian countries (Solomon Islands, Papua New Guinea and Vanuatu), most customary land (iTaukei land) in Fiji is registered. The boundaries of each parcel of land together with the names of each person comprising the proprietary unit are recorded by the iTaukei Lands Commission in the Register of iTaukei Lands, which is kept by the Registrar of Titles.⁵² However, this does not mean that the land in the *Register of iTaukei Lands* has been properly surveyed, as the following statistics (in relation to all land in Fiji), although now old (2003) reveal:⁵³

**Land
Parcels in
URBAN
Areas:** *properly registered and surveyed: 90%
legally occupied, but not registered or
surveyed: 8%
informally occupied without legal title: 2%*

**Land
Parcels in
RURAL
Areas:** *properly registered and surveyed: 30%
legally occupied, but not registered or
surveyed: 65%
informally occupied without legal title: 5%*

⁴¹S 3 iTaukei Lands Act

⁴²as at 2009: see Fiji National report submitted in accordance with paragraph 15 (a) of the Annex to Human Rights

Council resolution 5/1 to United Nations General Assembly 4 February 2010, last accessed on 9 Nov 2012 at http://lib.ohchr.org/HRBodies/UPR/Documents/Session7/FJ/A_HRC_WG.6_7_FJI_1_FJI.pdf

⁴³as at 2009: *ibid*

⁴⁴as at 2009: *ibid*

⁴⁵as at 2009: *ibid*

⁴⁶S 4 iTaukei Lands Act

⁴⁷See *Waisake Ratu No.2 v Native Land Development Corporation & Native Land Trust Board* [1991] 37 FLR 146

⁴⁸as at 2010: *op cit* n36

⁴⁹Land tenure systems in Fiji, Department of Lands and Survey. Accessed at: www.lands.gov.fj/downloads/landtenuresystems.pdf

⁵⁰Ministry of iTaukei Affairs Annual Corporate Plan for 2011 at p17.

⁵¹Min iTaukei Affairs.

⁵²S10 iTaukei Lands Act.

⁵³See Cadastral Country Report – Fiji at <http://www.cadastraltemplate.org/countrydata/fj.htm>

3.2 iTaukei leased land

When land is leased by the iTaukei Land Trust Board (TLTB) on behalf of iTaukei it is registered in the *Register of iTaukei Leases* and is subject to the provisions of the *Land Transfer Act*⁵⁴.

3.3 iTaukei reserve land

A portion of any iTaukei land may be set aside as reserve land, in which case, subject to the provisions of the *Forest Decree*, the *Mining Act*, the *State Acquisition of Lands Act*, and the *Petroleum (Exploration and Exploitation) Act* the land cannot be alienated, excepting that with the consent of the iTaukei owners the TLTB may grant a lease or licence over the reserved land to other iTaukei⁵⁵.

3.4 The role of the iTaukei Land Trust Board

The TLTB has control of iTaukei lands, except those lands which are registered in the Land Use Bank or which are the subject of a lease under the *Land Use Decree 2010*^{56,57} (see section 3.6 on the Land Bank below).

While legal ownership of iTaukei lands remains with the customary owners, the TLTB has the role of a trustee in relation to those lands not held in the Land Bank, being required to administer them 'for the benefit of the iTaukei owners'.^{58, 59} Before the TLTB can grant a lease or licence over land it must satisfy itself that the land is not presently being beneficially used by the landowners nor will it be required during the period of the lease or licence by the landowners for their use, maintenance or support⁶⁰.

Land may be leased for up to 99 years, with exception of land leased under the *Agricultural Landlord and Tenant Act*, under which leases may be for a maximum of 30 years. The TLTB receives rental income for leased lands and distributes these monies, reduced by an administrative fee of 15% rental,⁶¹ to the landowners.

3.5 Limitations on dealing with iTaukei land

Land that is customarily owned by iTaukei cannot be alienated, except to the State.⁶² That means it cannot be sold, transferred, exchanged, etc., except to the Fijian Government. Any person may exercise customary hunting rights and take forest produce for personal use or for community benefit (for example to construct or repair a dwelling house or village structure) in the locality of the district where the person usually lives.⁶³

Landowners cannot lawfully lease their land directly to a lessee, nor can they lawfully grant a licence or any other right over the land. Leases, licences, etc., may only be granted by the TLTB or through the Land Bank (leases).⁶⁴ The exceptions concern the grant of rights under the *Forest Decree*,⁶⁵ the *Mining Act*,⁶⁶ the *State Acquisition of Lands Act*,⁶⁷ and the *Petroleum (Exploration and Exploitation) Act*⁶⁸, but even so, the holder of a prospector's right must inform the TLTB when he intends to enter iTaukei land⁶⁹ and a licence under the Forest Decree cannot be issued without the prior approval of the TLTB⁷⁰.

However, customary arrangements or 'leases' for the use of iTaukei lands by persons other than members of the landowning unit (known as *vakavanua*⁷¹), do continue to

⁵⁴S9 iTaukei Land Trust Act.

⁵⁵Part III iTaukei Land Trust Act.

⁵⁶Ss 7, 9 Land Use Decree 2010.

⁵⁷S 4 iTaukei Land Trust Act.

⁵⁸S4 iTaukei Land Trust Act.

⁵⁹See also *Waisake Ratu No.2 v Native Land Development Corporation & Native Land Trust Board* [1991]FJSC 9.

⁶⁰S 9 iTaukei Land Trust Act.

⁶¹To be reduced to 12.5% from 1 January 2013 and to 10% later in 2013, according to the Prime Minister's Remarks at the opening of the Annual TLTB Strategic Corporate Planning Workshop, 22 October 2012, reported at http://www.fiji.gov.fj/index.php?option=com_content&view=article&id=7004:pm-bainimarama-remarks-at-the-annual-tltb-strategic-corporate-planning-workshop&catid=50:speeches&Itemid=168

⁶²S5 iTaukei Land Trust Act (Cap 134).

⁶³Reg 17 iTaukei Land (Forest) Regulations.

⁶⁴See Land Use Decree.

⁶⁵Forest Decree 1992.

⁶⁶Mining Act (Cap 146).

⁶⁷State Acquisition of Lands Act (Cap 279).

⁶⁸Petroleum (Exploration and Exploitation) Act (Cap 148).

⁶⁹s 24 Mining Act.

⁷⁰s10 Forest Decree.

⁷¹'A *vakavanua* lease is a customary lease that is not recognised by "western" Fijian common law. In most cases the arrangement is made with the head of the land owning unit, who accepts the traditional request for land on behalf of his *mataqali*. The head of the *mataqali* is not bound by statutory laws or guidelines and as such, may demand money or goods from his tenants.' In: Fonmanu, K., Ting, L. and Williamson, I. 2003. Dispute Resolution in Customary Lands: Some Lessons from Fiji. University of Melbourne <http://www.csdila.unimelb.edu.au/publication/journals/Dispute%20resolution%20for%20customary%20lands.pdf>

exist and be made, outside the provisions of the legislation referred to in the preceding paragraph.⁷²

3.6 Land Use Unit

In 2011, a Land Use Unit was established in the Department of Lands under the *Land Use Decree* 2010, and a Land Bank was created. The Land Use Unit was established by the *Land Use Decree* 2010, “to accept under-utilised iTaukei and State land for the purpose of leasing same for economic development in the best interests of the landowners”. The provisions of the Decree take precedence over the *iTaukei Land Trust Act*.⁷³ The Land Use Unit is able to provide greater and more secure rental returns for landowners than the TLTB (because the State leases the land and pays the rental (which it recovers from a lessee), the Unit does not charge any administration fee (unlike the TLTB) and the government offers greater security of lease for the lessee (government guaranteed up to 99 years).⁷⁴

iTaukei landowners have the option of depositing under-utilized land into the Land Bank (which can also accept State land) for the purpose of leasing that land to developers in the best interests of landowners and the well-being of the economy. The intention of the Decree is that the land is leased to the State and the latter subleases to a developer.⁷⁵ Once deposited, land remains in the Land Bank until leased to a developer or for 5 years. Before leasing, land is properly surveyed. The rental is 10% unimproved capital value of the land (UCV) compared with a rental rate of 6% UCV charged to lessees by TLTB.⁷⁶

To date, parcels of land with a total area of approximately 4,389ha have been deposited into the Land Bank for lease.⁷⁷ Assuming this is entirely iTaukei land, it represented approximately 0.28% of all iTaukei land at the time. A further 4,593ha was being considered for deposit by landowners. Together with the land already deposited, the total area represents 0.57% of all iTaukei land. Land has been leased for coconut plantations (for biofuel and *bu*), tourism and mining purposes.

The figures are set out in Table 3.

Table 3.6 Land deposited / interest shown under Land Use Decree

Details	Area (hectares)	Count (No. of land parcels)
Leased Areas	1,070	19
Un-leased Areas	3,319	34
Total Designated Areas	4,389	53
Land Owning Unit showing interest to Deposit (Designate)	4,593	40

Source: Land Use Unit 2012⁷⁸

3.7 State land

State land, being all public lands in Fiji including foreshores and the soil under the waters of Fiji, may only be sold, leased or the subject of a licence in accordance with the provisions of the *State Lands Act*.⁷⁹

Leases must be recorded in the *Register of State Leases*, kept by the Registrar of Titles and are subject to the provisions of the *Land Transfer Act*⁸⁰. Leases are limited to the following classes and maximum terms (although there is scope to extend the 30 year terms to 99 years)⁸¹:

Class A-Agricultural Leases (30 years)

Class B-Residential Leases (99 years)

Class C-Commercial Leases (99 years)

Class D-Grazing Leases (30 years)

Class E-Industrial Leases (99 years)

Class F-Dairying Leases (30 years)

⁷²(Crosetto 2005).

⁷³S 9 Land Use Decree.

⁷⁴Part 5 Land Use Decree 2010; Rokovasa, F. 2012. Land Reform in Fiji. (Paper presented at the Commonwealth Heads Of Valuation Agencies Conference, Sydney, April 2012).

⁷⁵Ministry of Information media release 30/6/10, quoting the Hon Attorney-General Mr Aiyaz Sayed-Khaiyum, accessed at: http://www.fiji.gov.fj/index.php?option=com_content&view=article&id=1798:30610-cabinet-approves-land-use-decree-2010&catid=49:cabinet-releases&Itemid=166

⁷⁶Report in Islands Business citing 5 October 2012 report from Fiji Sun quoting the Permanent Secretary for Lands and Mineral Resources Mr Filimone Kau, accessed at http://www.islandsbusiness.com/news/index_dynamic/containerNameToReplace=MiddleMiddle/focusModuleID=130/focusContentID=25777/tableName=mediaRelease/overrideSkinName=newsArticle-full.tpl.

⁷⁷Figures supplied by the Land Use Unit by email 22 August 2012.

⁷⁸Land Use Unit per email 22 August 2012

⁷⁹S3 State Lands Act, but subject to the provisions of other Acts

⁸⁰S 12 State Lands Act

⁸¹Regs 7,8,9 State Lands (Leases and Licences) Regulations

Class G-Tramway Leases (99 years)

Class H-Quarry Leases (30 years)

Class I-Special Leases (99 years)

Licences over State land are to be recorded in a *Register of Licences* in respect of State Land, kept by the Director of Lands⁸². They may be granted for 12 months for the purposes of grazing; the removal of sand, lime and common stone; the cultivation of annual crops; and residence.⁸³

However, the Director is empowered to grant a licence for another purpose, upon conditions⁸⁴.

3.8 Freehold land

Freehold land is land that is neither iTaukei land nor State land. This is in effect private land, and can be bought, charged, encumbered, and sold without restriction, but subject to the provisions of the *Property Law Act*⁸⁵ and the *Land Transfer Act*⁸⁶.

⁸²S 14 State Lands Act.

⁸³Reg 29 State Lands (Leases and Licences) Regulations.

⁸⁴Reg 30 State Lands (Leases and Licences) Regulations.

⁸⁵S 3 Property Law Act (Cap 130).

⁸⁶S 5 Land Transfer Act (Cap 131).

4 Who owns the forest carbon under current laws?

The starting point for developing a legislative and policy framework for forest carbon rights is to establish who owns the carbon in the forest and soil (sometimes referred to as the “carbon sink”) under current laws. This is important because it has implications for how these rights can be defined.

Conclusion: Under the current legal system in Fiji, the landowner owns the forest growing naturally on the land, and by implication, must also own the forest carbon rights. This applies for iTaukei land, State land, and freehold land.

The legal reasoning for this conclusion is set out below, followed by a consideration of more specific types of tenure.

4.1 General position: ‘Land’ is already defined broadly and could include carbon rights

Fijian law is based on English common law. The common law contains a presumption that trees growing upon land, and by implication, the carbon contained within those trees, are a natural part of the land and therefore belong to the landowner.⁸⁷

This position is reflected in the broad and comprehensive statutory definition of ‘land’, which, wherever used in legislation in Fiji (unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided), includes the following :

*messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure and description, and whatsoever may be the estates therein.*⁸⁸

In essence, this definition means that subject to a different definition or the context suggesting otherwise, ‘land’ includes an interest in land, even if that interest is, for example, merely a personal right in relation to the land which is capable of being passed to an heir or a right of exclusive possession of the land. A hereditament is something which

may be inherited by one’s heirs.

Examples of incorporeal hereditaments are the right to rental payments for a lease, an easement and a *profit a prendre*. A specific example of an incorporeal hereditament is a fishing licence granted by a landowner – the right for life or a period of years, to take fish from a pond or dam on another person’s land and take it away from the land for one’s own benefit – also known in law as a *profit a prendre*.⁸⁹ Forest carbon rights could be characterized either as an incorporeal hereditament, or a *profit a prendre*, and therefore constitute an interest in, or part of, the land.

The result is that the carbon rights in naturally growing forest trees are part of the bundle of rights that constitute property rights in the land in which they stand; that is, the landowner owns the stored carbon as part of their ownership of the land. In a similar vein, where a landowner plants trees on his land – the landowner will own the carbon rights in the trees.

For the purposes of the Land Transfer Act, ‘land’ has the following inclusive meaning:

*land, messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description, together with all buildings and other fixtures, paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals and quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted.*⁹⁰

The consequence of this definition is that where land is sold or transferred in some way under the provisions of the *Land Transfer Act*, it is assumed that the forest carbon rights will also be transferred.

Based on common law principles, and the statutory definition of ‘land’ in Fiji, it follows that the rights in the forest resource are attached to the land and the carbon rights are in effect ‘embedded’ in the forest resource, unless there is other legislation which expressly provides to the contrary (e.g. the Forest Decree).

⁸⁷This principle is encapsulated within the latin maxim: ‘cuius est solum eius est usque ad coelum et usque ad inferos’ meaning literally ‘ownership of land extends up to heaven and down to the centre of the earth’ : This has been refined by the courts: See *Wandsworth Board of Works v United Telephone Co* (1884) 13 QBD 904 at 914 per Brett MR who described the principle as a ‘fanciful phrase’. For a discussion of the scope and meaning of natural rights held by a land-owner see generally: *Dalton v Angus* (1881) 6 App Cas 740.

⁸⁸S2, Interpretation Act (Cap 7).

⁸⁹See, for example, the New Zealand judgment: *Smith v CIR* [1969] NLLR 5665; and in relation to incorporeal hereditaments generally, see for example: *Hindmarsh v Quinn* [1914]HCA 27

⁹⁰S2(1) Land Transfer Act (Cap 131).

4.2 Forest Decree and Mining Act both confirm landowners also own trees

The provisions of the *Forest Decree* and *Mining Act* both confirm the position that the owner of land also owns the forest on that land. Under the *Forest Decree*, there is a clear inference that the ownership of forest timber remains with the owner of the land while the trees are attached to the land.⁹¹ Once a tree is cut and removed under the authority of a timber licence, a royalty is due to the landowner and the timber/forest produce then becomes the property of the licensee, provided he has not breached the law or the licence conditions.

This position has been accepted by the courts as being the case in Fiji.⁹² In addition, the law provides⁹³ that no person may enter land to cut and take timber without a licence granting the right to do so having first been obtained, together with the approval of the TLTB in the case of iTaukei land,⁹⁴ and that royalties are payable, as prescribed.⁹⁵ The requirement to pay royalties for the cutting of trees on land and the extraction of the timber implies that it is accepted that the landowner owns the trees growing on the land.

On the other hand, it is open to the holder of a mining tenement to cut, take and use without payment any trees that are not specified, or trees within the classes specified, with the consent of the owner.⁹⁶ The fact that this provision is set out in the *Mining Act* suggests an underlying acknowledgement that landowners have a proprietary interest in trees on their land – as well as the primacy of mining legislation.

4.3 iTaukei land (bare)

Conclusion: Under the current laws in Fiji, the landowner of iTaukei land owns the forest growing naturally on the land, and by implication, must also own the forest carbon rights.

The legal reasoning for this conclusion is set out below.

Does the common law presumption that the owner of land also owns the trees (and therefore, by implication, the carbon rights), which is also reflected in the statutory definition of 'land', apply to iTaukei land? To answer this question it is necessary to ask whether customary law changes the position under common law that landowners also own the trees.

Prior to 1998, Fiji's constitution recognised customary law to an extent.⁹⁷ However the *Constitution Amendment Act 1997* repealed this provision and as it stands today Fiji does not recognise customary law save for a provision within the *iTaukei Lands Act* s3 which provides that 'native lands shall be held by native Fijians according to native custom as evidenced by usage and custom'.⁹⁸ Thus apart from iTaukei land ownership and customary access rights as recognised by legislation, there is no recognition of customary law, although in some cases, such as the *vakavanua*, customary arrangements may be tolerated.⁹⁹

Customarily there were three exclusive rights in relation to the land of a *vanua* or *yavusa* (tribe/clan), as follows:

- The *yavu* or house site, which vested in the occupant of the house;
- The *qeke* or cultivated area, which was held by extended families and subject to the payment of *sevu* or rendering of services to the tribe/clan, or both; and
- The *veikau* or forest area, which vested in the community and rights over which were exercised by the members of the community for their personal or the communal use,¹⁰⁰ or as distributed by the Chief.¹⁰¹

In addition it was in the gift of the chief to allow persons outside the *mataqali*, *yavusa* or *vanua* to use land, through a customary arrangement (*vakavanua*), which might last for generations until the beneficiary of the arrangement (*yavusa* or *mataqali*) died out. Such customary arrangements which have always been oral agreements, and continue to be respected today within the customary sphere, if not in law.

⁹¹Also in the meaning given to land in legislation.

⁹²See *Mosese Radreu & Anor v Emperor Gold Mining Company Ltd & Native Land Trust Board* [1978] FJSC 84.

⁹³Forest Decree 1992.

⁹⁴Ss 9, 10 Forest Decree.

⁹⁵S 17 Forest Decree.

⁹⁶S20 and 24(1)(c) Mining Act.

⁹⁷Section 100(3) Constitution of Fiji 1990.

⁹⁸C Corrin, J. 2000. The Status Of Customary Law In Fiji Islands After The Constitutional Amendment Act 1997. *Journal of South Pacific Law*. Vol. 4:1. http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Corrin1.htm

⁹⁹Crosetto, J. 2005. Comment: The heart of Fiji's Land Tenure Conflict: The law of Tradition and Vakavanua, the customary "way of the land." *Pacific Rim Law & Policy Journal*. 14:71

¹⁰⁰Ravuvu, A. 1985. *Vaka I Taukei : The Fijian Way of Life*. Institute of Pacific Studies. The University of the South Pacific. pp. 73-74.

¹⁰¹France, P *The Charter of the Land* (OUP, 1969) at pp14-15, as cited in the judgment in *Waisake Ratu No. 2* and in Corrin, J., and Paterson, D. 2011. *Introduction to South Pacific law*. 3rd edition. Palgrave MacMillan.

The fruits of the forest or *veikau* belonged to the community, but as the chief could allocate the use of particular lands, so he could allocate rights to forest products. Thus we can infer that customarily, trees growing in the forest were the property of the wider community (*vanua* or *yavusa*), and so rights to the products of trees generally extended beyond the members of the *mataqali*, as decided by the chief. Thus the products of the forest were, and subject to overriding legislation, continue to be available to persons other than the landowning unit in whose name as owner, a particular area of forest is registered.¹⁰²

In Fiji it is accepted that the ownership in trees and therefore the forest growing naturally on the land lies with the landowner, but this is qualified by the statutorily reserved right of the local people to access the forest and extract items for customary purposes (hunting, gathering and obtaining house building materials). Ownership of an area of forest may also be qualified by an existing customary arrangement whereby a group or person outside the landowning unit has been given rights over an area of forest, but this customary arrangement will have no basis in law and so is unlikely to be respected by the law, and could be the cause of disputes.

4.4 Planted trees on iTaukei land (bare)

Conclusion: Where trees have been planted, the person who planted the trees will also own the forest carbon rights, so long as the planting was done with the informed consent of the landowner.

The legal reasoning for this conclusion is set out below.

While landowners own the trees growing naturally on land the situation is different where the trees have been planted by person B on land owned by person A, with person A's consent. In this case, the planted trees are owned by person B.

Where valuable trees have been planted in the *qeile*, such as fruit trees, it is customarily acknowledged that the trees belong to the planter and his descendants, regardless of whether the planter had enjoyed assistance from others in the community in the preparation of the land for planting.¹⁰³ Where a person or family cultivates a garden plot in the *qeile*,

the fruits of that plot are customarily recognised as being owned by the cultivator or the cultivator's household.¹⁰⁴

It follows that the person who planted the trees on iTaukei land will also own the carbon rights in those trees, so long as the planting occurred with the informed consent of the landowner.

4.5 Leased iTaukei land

Approximately 29% iTaukei land or 25.5% total land area of Fiji is leased iTaukei land.

Conclusion: Under the law currently in Fiji, the ownership of trees growing naturally on leased land is reserved to the landowner, or specifically, the lessor.

By inference, the lessor of leased land (as the agent or trustee for the landowner) also owns the forest carbon rights in the trees growing naturally on the land.

The legal reasoning for this conclusion is set out below.

A lease is a grant by the lessor (landowner or head lessee) of an exclusive right to a tenant to use and enjoy land (to the exclusion of all others including the landowner, except as specified in the lease) for a specific purpose, and a specified period (after which the land reverts to the lessor), upon payment of rental. A lease is the grant of an interest in the land. The interest can be assigned and passed on to heirs. As to what can be done on the leased land, a lessee is bound by the terms of the lease and the general laws and is subject to an implied common law duty not to commit waste, that is, not to spoil or degrade the land (including any trees growing on the land), although much will depend on the terms of the lease.

It is noted that forest trees cannot be harvested on any leased land without a licence under the Forest Decree and the consent of the landowner,¹⁰⁵ which indicates a presumption that ownership in the trees remains with the landowner. This is also supported by the requirement that royalties be paid to iTaukei landowners.¹⁰⁶

Concerning leases generally of iTaukei land, the lessee must at all times act in accordance with the purpose of the lease and may not carry out any 'development' on

¹⁰²Recognised in, for example, Reg 17, Forest Regulations.

¹⁰³France, P op cit at p17, as cited in the judgment in Waisake Ratu No. 2 and in Corrin, J., and Paterson, D. 2011. Introduction to South Pacific law. 3rd edition. Palgrave MacMillan.

¹⁰⁴Ravuvu, op cit at pp 71-73.

¹⁰⁵S10 Forest Decree.

¹⁰⁶S17 Forest Decree.

the leased land without the consent in writing of the TLTB and any consents required under other legislation.¹⁰⁷ 'Development' includes improvements to the land and the use of the land for a purpose different from that for which the land was leased.¹⁰⁸ "Improvements" includes the planting of trees and shrubs.¹⁰⁹ When the lease is relinquished or not renewed, in the absence of breaches of the lease or relevant laws, the lessee may be paid compensation for improvements made.¹¹⁰

4.6 Standard form REDD+ clause in leases

A standard clause already included in most forms of lease of iTaukei land commits the lessor and lessee to further discussion and agreement on the sharing of income if the activity by the lessee on the leased land is to be developed as a 'carbon trading project', subsequent to the execution of the lease.

The purpose of the clause is to ensure that the landowner shares the benefits resulting from the use of the leased land that were not foreseen at the time of the execution of the lease, in the event of the use of the land being accepted as a REDD-Plus project. An example might be where land has been leased for the purposes of forest retention for the protection of an unpolluted water catchment area, and subsequently the lessee is able to benefit financially from the retention of the forest through an approved REDD-Plus project. Consistently with the REDD+ safeguards, those benefits should be shared with the landowners.

Set out below (**Table 4.2**) is an analysis of standard form leases (based on statutory provisions) for iTaukei land that are used in Fiji.

Table 4.2 Standard lease provisions

Type of instrument	Issued under	Purpose for which lease is used	Observations regarding ownership of forest and carbon rights
iTaukei Agreement for Lease (excluded from ALTA but not in reserve)	<i>iTaukei Land Trust Act</i> <i>iTaukei Land Trust (Leases and Licences) Regs: Reg 12</i>	Agriculture (may include forestry) and ancillary residential	All timber and timber like trees are reserved to the Lessor (see Cl. A(1) and First Schedule) The Lessee must not remove or dispose of any forest produce (see Cl. A(2)(p)). REDD+ clause (Special condition 4)

¹⁰⁷Reg 14(1)(c) iTaukei Land Trust (Leases and Licences) Regulations

¹⁰⁸Reg 14(2) iTaukei Land Trust (Leases and Licences) Regulations

¹⁰⁹Reg 2 and first Schedule, iTaukei Land Trust (Leases and Licences) Regulations

¹¹⁰Regs 15, 19, iTaukei Land Trust (Leases and Licences) Regulations

¹¹¹See, eg, Special Condition 7 of the TLTB standard form Agreement for Lease for Special (Re-Afforestation) Purpose.

The form of the REDD+ clause is as follows:

That the Lessor and the Lessee agree and declare:

- (a) *That they will engage in discussion and to agree on resolving issues relating to the participation of Landowners in any Carbon Trading project being developed as a consequence of the Capital project on the leased land including sharing or apportionment of income generated from the International Carbon Trading markets to the **REDD Plus (Reducing Emission from Deforestation & Forest Degradation, Forest Conservation, Sustainable Management of Forest Carbon Stocks) Project Developers, the Lessor, the Lessee and the Landowners;***
- (b) *That in default of agreement or in case of irreconcilable differences arising leading to a dispute on any of the matters covered in (a) above the Lessor and the Lessee are to refer the issue to mediation and/or arbitration in accordance with applicable laws.¹¹¹ (hereafter '**REDD+ clause**').*

4.6.1 Types of leases

In the case of leased land, the landowner retains the ownership of the trees which were already growing on the land when the lease was granted.

Type of instrument	Issued under	Purpose for which lease is used	Observations regarding ownership of forest and carbon rights
iTaukei Agreement for Lease for Special (Re-Afforestation Purpose)	<i>iTaukei Land Trust Act</i> <i>iTaukei Land Trust (Leases and Licences)</i> <i>Regs: Reg 12</i>	Re-afforestation and agro-forestry	All timber and timber like trees are reserved to the Lessor (see Cl. A 1. and First Schedule) The Lessee owns the (planted) trees and has full rights and access over the trees and can determine what to do with the trees (Special Condition 1). REDD+ clause (Special condition 7)
ALTA Instrument of Tenancy Agricultural	<i>Agricultural Landlord and Tenant Act: s 8</i>	Forestry/plantations (agriculture includes forestry: ALTA s2)	The Lessor reserves the right to search for, cut and carry away all indigenous trees (Cl (23)) Felling payment due to Lessor based on volume of plantation timber felled (Cl (31)). REDD+ clause (Special Condition 4)
Lease for Agricultural Purpose (ALTA)	<i>Agricultural Landlord and Tenant Act: s 8 (4); iTaukei Land Trust Act</i> <i>iTaukei Land Trust (Leases and Licences)</i> <i>Regs: Reg 12</i>	Agriculture (may include forestry: ALTA s 2) and ancillary residential	All timber and timber like trees are reserved to the Lessor (see Cl.1 and The Schedule) The Lessee must not remove or dispose of any forest produce (see Cl. 2(p)).
Lease for Agricultural Purpose (Exempted under section 58(f) of ALTA) iTaukei Lease	<i>iTaukei Land Trust Act</i> <i>iTaukei Land Trust (Leases and Licences)</i> <i>Regs: Reg 12</i>	Agricultural purposes	All timber and timber like trees are reserved to the Lessor (see Cl.1 and First Schedule) The Lessee must not remove or dispose of any forest produce (see Cl. 2(p)). REDD+ clause (Special Condition 4)
Agreement for Lease for Special (Protected Area – Conservation) Purpose	<i>iTaukei Land Trust Act</i> <i>iTaukei Land Trust (Leases and Licences)</i> <i>Regs: Reg 12</i>	Protected Area and ancillary operations (management for the exclusive purpose of permanent preservation of the environment on the land: Cl B 3.)	All timber and timber like trees are reserved to the Lessor (see Cl. A 1. and First Schedule) BUT it is the intention of the Lessee to wholly prevent logging or exploitation of any timber or timber like trees, and minerals extraction (Cl B 5.) The Lessee must not remove or dispose of any forest produce (see Cl. 2(o)). REDD+ clause (Cl B 8.)

Type of instrument	Issued under	Purpose for which lease is used	Observations regarding ownership of forest and carbon rights
Land Bank Lease	<i>Land Use Act: s 8 and Land Use Regulations: Reg 13</i>	various	<p>The Lessee must not remove or dispose of any forest produce without the written consent of the Lessor and subject to the payment of royalty as prescribed in the Forest Regulations (see Annexure B General Conditions cl 8 (b))</p> <p>The Lessee cannot take, use or otherwise injure any forest tree growing on the leased land without the prior written consent of the Lessor except for purposes incidental to grazing use: Specific Condition (g) for Grazing/Dairying Purpose</p>

Source: TLTB standard form leases; relevant legislation

With the exception of the standard form of lease granted under the Land Use Decree, the provisions of standard form leases in use for iTaukei land infer that the ownership of the natural forest, and by implication the carbon rights, remain with the landowner.

There are specific conditions prescribed for the 7 categories of land use that might be the subject of a lease of land in the Land Bank, but only one set of conditions includes a provision prohibiting without permission the taking of any forest tree growing on the land.

In the case of a lease for agricultural purposes, where the land contains natural forest it can be clear-felled in accordance with the requirements of the law, such as the *Forest Decree*, which does not exempt forest land even though leased for a purpose which requires the forest to be cleared. Indeed, the *Agricultural Landlord and Tenant Act*¹¹² which applies to State and all agricultural land,¹¹³ specifically provides that it is subject to the provisions of the *Forest Act* (sic).¹¹⁴ Royalties would be payable in the ordinary course of events to the landowner, in accordance with the *Forest Decree*.

In conclusion, the law generally in Fiji is in accordance with the common law position that ownership in trees growing naturally on leased land remains with the landowner, even when the land is leased, unless the terms of the lease provide otherwise (i.e., specific consent granted by the lessor).

4.6.2 Plantations on leased iTaukei land

Who owns the forest carbon in plantations?

Conclusion: In the case of plantations, the (planted) trees are owned by the lessee who has full rights over them but not in relation to the stored carbon.

Approximately 10.47% of the total land area of Fiji is under plantations.¹¹⁵ Pine and hardwood (primarily mahogany) plantations together make up 14.6% Fiji's forested land (approximately 60% total land area), with mahogany (2.9% total land area) having generally been established on logged over rainforest land and pine (2.5% total land area) predominantly on grasslands in western Viti Levu and Vanua Levu.¹¹⁶

¹¹²Cap 270.

¹¹³S64 Agricultural and Tenant Act.

¹¹⁴S59 Agricultural and Tenant Act.

¹¹⁵Includes pine, hardwood and coconut plantations: see FAO Global Forest Resources Assessment 2010 Fiji Country Report, accessed at <http://www.fao.org/forestry/fra>

¹¹⁶Sue, D. 2010. Facilitating Financing for Sustainable Forest Management in Small Islands Developing States and Low Forest Cover Countries. UNFF; Leslie, A. and Tuinivanua, O. 2009. Fiji Forestry Outlook Study. Food and Agriculture Organization of the United Nations.

The distribution of plantations by category of land tenure is set out in **Table 5** below:

Table 4.3 Plantation cover across various land tenure systems

LAND TENURE	Plantation (Hardwood and Pine) (Hectares)	% Total Land Area under Plantation
iTaukei Land	135,619	83.38%
State Land	16,510	10.15%
Private Freehold Land	10,531	6.47%
	162,660	

Source: FAO 2010. Global Forest Resources Assessment 2010- Fiji Country Report

Most plantations in Fiji are established on leased land under the iTaukei Land Trust Act and the iTaukei Trust (Leases and Licences) Regulations. The standard provisions of this type of lease provide that the lessee owns the (planted) trees and has full rights and access over the trees and can determine what to do with them. However, the presence of the REDD+ clause in the standard form leases suggests that the carbon rights in plantation trees will not automatically stay with the ownership of the tree; it will be a matter for negotiation where REDD+ activities were not in contemplation at the time of the agreement to lease.

The provisions of the *Forest Decree*¹¹⁷ appear to confirm that for the purposes of harvesting, trees in a plantation are the property of the lessee. It cannot be inferred thereby that the forest carbon rights in the planted trees are also the property of the lessee; that will depend on what was agreed at the time of the lease agreement.

Under the Agricultural Landlord and Tenant Act (which applies to all agricultural land), a lessee is entitled at the end of the lease to the payment of compensation by the lessor for trees of economic value planted by the lessee, provided he first obtained the consent of the lessor to their planting.¹¹⁸

It can be concluded that ownership in planted trees on any land resides in the person who was responsible for their planting, where they were planted with the consent of the

landowner during the period of a tenancy, but only for the duration of the lease unless other arrangements were made with the lessor. However, whether the lessee can benefit from the products of planted trees not foreseen at the time of the agreement with the lessor, is a debatable point. It may be argued that in the case of a lease, the lessee may not stray outside the purpose of the lease. Thus, a lessee who leased for the purpose of a plantation for timber, although technically owning all the products of the tree, may not be able to benefit from the trees except by way of harvesting for timber, as this was the only purpose in contemplation and agreed, at the time of the agreement for lease of the land.

The law in Fiji is in accordance with both the common law and customary position that the rights in planted trees lie with the planter of the trees, provided that permission to plant was given by the landowner (through a lease or other written consent) prior to the planting of the trees, and subject to the terms of any lease. However, if REDD+ activities were not in contemplation by all parties at the time of the lease agreement, while the carbon rights in trees planted in accordance with the lease most likely lie with the owner of the trees (the lessee), the lessee cannot benefit from the forest carbon rights in the absence of an agreement specifically addressing this purpose.

4.7 State land

Conclusion: Under current law, the ownership of carbon in forest trees on State land remains with the State, including where the land is leased.

Concerning leases of State land (which includes foreshore land), the lessee must act in accordance with the purpose of the lease and similar provisions apply as for leases of iTaukei land, concerning improvements.¹¹⁹ Fruit trees may not be cut down without the written consent of the lessor unless waived,¹²⁰ nor may forest produce be removed without the lessor's consent and payment of royalties as directed by the lessor.¹²¹

It follows from the common law presumption coupled with the statutory definition of land that the State, as the owner of State land, also owns the carbon rights in that land.

¹¹⁷S 12 Forest Decree provides that, in relation to plantation timber, the licensing officer need only have proof of the applicant's entitlement to the timber (together with a compliant logging plan) to issue a licence to fell/extract timber, upon which neither royalties are payable, nor is the prior consent of the TLTB required.

¹¹⁸S40(1) and the Schedule, Agricultural and Tenant Act.

¹¹⁹See the State Lands (Leases and Licences) Regulations.

¹²⁰Reg 21 (c) State Lands (Leases and Licences) Regulations.

¹²¹Reg 21(f) State Lands (Leases and Licences) Regulations.

4.8 Freehold land

Conclusion: The freehold owner of land holds the carbon rights in any forest trees growing on the land.

It follows from the common law presumption coupled with the statutory definition of land that the owner of freehold land also owns the carbon rights in that land.

4.9 Mangroves

Significant amounts of carbon are stored and sequestered in coastal ecosystems of tidal marshes, mangroves and seagrass meadows. This is often referred to as “Blue Carbon”.¹²² It is therefore important to determine who owns the carbon in tidal marshes, mangroves and seagrass meadows.

Conclusion: In Fiji, foreshore land is owned by the State. It follows that the forest carbon rights in mangroves are owned by the State.

The legal reasoning for this conclusion is set out below.

In Fiji, foreshore land and the land under territorial waters is owned by the State.¹²³ The State owns the foreshore¹²⁴ which is between the mean high water and the mean low water marks. In Fiji most mangrove species grow in the foreshore zone¹²⁵. Mangroves frequently occur in conjunction with

coral reefs and seagrass beds and there is interaction between them¹²⁶. As the mangroves in the foreshore zone, are growing on State land, they are owned by the State. The total area of mangroves has been estimated variously to cover between 38,000 and 42,000 hectares¹²⁷, and at the lower end of the spectrum, an estimated 3% total forested areas.¹²⁸

Some species of mangroves grow adjacent to the foreshore zone, in abutting land that is either iTaukei, State or freehold land. The trees will be owned by the relevant landowner in each case.

4.10 Forest concessions and timber licences

Where a forest concession or timber licence is in place, have the forest carbon rights passed to the holder of the concession or licence under the law currently in Fiji?

Conclusion: Where a forest concession is in place, the rights in the forest trees pass to the concession holder (licensee), for the limited purpose of logging the trees and converting them into timber products. The carbon rights in the timber would pass to the concession holder who has an obligation to log the trees and cannot benefit from the carbon rights.

The legal reasoning for this conclusion is set out below.

¹²²For a discussion of the emerging international policy frameworks for Blue Carbon, see: Herr, D., Pidgeon, E., and Laffoley, D. (eds.) 2012. Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group. IUCN. http://www.iucn.org/knowledge/publications_doc/publications/?uPubslD=4631

¹²³S 2 State Land Act.

¹²⁴The Deed of Cession of Fiji to Great Britain 10 Oct 1874.

¹²⁵Sykes, H. 2007. Mangrove Management Plan for Vulani Islands March. <http://www.vulani.com/EIA/Appendix%20B%20Mangrove%20Management%20Plan%20Stage%201%20Vulani%20Islands.pdf>; and Spalding, M., Kainuma, M. and Collins, L. 2010. World Atlas of Mangroves. Earthscan Ltd., Dunstan House. Annex 3: National Statistics pp. 292-295.

¹²⁶Agrawala, S. et al. 2003. Development and Climate Change in Fiji: Focus on Coastal Mangroves. OECD. <http://www.oecd.org/env/climatechange/21056315.pdf>

¹²⁷See notes 103, 104; also FAO Global Forest Resources Assessment 2010 Fiji Country Report, accessed at <http://www.fao.org/forestry/fra>

¹²⁸Moorhead, A (ed). 2011. Forests of the Pacific islands : Foundation for a sustainable future. SPC. p.16.

The *Forest Decree* in Fiji provides for 2 kinds of licence; a concession (licence) for a period of years, and an annual logging licence. Both of these may be renewed. The types of authorizations and their main elements are summarized in **Table 6** below.

Table 4.4 Types of forestry concessions, licences and approvals in Fiji

Type of approval	Issued under	Duration	Issued by	Comments
Forest concession (timber licence) 10-30 years	Forest Decree 1992 Forest Regulations s8 iTaukei Land Trust Act reg 10 iTaukei Land Trust (Leases and Licences) Regs	10-30 years max. renewable ¹²⁹ (Applicant must undertake to operate timber processing facilities ¹³⁰)	Conservator of Forests	Prior approval of landowner rep ¹³¹ Not transferable ¹³² Application must include harvesting plan for approval Subject to approval of annual logging plan ¹³³ May be revoked or suspended ¹³⁴ Prior approval to employ other loggers Subject to payment of royalties ¹³⁵
Forest concession (timber licence) 10 years or less	<i>Forest Decree Forest Regulations</i>	10 years max. ¹³⁶ renewable	Conservator of Forests/ Forest Licensing Officer	As above Currently not used
Logging licence	<i>Forest Decree</i>	1 year; renewable	Forest Licensing Officer	Licence required from TLTB for iTaukei land. Held by the landowner The logging contractor is authorized in the licence ¹³⁷
Logging licence for planted timber¹³⁸	<i>Forest Decree</i>	1 year	Forest Licensing Officer	Logging plan; show entitlement to timber No prior landowner approval required Not subject to royalty payments
Logging licence to clear land for ALTA lease	<i>Forest Decree</i>	6 months	Forest Licensing Officer	Licence required from TLTB authorizing clear fell of iTaukei leasehold land

¹²⁹Reg 3 Forest Regulations.

¹³⁰S11(2) Forest Decree.

¹³¹S 10 Forest Decree.

¹³²S 18 Forest Decree.

¹³³S 14 Forest Decree.

¹³⁴S 19 Forest Decree.

¹³⁵S 16(2) Forest Decree.

¹³⁶S 11 Forest Decree.

¹³⁷Condition 6 Standard form Licence to take forest produce (TLTB)

¹³⁸S 12 Forest Decree

4.10.1 Logging concessions

A person may apply under the *iTaukei Lands Trust Act*, the Forest Decree and the Forest Regulations, for a licence (concession) over iTaukei forested land (the concession area)¹³⁹ for the specified purpose of extracting timber, for a period of up to 30 years.¹⁴⁰ A concession is usually held by landowners or an incorporated group of landowners (in which case the incorporated body leases the lands the subject of the concession).

The concession is a mere non-transferable licence (no tenancy rights), although it is often referred to as a lease, because a single document the parties to which are the TLTB on behalf of the landowners, the concession holder (the incorporated body) and the Conservator of Forests, contains all rights and duties. The concession holder enters into a contract with a logging company who becomes responsible for implementing the terms of the concession. The concession land must be divided into coupes, each preferably wholly within the boundaries of one landowning unit, in an approved harvesting plan.

The rights passing to the concession holder in the concession area are limited to the following:

1. The right to fell and/or remove trees and naturally fallen trees of certain specified species (being the 'obligatory species' numbering 28 in total¹⁴¹);
2. The right to convert any felled tree into logs, timber, veneer or other wood products; and
3. The right to build and use roads, bridges, culverts, fords, causeways and other works as are necessary to carry out the concession holder's rights and obligations¹⁴²

A concession holder pays to the landowner an annual rental fee in addition to royalties payable for the rights to the trees as a condition of the grant of the concession.¹⁴³

The activities of the concession holder are tightly regulated under the concession, with minimum and maximum

volumes specified to be harvested in each calendar year¹⁴⁴.

The TLTB may seek to take back any part of the concession land for its purposes (including agricultural, pastoral, silvicultural and mining) upon 6 months' notice, after which period the concession holder is obliged to clear fell all obligatory species from that part within a reasonable period of time not exceeding 2 years¹⁴⁵. If the TLTB seeks the surrender of an area of the land to landowners for their use, maintenance and support, the concession holder may relinquish that area after first logging same¹⁴⁶. Aside from termination for serious breach by the concession holder, the concession in its entirety may only be terminated early if all coupes have been declared closed, in which case all timber will have been extracted from all coupes.^{147, 148}

At present in Fiji, there are only 2 forest concessions in existence, both on Vanua Levu.¹⁴⁹ The more significant concession lies with Fiji Forest Industries, owned by Tropik Wood Industries Limited, a subsidiary of Fiji Pine Limited in which the largest shareholder is the Fiji Government. It covers a large area of Vanua Levu.¹⁵⁰ The two remaining concessions together cover approximately half the land area of Vanua Levu.

With existing concessions, the rights to the stored carbon in the forest trees have not passed to the concession holder because, as with a plantation lease, the landholders leased the land and agreed to a concession licence over the land for the specific purpose of harvesting the trees and did not agree and never had in contemplation that the concession holder would benefit from the rights in the stored carbon. In any event, the concession holder has an obligation to harvest the trees and could not under the present law and the form of the concession document, without the approval of the Conservator of Forests and the agreement of the landowners (TLTB), relinquish the concession before all coupes are closed in order to use the trees for any other purpose including benefitting from the carbon rights. It should here be noted that there is a precedent for approval to relinquish a concession in the interests of the protection of the remaining forest; namely in the case of the Sovi Basin¹⁵¹.

¹³⁹Ss 8, 11 iTaukei Land Trust Act

¹⁴⁰Reg 3, Forests Regulations

¹⁴¹Schedule 3 to standard form iTaukei Forest Concession Agreement (TLTB)

¹⁴²Cl 1 standard form iTaukei Forest Concession Agreement (TLTB).

¹⁴³See standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁴Cl 15 standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁵Cl 23 standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁶Cl 48 standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁷Cl 40 standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁸Schedule 5 to standard form iTaukei Forest Concession Agreement (TLTB, 2012).

¹⁴⁹Draft Fiji REDD+ Carbon Financing Guidelines (Dec 2011), p. 40.

¹⁵⁰Vanua Levu is 30% total land area of Fiji; concessions cover 14.9% total land area Fiji: see table 1.

¹⁵¹See a description in Moorhead, A (ed). 2011. Forests of the Pacific islands: Foundation for a sustainable future. SPC. p.20.

5 Could the State take ownership of forest carbon rights?

An alternative to forest carbon being owned by landowners is for the State to assume ownership of forest carbon property rights. Under this option, the rights (and liabilities) in forest carbon would be reserved exclusively for use by the State, in a similar way in which the rights to mineral resources and crude oil is reserved to the State.¹⁵² This is sometimes described as the ‘nationalisation’ of forest carbon rights.

Given the conclusion in Section 3 above that landowners currently hold the property rights in the stored forest carbon, a legislative act by the Government to reserve all forest carbon rights to itself could amount to arbitrarily depriving landowners of their forest carbon rights, unless adequate compensation was paid. Some compensation, could, however, be paid to landowners under the terms of a national REDD+ benefit-sharing plan, assuming that the provisions of the scheme effect fair and equitable payments. It may be possible for the State to acquire forest areas on the basis that this is for a public purpose, although to do this adequate compensation must be paid.¹⁵³

However, some difficulties with this approach are that:

- The taking of forest carbon rights is likely to amount to the taking of the property of indigenous landowners, which is likely to be contrary to Fiji’s international obligations under the Indigenous and Tribal Peoples Convention (ILO 169), which Fiji has ratified, and the general principles under which the nation operates¹⁵⁴.
- It would be contrary to the Safeguards set out in the Pacific Islands Regional Framework for REDD+ and Fiji’s REDD-Plus Policy which states that: “The following will be ensured for all REDD-Plus initiatives and projects in Fiji: (i) protection of and respect for the knowledge and rights of indigenous peoples (as stated in [the United Nations Declaration on the Rights of Indigenous Peoples] UNDRIP and [the Convention for the Safeguarding of the Intangible Cultural Heritage] UNCSICH, and other international instruments;...”¹⁵⁵.

5.1 Advantages and disadvantages

The box below sets out the potential advantages and disadvantages of the nationalization option:

Advantages	Disadvantages
<ul style="list-style-type: none"> • Direct engagement by national government in REDD+ funding/markets for national benefit. • Control of all forest carbon rights lies with national government • National government would control REDD+ projects, including: <ul style="list-style-type: none"> • reforestation and re-establishment of ecosystems; • the location of REDD+ projects; and 	<ul style="list-style-type: none"> • Inconsistent with the customary concept of community ownership of the (natural) forest on community land. • Removes a right of indigenous peoples. • The location and priority of projects would be determined by the government. • Landowners have a permanence obligation; must maintain and sustainably manage the forest for the life of the REDD+ project without control over the forest carbon rights.

¹⁵²S3 Mining Act(Cap 148).

¹⁵³S7 State Acquisition of Lands Act (Cap 135).

¹⁵⁴There is presently no Constitution in Fiji; work is progressing on the preparation of a new Constitution.

¹⁵⁵Fiji REDD-Plus Policy, p 6. Note UNDRIP protects the rights of indigenous peoples to the land and resources they have traditionally owned, used or occupied (Art. 26), and also incorporates the right for indigenous peoples to give or withhold their Free, Prior and Informed Consent (FPIC) to legislative measures that may affect them (Art. 19).

Advantages	Disadvantages
<ul style="list-style-type: none"> • the development of expertise in management by communities to improve and sustainably manage natural forest resources. • Easier to coordinate REDD+ projects (than other options). • Government would be contractor and enforcer – could withhold payments as means of enforcing compliance with REDD+ plan 	<ul style="list-style-type: none"> • May remove the incentive for landowners to sustainably manage and conserve the forest resource. • Government would have to manage a large number of contract, leases or acquisitions.

5.2 Legislative change

This option would require separate enabling legislation to declare State ownership, and establish systems to control and manage REDD+ projects in the interests of increasing Fiji's carbon stock, enhancing Fiji's forests with all their consequent benefits, facilitating natural solutions to threats from climate change likely to affect Fiji and receiving income to achieve these outcomes.

5.3 “Deeming” by State of ownership of carbon rights

Must the State ‘deem’ ownership of carbon rights in order to participate in the UNFCCC mechanism? No. It is not necessary for a State to “deem” ownership of carbon rights on behalf of the domestic owners of those rights in order for the State to participate in intergovernmental or other international carbon finance transactions that require a national level (e.g. Fiji Government) counter party.¹⁵⁶

For example, all of the carbon units that are created under the Kyoto Protocol are created by an act of international law, namely the ratification of the treaty. All credits are therefore owned and held by governments under international law between the countries that ratified the treaty, with the carbon credits (Certified Emission Reductions) that are generated, being owned, held and traded by the State Parties. No ‘deeming’ of ownership is required for this to occur. However the Kyoto Protocol clearly envisages that States may transfer their rights (credits) down to the sub-national actors who carry out CDM projects. This is done by the State Party authorizing, through its Designated National Authority, the private entities to hold, own and trade the Certified Emission Reductions generated by the project.¹⁵⁷ However, it should be noted that it is not yet clear whether UNFCCC will adopt the same approach in its emerging REDD+ regime.

¹⁵⁶Fiji's draft REDD+ Carbon Financing Guidelines (Draft 4, December 2011) suggest that this may be necessary in order for the country to access international carbon finance: para. 2.2.

¹⁵⁷Kyoto Protocol, Article 12(9). For a discussion on this point, see Peskett and Brodnig (2009), at p. 7. See also Wemaere M., and Streck, C. 2005. Legal Ownership and Nature of Kyoto Units and EU Allowances. Chap. 8 in: Freestone, D., and Streck, C. (eds.) Legal Aspects of Implementing the Kyoto Protocol Mechanisms. Oxford University Press.

6 Defining forest carbon rights in legislation

The first step in developing a legal framework for carbon rights is to define exactly what is being owned.

6.1 What should the definition cover?

The statutory definition should be comprehensive and should address:

- stored forest carbon (whose emission will be avoided), and
- carbon sequestration rights: the carbon that will be sequestered (absorbed) in the future.

6.2 Carbon pools

The IPCC has identified five carbon pools that constitute forest carbon in the forest land use category which countries should measure and report against.

The definition should also address who owns the carbon contained in the five carbon pools:

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

- below-ground biomass (live roots more than 2mm diameter);
- dead wood;
- litter;
- soil organic matter (including organic carbon in mineral soils, and includes live and dead roots of less than 2mm diameter. Each country can specify the depth to which it will measure soil organic carbon).¹⁵⁸

Where voluntary projects are concerned, the particular methodology to be used will usually specify which of these five carbon pools the Project Proponent must include and measure as part of its REDD+ project. (This is a requirement under the VCS: AFOLU Requirements, Ver. 3, para 4.3.1).

It is therefore suggested that the legislative definition of 'forest carbon rights' includes each of the five carbon pools so that the position is clear.

¹⁵⁸The Pacific Islands Regional Policy Framework for REDD+ defines "Carbon Pool" as: "A reservoir of carbon. A system that has the capacity to accumulate or release carbon. Carbon pools are measured in terms of mass (e.g., metric tonnes of carbon). The major carbon pools associated with forestry projects include live biomass (including above and below ground components such as roots), dead biomass, soil and wood products." see Policy Framework Glossary. Harvested wood products constitute a carbon reservoir. Note that the 2006 IPCC Guidelines do not include 'harvested wood products' as one of the five carbon pools associated with the six land use categories, but instead suggests that the contribution that harvested wood products make to a country's annual AFOLU emissions/removals be reported separately at the national scale (see Eggleston, H.S., Buendia, L., Miwa, K., Ngara, T. and Tanabe, K. (eds). 2006. IPCC Guidelines for National Greenhouse Gas Inventories 2006. IGES. <http://www.ipcc-nggip.iges.or.jp/public/2006gl/vol4.html>). The VCS treats harvested wood products as a separate carbon pool to be measured under its Approved REDD Methodology Modules (VM0007, Ver. 1.2, 31 July 2012).

7 Proposed definition of ‘forest carbon rights’ in Fiji legislation

Some relevant definitions are proposed in the draft Forest Decree. These include the following:

“biomass” means the total amount of live and inert organic matter above and below ground expressed in tonnes of dry matter per unit area

“carbon” means chemical element present in all organic matter which contributes in the form of various greenhouse gases, for example carbon dioxide and methane to climate change;

“carbon credit” is a generic term for any tradable certificate or permit representing the right to emit one tonne of carbon dioxide or the mass of another greenhouse gas with a carbon dioxide equivalent (tCO₂e) equivalent to one tonne of carbon dioxide;

“carbon stock” means the amount of carbon stored in the above-ground biomass;

“forest biomass” means all organic matter in a forest, i.e. leaves, branches, trunks, roots, litter, and soil organic matter, irrespective if dead or alive;

“forest carbon” means carbon stored in forest biomass;

With respect, **“carbon stock”** may not be necessary and it appears to be in conflict with **“forest carbon”**. The following definitions could be added:

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

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

These definitions will make it clear that forest carbon rights are based on land ownership. They can also be used in documents, such as contracts and leases, to explain whether a particular transaction includes forest carbon rights or not.

7.1 Linking forest carbon property rights to land ownership

This reflects the current position under Fiji law, and also reflects the preliminary position adopted by Fiji (draft Guidelines). While there is no need for legislative amendment to declare who has legal ownership of the carbon in trees, it would be best to clarify the position in legislation to avoid any uncertainty. The ownership of stored forest carbon would not change. It would remain with whoever has lawful possession of the trees. Thus a landowner who has not leased the land to another person retains ownership of the trees growing on the land, and a lessee who has planted trees with the informed permission of the landowner (under a lease or by agreement/licence) owns the carbon stored in the trees, but whether a lessee may benefit exclusively from the forest carbon will depend on whether the lessor was informed of the intention by the lessee to exploit the sequestered forest carbon or the potential therefor, at the time of negotiation of the lease; that is whether the exploitation of stored forest carbon is within the purpose of the lease.

If a definition of ‘forest carbon rights’ was inserted in the Property Act with a consequent amendment to the existing definition of ‘land’ in that Act, for the sake of clarity, it would create a consistent definition of forest carbon rights that would apply across all land categories (iTaukei land, State land and freehold land), and could be used for consistency in different land transaction instruments, such as leases.

8 Landowners and REDD+ projects

The purpose of this section is to explore the options as to how a landowner could undertake a REDD+ project on their land.¹⁵⁹

Firstly REDD+ activities must be attractive to forest owners. That may require policy changes.

It has to be borne in mind that a project should cover a minimum area of 5,000 - 10,000ha and preferably 50,000ha to be a viable REDD+ project, having regard to establishment costs, the current low carbon price and the ongoing costs, although much will depend on the type of forest, the number of carbon credits likely to be generated (the baseline driver) and the future carbon price.¹⁶⁰ It follows that it will be desirable for parcels of land to be aggregated for any REDD+ project to be viable.

The State will have to consider how it will manage REDD+ projects. The present plans are for the Conservator of Forests to approve REDD+ projects. How this is proposed is not yet detailed. One model could be by way of a 'forest ecosystem restoration' licence, issued in conjunction with a REDD+ project approval.

In this option, a government authority (most likely the Forestry Department) would be authorised by legislation to grant a licence to an incorporated landowning entity or other person (which could include the State or a non-government organisation (NGO)) to enable ecosystem regeneration or restoration of an area of forest. TLTB approval would be necessary under the current legislation for the grant of the proposed statutory ecosystem restoration licence, for iTaukei lands. Under the licence provisions, rental fees (the land would be effectively leased by the landowners to the landowning entity) and royalties (for the use of the landowners' carbon rights) would be payable.

First, the particular area would be declared 'permanent forest' under the Forest Decree and a 'Government protected area' under the *Mining Act*¹⁶¹, to ensure that forest harvesting and mining activities were prohibited in the interests of the integrity of the forest restoration process (and any consequent REDD+ project). Ideally, the Forestry

Department would have identified on a map, as part of its REDD+ strategy, those areas suitable for REDD+ forest projects or 'ecosystem restoration'.

In conjunction with the grant of an ecosystem restoration licence the Conservator of Forests would approve a REDD+ project over the land.

A person (which could include the State, an NGO, an incorporated group of landowners, etc.) would apply for a licence (ecosystem restoration), which would enable the holder to carry out forest restoration/regeneration. The period of the licence may need to be at least 30 years, in the interests of the development of the volume of sequestered carbon leading to verifiable emissions reduction units, depending on the forest type. Necessary work or the delivery of the project could be contracted out to an NGO or other person, with some benefit sharing achieved through standard licence conditions requiring the preferential employment of members of landowning units, training of employees and potential employees, etc., as in the current standard forest concession licence.

This option is modelled on the way in which forest concessions operate.

A system of Ecosystem Restoration Forest Timber Utilisation Permits for Natural Forests in Production Forests is established in Indonesian law.¹⁶² Under the Indonesian system, a proposal plan is required together with an environmental impact assessment. The permit is evaluated periodically (every 5 years) and it appears that the permit holder may also be granted a harvesting permit for sustainable forest harvesting after assessment of the relevant application.

The means by which REDD+ projects could occur under this option is two-fold and involves land being leased. The alternatives are:

1. The landowner grants a lease including the forest carbon rights to the State or a REDD+ project developer; and

¹⁵⁹This section is based on the assumption that Fiji decides to confirm through legislation the current legal position that iTaukei landowners will own the forest carbon rights in their land, as is foreshadowed in the draft Fiji REDD+ Carbon Financing Guidelines.

¹⁶⁰Comment by Mark Lambert of Terra Global Capital, in presentation at Regional Forest Carbon Workshop 23 Oct 2012.

¹⁶¹S5, but note that the limit of the land area that may be the subject of a declaration is presently 250ha.

¹⁶²Ministry of Forestry Republic of Indonesia Decree Number: P.36/Menhut-li/2009 regarding Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests.

2. A group of landowners forms a landowning entity to undertake the project, through a contract with a service provider and a contract of sale with a buyer. The landowning entity leases the lands from the landowners.

It should be recalled that under the *iTaukei Lands Act*,¹⁶³ iTaukei landowners cannot lease their land directly to a lessee, nor can they grant a licence or any other right over the land, leases, licences, etc.,. These can only be granted by the TLTB or through the Land Bank (leases).¹⁶⁴

8.1 Lease

Conclusion: The landowner may grant a lease over land. The lease must specify that the purpose is to exploit the forest carbon rights. The lessee would need a forest ecosystem restoration licence under the Forest Decree.

Land could be leased to a REDD+ project developer, which could be the State, a group of landowners, a Non-Government Organisation (NGO) or other person. Where iTaukei land is concerned, this would need to occur through the TLTB or the Land Use Unit and the lease could be to the State if it chose to be a REDD+ developer. Where State land is concerned, the Director of Lands would grant the lease, and where freehold land is concerned, the freehold owner would grant the lease.

The diagram below illustrates this approach. In this example the REDD+ developer leases iTaukei land from the Land Use Unit (previously deposited into the Land Bank by iTaukei owners) for a REDD+ project, providing for the landowners a rental income stream. The REDD+ developer obtains a forest ecosystem restoration licence and is bound by its conditions.

This would provide long term certainty for the project developer as a lease would have to be registered under existing legislation.

The lease might include the following:

- a) Description of the land
- b) Description of REDD+ purpose of the lease
- c) Lessor warrants that the land is free of all competing interests/claims
- d) Provision for rental payments by lessee

If all land to be the subject of REDD+ activity must also be the subject of a forest ecosystem restoration licence by law, no further documentation is needed, as the statutory licence would include binding conditions for restoration of the forest ecosystem and thus the development of carbon credits or emissions reductions. Further, if the Forestry Department has identified suitable forest areas for ecosystem restoration/REDD+ activities, it may have also caused the areas to be declared permanent forest under the Forest Decree and protected areas under the Mining Act.

The forest carbon rights would be part of the leased land and thus be lost to the landowner for the duration of the lease (but would revert to the landowner with the land at the end of the lease). The landowner would have rental income from the leased land. Provision would have to be made in the legislation for iTaukei rights of access and taking in accordance with custom (as is the case with any arrangement for iTaukei forest land), as consultation has indicated that this is non-negotiable.



¹⁶³S. 5, iTaukei Lands Act.

¹⁶⁴See Land Use Decree

8.1.1 Advantages and disadvantages

Some advantages and disadvantages are set out in the box below.

Advantages	Disadvantages
<ol style="list-style-type: none"> 1. The forest carbon rights stay with the land and thus there is security for the REDD+ investor because the lease must be registered on the title and in the relevant Land Register. 2. Follows a known model (lease) is relatively simple 3. Is transparent through necessary registration 4. would apply to all categories of land tenure 5. The system would be easily understood. 6. It would provide financial benefits direct to resource owners (through TLTB or LUU). 7. Protects the rights of indigenous landowners. 8. Provides stream of rental income. 9. There would be certainty for a REDD+ project developer (lease must be registered). 10. Less risk of fraud/corruption because the forest carbon rights would always remain with the landowner (cannot be sold) 11. Security for buyer through State control: monitoring and regulation; enforcement 	<ol style="list-style-type: none"> 1. Forest carbon rights could not be sold independently of the land (but not an issue for iTaukei land). 2. For REDD+ developers, carbon rights cannot be purchased. 3. The lessee's rights are subject to the exercise of limited customary forest rights. 4. Additional work for Forestry Department. 5. Requires several documents.

8.12 Legislative Change

Where land is already the subject of a lease (other than a mining lease) what consequences would flow from embracing the lease option? Could the lessee sublease and benefit from the carbon rights that are part of the leased land? The simple response is that a lessee could not do this without changing the purpose of the lease which would amount to a breach of the lease. In any event, to permit an existing lessee (for non REDD+ purpose) to benefit in any way from the forest carbon rights would be a windfall for the lessee and unfair to the lessor, as it would not have been taken into account by the lessor at the time of agreeing to grant the lease. It has been noted above (section 4.5) that a number of standard form TLTB leases already contain a REDD+ clause, providing for renegotiation of the lease in the event that a carbon trading project may be pursued as a result of the development by the lessee of the capital project on the leased land.

In the alternative and to cover all current leases, legislation such as the Property Law Act¹⁶⁵, the *Forestry Decree*, the *Crown Lands Act*, the *Land Use Decree* and the *Agricultural Landlord and Tenant Act* might be amended to insert a special provision to address the situation and force renegotiation of a lease where the lessee desires to engage in a REDD+ project in conjunction with the use of the land for the lease purpose. For example the Property Law Act could be amended by the insertion of a section to the following effect:

Subject to the provisions of the Forest Decree, the Crown Lands Act, the Land Use Decree and the Agricultural Landlord and Tenant Act, a lease of land entered into prior to.....(insert effective date of REDD+ legislation).....is declared not to have included any rights in forest carbon as part of the leased land.

¹⁶⁵Property Law Act (Cap 130)

Under Fiji's draft REDD+ Carbon

Financing Guidelines, it is foreshadowed that a landowner could undertake a REDD+ project in two ways:

1. by participating in the **Fiji Forest Carbon Programme** and sell their verified emission reductions to the State, which then sells them on.
2. by participating directly in the **voluntary carbon market**. The landowner would undertake the REDD+ project activities themselves, possibly with the support of a REDD+ project developer.

8.2 A landowning entity aggregates and leases land

Conclusion: Landowners can join together to form an incorporated body (landowning entity) which can apply for a forest ecosystem restoration licence, together with approval for a REDD+ project. The landowning entity would lease the lands from the landowners and may contract with a service provider (could include an NGO) to carry out or coordinate the REDD+ activities and will enter into an emission reduction purchase agreement with a buyer (could be the State) for sale of the carbon credits.

This is a variation on the lease model described above in 8.1, based on the existing forest concession model.

A number of landowners would form an incorporated body and obtain one or more forest ecosystem restoration licence(s) for their aggregated forest areas, in the same way that in the past a landowning entity obtained a forest concession. TLTB consent would be required. The entity would enter into an emission reduction purchase agreement with a buyer which would fund the necessary activities. A means of sharing benefits among all landowners might be

8.2.1 Advantages and disadvantages

Some advantages and disadvantages, in addition to those set out in relation to the general lease alternative in 8.1 are set out in the box below.

Advantages	Disadvantages
Simple and known model	
Landowners continue to have interest in the land through landowning entity	
Direct dealing between incorporated landowning entity and buyer of carbon credits	

through the withholding of an amount by the TLTB for the payment of royalties in relation to the use of the carbon rights – but this is a matter of policy.

The landowning entity would enter into leases with TLTB or the Land Bank on behalf of the landowners for the lands, which would be registered as required under current legislation.

The work could be carried out by persons engaged by the landowning entity. A contract or MOU would be appropriate to secure obligations between the landowning entity and the NGO or other person(s) engaged to implement the restoration work (the 'service provider'). This contract/MOU should be of long duration, but could be terminated and responsibilities and duties transferred to another person through a new contract, if necessary.

This is the simplest approach to a REDD+ project. Land and carbon rights would be alienated, but to an entity in which landowners have a share. The forest ecosystem licence holder would be responsible for complying with the conditions, and would ensure these duties and responsibilities were transferred through the contract with the service provider. The Forestry Department would be responsible for monitoring compliance with the conditions of the licence. The buyer of carbon credits/verified emission reduction units (could be the State) would have to be confident of the ability of the State to monitor and control.

While this approach is based on the known forest concession (licence) model, modifications are suggested. The current standard forest concession agreement serves as a licence, lease and agreement. It is suggested that there be separate documents being the statutory licence and the lease of each land parcel to the landowning entity. In addition where a service provider is engaged, a contract/MOU would be needed.

8.2.2 Legislative change

The necessary system to provide for ecosystem restoration licences could be incorporated into the Forest Decree, with a regulations providing for the specific requirements and process. This would require relatively simple legislative change.

8.3 Recommendation

Upon assessment by the criteria set out earlier, the option described in 8.2 is the most attractive option for Fiji, as it is a model that is readily understood (the forest concession) and the landowners retain an interest in and control over their land through the corporate entity that is the landowning entity.

Adoption of this option would also enable Land Bank land to be used for REDD+ projects.

The model would apply in the same way to all categories of land.

Given that a lease must be registered and the purchaser of carbon credits (verified emission reductions) is dealing with an incorporated entity, there is security for a purchaser provided the State seriously implements its role of monitoring and enforcing the forest ecosystem restoration licences.

9 REDD+ and mangroves

REDD+ and mangroves

Although it is possible for countries to include mangrove specific activities in their national REDD+ strategies, it is not yet clear whether the emerging UNFCCC framework for REDD+ will include such activities.¹⁶⁶ However, in the meantime, it is possible to generate carbon credits from projects to reduce emissions and increase removals of CO₂ from the atmosphere by restoring and conserving wetlands and mangroves under the following alternative standards and methodologies:

- **CDM Afforestation/Reforestation projects**, for which the Executive Board has approved a large-scale¹⁶⁷ and small-scale¹⁶⁸ methodology concerning mangroves
- **Verified Carbon Standard (VCS)**, which recently recognised Wetlands Restoration and Conservation as an eligible project category (October 2012), covering areas including mangroves, salt marsh and seagrass meadows.¹⁶⁹

Mangroves and the soil in which they grow store and sequester significant amounts of carbon. Mangroves are found on foreshore land being the inter-tidal zone which is owned by the State.

A lease of foreshore land can be granted by the Director of Lands, with the express approval of the Minister. That

approval cannot be given until the Minister has considered any objections to the grant of the proposed lease, made after the proponent has given public notice of the land to be affected and the substance of the proposed lease, and determined and declared that the proposed lease would not result in a substantial infringement of public rights.¹⁷⁰

Every lease for foreshore land must:¹⁷¹

- Specify the purposes for which the land is required; and
- Vest the land in the lessee free and discharged from all public rights and privileges which may have existed *so far as is necessary for carrying out the purposes of the lease*.

Mangroves were designated as 'forest reserves' and managed by the Forestry Department, between 1933 and 1974 when responsibility for the foreshore was given to the Department of Lands¹⁷². *The Fiji Forest Policy Statement 2007* states that the Forestry Department would advocate for "the permanent conservation of mangroves to serve sustainable customary uses".

Given the huge ecosystems services potentially provided by mangroves, exploring the legal means to capitalise on REDD+ opportunities for foreshore land through the medium of forest carbon rights is bound to be reap benefits.

¹⁶⁶For a discussion on the potential for this, see: Herr, D., Pidgeon, E., and Laffoley, D. (eds.) 2012. Blue Carbon Policy Framework: Based on the discussion of the International Blue Carbon Policy Working Group. IUCN. pp. 13 – 14.

¹⁶⁷See the methodology: Afforestation and reforestation of degraded mangrove habitats, AR-AM0014, Ver. 01.0.0.

¹⁶⁸See the methodology: Simplified baseline and monitoring methodology for small scale CDM afforestation and reforestation project activities implemented on wetlands, AR-AMS0003, Ver. 02.0.0. Small-scale projects are defined as removing less than 16,000 tonnes of CO₂/year and are developed or implemented by low income communities.

¹⁶⁹VCS Agriculture, Forestry and Other Land Use (AFOLU) Requirements, Version 3, Requirements Document, 4 October 2012, v3.3: pp. 23 – 30.

¹⁷⁰S21 State Lands Act

¹⁷¹See s22(1) State Lands Act

¹⁷²Watling, R. 1986. A mangrove management plan for Fiji. Phase 2: A plan for the mangroves of the Nadi Bay and Suva-Navua locales. The Fiji Government and SPC. In: Agrawala, S. et al. 2003.

10 Plantations

At present, the UNFCCC framework for REDD+ does not cover plantations. However, it is possible to generate carbon credits from projects involving plantations under other standards and methodologies, including:

- The Clean development Mechanism (CDM), which permits Afforestation and Reforestation (AR) projects
- Verified Carbon Standard (VCS), which permits as eligible activities, Afforestation, Reforestation and Revegetation (ARR); ^[1] VCS has approved a specific methodology which allows existing plantations to generate carbon credits by extending their rotation age (VCS Methodology for Improved Forest Management through Extension of Rotation Age, v1.0, VM 0003, approval date 17 May 2010).

Resource managers and developers in Fiji seek clarity as to who holds the forest carbon rights in their plantations.

Where a plantation is on leased land, the rights in the plantation trees belong to the lessee. However if carbon rights were not in contemplation at the time of the agreement for the lease, it would be unfair to the lessor should the lessee capitalise on his possession of the land for an unforeseen purpose (and benefit). In addition, the purpose of the use of the land would be changed (for example from silviculture /agroforestry to REDD+ project); a development which would require the consent of the lessor and potentially involve renegotiation of the lease.

The rights to the sequestered carbon in plantation trees on leased land must be negotiated with the landowner in each case. If a plantation is on the plantation owner's land the landowner will also own the carbon rights in the plantation trees.

11 Should third parties be able to hold forest carbon property rights?

Given the conclusion reached in Section 3 that landowners currently own forest carbon property rights in Fiji (and assuming this is reflected in legislation), a further decision that Fiji should address is whether it then wishes to allow third parties (e.g. non-landowners, such as local or foreign companies, or foreign individuals) to control or buy forest carbon property rights from landowners?¹⁷³

If Fiji wishes to allow third parties, such as logging companies, REDD+ project developers or carbon brokers, to hold or own forest carbon rights, this will require legislative change.

Note: The discussion in this section is based on an important distinction between the *transfer or sale of forest carbon rights*, and the *transfer and sale of the verified carbon emission reductions/removals* that are generated by a REDD+ project. This important distinction is explained in the box below.

Why would creating a separate property right be of use? A mere contractual right without legislative support might not provide the purchaser with a right that is sufficiently enforceable, compared with a property right that amounts to an interest in the land and is enforceable against future owners. This is the approach that is taken in Australia (see Box 11.1).

11.1 How can a separate property right for forest carbon be created?

The law in Fiji allows for interests in or restrictions over

Box 11.1: Carbon rights as separate property rights in Australia

Every State and Territory in Australia has introduced legislation to clarify the ownership and nature of carbon rights as a new property interest. While the legislative frameworks differ from State to State,¹⁷⁴ the general approach taken is to allocate the carbon rights to the landowner, who may then permit the carbon rights to be separated from the land on which they are situated and transferred or sold to a third party. The carbon rights and the name in which they are held are then registered on the land title. Purchasers of the land are therefore on notice that the carbon rights are held by a third party.¹⁷⁵

land to be created. These run with the land and include *covenants*¹⁷⁶, *easements*¹⁷⁷ and profits a *prendre*¹⁷⁸. An *encumbrance* is a claim on, or right or interest in land, such that it restricts any dealing with land, until cleared from the title.

Under existing legislation¹⁷⁹, when any easement or *profit a prendre* is created, the same may be registered in the Register of Titles and on the relevant certificates of title, grant or lease¹⁸⁰, but will only be binding against a prior lessee, mortgagee, etc., if the lessee or mortgagee has consented¹⁸¹. An easement and a *profit a prendre* may be varied or surrendered with an appropriate notation on the relevant certificate of title¹⁸².

¹⁷³Note: buying or controlling forest carbon rights is different from buying or selling carbon credits. Carbon credits are the financial documents that are issued to those holding the carbon rights once emission reductions/removals from a project have been verified. It is the carbon credits that are traded on voluntary and international carbon markets, not the carbon rights.

¹⁷⁴For example, in New South Wales, Queensland and Tasmania, forest carbon rights and deemed to constitute a profit-a-prendre: see the Conveyancing Act 1919 (NSW), s. 87A, Forestry Act 1959 (Qld), s. 61J(5), and the Forest Rights Registration Act 1990 (Tas.) s. 5). By contrast, in Western Australia, a statutory carbon right is created upon registration of the underlying carbon agreement: Carbon Rights Act 2003 (WA).

¹⁷⁵For a comprehensive description and critique of the various State and Territory legislative schemes in Australia regulating forest carbon rights, see: Hepburn, S., (2009). Carbon Rights as New Property: The benefits of statutory verification. Sydney Law Review, 31:239.

¹⁷⁶A *covenant* is a restriction binding the landowner either to do something or refrain from doing something.

¹⁷⁷An *easement* gives another person a right of user over the land.

¹⁷⁸A *profit a prendre* entitles the holder to enter the land and take away specified natural produce of the land.

¹⁷⁹Land Transfer Act.

¹⁸⁰S 49 Land Transfer Act.

¹⁸¹S 50 Land Transfer Act.

¹⁸²S 51, 52 Land Transfer Act.

Examples of interests that could possibly be created *under existing legislation* are set out below:

- An *easement in gross*¹⁸³ could be created in favour of a REDD+ developer by which he could use the forest carbon rights, which would bind the landowner and the landowner's heirs¹⁸⁴ (TLTB approval would be needed for iTaukei land that is not in the Land Bank). An easement in gross is assignable¹⁸⁵. However there is an issue as to whether using the carbon rights is *using land*.
- Land could perhaps be made subject to a *profit a prendre* benefitting a REDD+ developer by which he could use the carbon rights. It would bind the landowner and his heirs (TLTB approval would be needed for iTaukei land that is not in the Land Bank), but there is an issue as to whether using the carbon rights amounts to entering another's land and *taking the fruits of the land*.

The use of these existing property rights such as those described above, is not favoured as it amounts to trying to fit a new property right into old concepts and the fit is not perfect.

It would be clearer (and probably cheaper for parties) to create by legislation, a new 'environmental service right' or 'carbon property right' in relation to land and prescribe the registration process. The landowner would incur a permanence obligation (be bound to maintain the forest).

The applicant could be a landowner (with intention to sell), a lessee, or any other REDD+ developer.

11.2 Certificate of ownership of forest carbon rights

Under this option, a *Certificate of Ownership of Forest*

Carbon Rights would clearly identify the owner of forest carbon rights and the land of which the forest carbon rights are part. A certificate would only be issued where the applicant could demonstrate:

- exclusive control of the subject land
- exclusive control of the subject forest resource
- absence of competing land uses (e.g. timber licences, leases (or subleases), or mining tenements)
- ability to maintain effective control of the land and forest for a specified period (e.g. 30 – 40 years).

The issue of the certificate would not be solely the function of the relevant land administrator, such as TLTB, Department of Lands or the Land Use Unit, as several registers would need to be consulted and clearance certification obtained (land, leases, forestry, mining). It is suggested that the Registrar of Titles be authorized under legislation to issue certificates in respect of forest carbon rights over land, given that the Registrar keeps the Register of Titles, the Register of iTaukei Lands and the Register of iTaukei Leases.

Following the issue of a certificate, the Registrar could enter a notation in the relevant Register.

11.3 iTaukei land

If Fiji were to decide to allow third parties to hold forest carbon rights as a property right that is separate from the land, iTaukei landowners could not sell these rights in perpetuity (permanently) to a third party because of the prohibition on alienating iTaukei land, although they could sell them to the State¹⁸⁶. If Fiji were to decide to create a separate property right, it would need to amend the *iTaukei Land Trust Act* to permit iTaukei landowners to permanently alienate the forest carbon rights in their land.

¹⁸³Easements in gross are usually created by legislation in favour of a government agency or statutory authority, for, eg, the passage of electricity cables, water pipes, etc across the land, so may not be appropriate here.

¹⁸⁴S106 Property Law Act.

¹⁸⁵S106.

¹⁸⁶S 5 iTaukei Land Trust Act

11.3.1 Advantages and disadvantages

Some advantages and disadvantages are set out below:

Advantages	Disadvantages
<ul style="list-style-type: none"> • The primary advantage of this Option is the certainty it provides for the purchaser, but the flaw is that the actual value (reduction of emissions) is dependent of the landowner fulfilling his permanence obligation regarding the forest, after the rights have been sold. • Landowners receive cash payment in exchange for sale of forest carbon rights. • REDD+ project developers have security and certainty through: <ul style="list-style-type: none"> ○ ownership of carbon rights ○ property interest registered ○ covenant runs with the land ○ ability to transfer 	<ul style="list-style-type: none"> • complex for landowners to understand • complex to administer • Sale of right in iTaukei land is contrary to principle of continuing right of ownership by iTaukei in customarily held land. • Sale of forest carbon rights results in permanent loss to landowners. • Landowners have duty to maintain forest (carbon stock) forever. • Use of land by landowners restricted; effectively 'locked up' for benefit of emissions reductions and short term cash advantage. • Will require new legislation or significant amendment to create forest PR. • There is more than one Register of Lands in Fiji. • Customary rights of forest access and taking could be extinguished

11.4 Legislative Change

Legislation could create a forest carbon right that is a separate interest in land. The legislation could provide for registration of the forest carbon property right in the same way that leases are required to be registered under the *Transfer of Land Act*.

A new approach, by legislation, could be as follows¹⁸⁷:

- a person applies to the Registrar of Lands to create a forest carbon right (FCR) over land for a period of years, with the consent of the landowner (TLTB for iTaukei land) and those persons having an interest in the land;
- upon the Registrar being satisfied with the application, the right is registered and becomes a separate interest in land;
- the right is an encumbrance over the land;

- the forest carbon right once registered may be dealt with as a separate interest in land;
- the applicant and the landowner may enter into a covenant over the land encompassing the REDD+ activity, the permanence obligation;
- the covenant is registered in the relevant land Register and on the land title certificate;
- the covenant attaches to and runs with the land and is transferable.

If this option is to be adopted, it is recommended that a new concept of carbon property right be created by legislation as suggested above, rather than using existing property concepts which may not be well understood, may involve greater legal expense to effect and register, and may need to be adapted for forest carbon rights in any event. The new carbon property right should be able to be sold, and required to be registered on the title to the land.

¹⁸⁷What follows is similar to the legislative model adopted for Western Australia: see Hepburn, S. 2008. Carbon Rights as New Property: Towards a Uniform Framework, Seminar Paper. (Paper presented at ANU College of Law Seminar Series, 21 August 2008) and see Carbon Rights Act (WA) 2003.

12 Reconciling competing rights to land and forest

Where a landowner seeks to exercise their forest carbon property rights, e.g. by participating in a REDD+ project, they may not be able to do so if another person (a third party) holds a pre-existing right to use the same land or forest resource, such as a timber permit, mining licence or lease. This section considers how these competing interests may be reconciled.

12.1 General principle: licences cannot be revoked

The general principle in Fiji is that licences remain valid during the currency of their term, unless cause has been given for them to be suspended or revoked - usually when there has been a failure to comply with the relevant law or the conditions of the licence have been breached.

12.2 Forestry approvals

The areas covered by forest in Fiji are in the order of 60% total land mass. Maps indicating the areas of forest coverage in Fiji by type may be found in Volume 3 of Fiji's Natural Resource Inventory.¹⁸⁸

An exception to the general rule that a licence or permit granted under statute cannot be revoked unless a breach of the law has occurred exists in relation to a forest licence in circumstances where iTaukei owners have need of their land for their use, maintenance or support, in which case notice may be given to the holder of a forest concession, who has the right to surrender the relevant portion of the concession area, but only after logging the land¹⁸⁹. It follows that negotiation with the concession holder (and the Conservator of Forests) would be necessary if the landholder does not want the portion to be logged. It is likely that the concession holder, unless it is the landowner, would seek compensation for profits foregone.

If landowners want to exercise their forest carbon rights, they will need to negotiate with holders of existing licences or leases to encourage the surrender of the lease/licence and can expect to have to buy out the licensee/lessee. This approach is not likely to be acceptable or successful in the case of mining tenements, for obvious financial reasons and given that the State has 'full liberty at all times to search, dig for and carry away all such minerals of every description and for that purpose to enter upon all lands throughout Fiji'¹⁹⁰.

The licensee may voluntarily surrender any portion of the concession area it does not require, upon a month's notice to the TLTB¹⁹¹, but this would appear to refer to a portion that is not addressed in the logging plan for the concession area.

Following a formal request by the landowners for surrender of land to them based upon their need of the land for their use, maintenance or support, the licensee may surrender the land, after first logging same¹⁹². If logging is not desirable, as would be the case for some REDD+ projects, compensation might be acceptable to the licensee, but negotiations would also have to ensue with the Conservator of Forests, given the strict requirements to actively log concessions.

12.3 Mining

All minerals and crude oil are the property of the State which has full liberty to enter any lands in Fiji and to search, dig for and carry away all minerals on or in the land¹⁹³, unless the land is within a declared Government protection area¹⁹⁴. Armed with the relevant authority a prospector or miner may enter any lands (except those closed lands¹⁹⁵) and conduct operations.

¹⁸⁸Source: Prasad, B. 2010. National Resource Inventory. Department of Environment. http://www.environment.gov.fj/pdf/RMU_reports/Natural_Resource_Inventory/Vol_3_Land_Resource_Inventory_Report.pdf

¹⁸⁹CI 48 Standard clauses of *iTaukei Forest Concession Agreement* [TLTB, 2012]

¹⁹⁰S3(2) Mining Act

¹⁹¹CI 49 Standard clauses of *iTaukei Forest Concession Agreement* [TLTB, 2012]

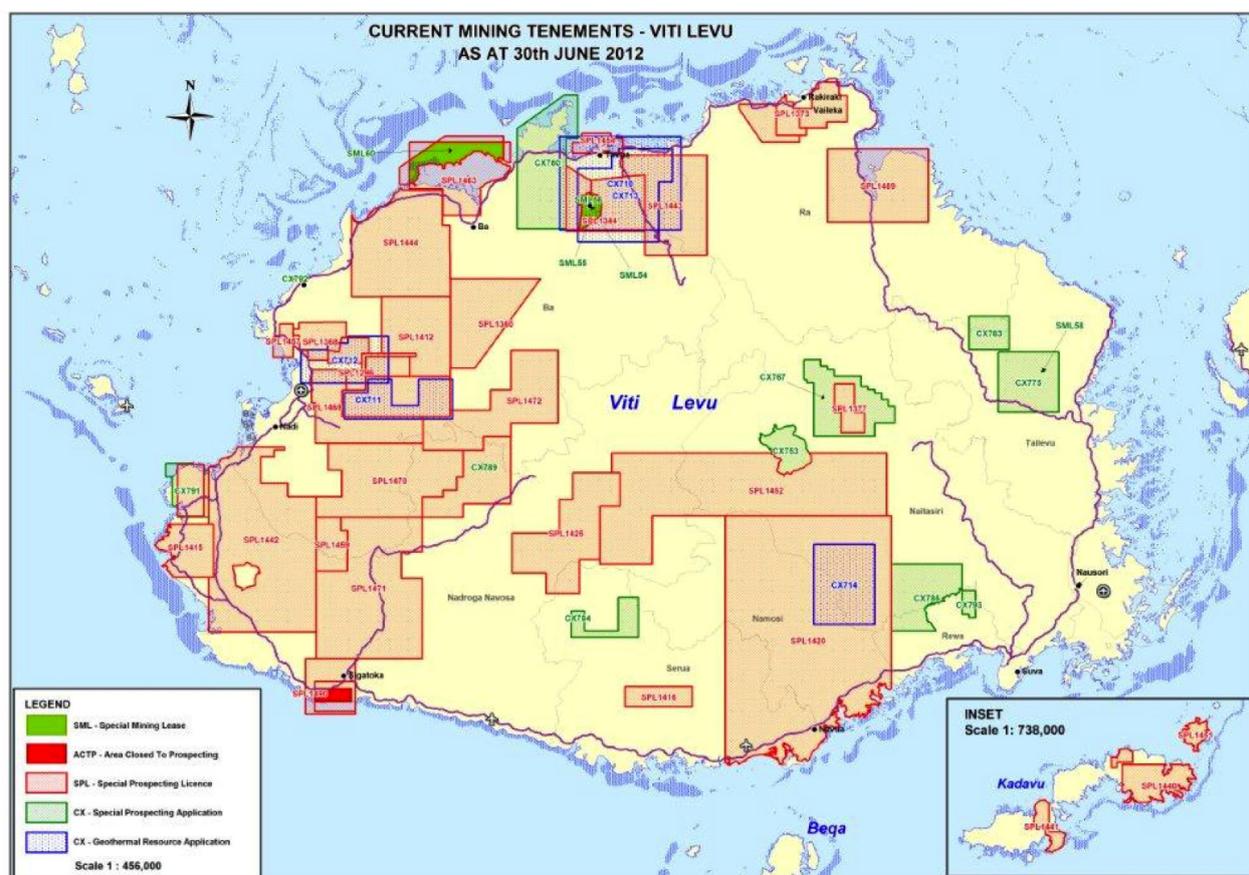
¹⁹²CI 48, Standard clauses of *iTaukei Forest Concession Agreement* [TLTB, 2012].

¹⁹³S 3 Mining Act.

¹⁹⁴S 5 Mining Act.

¹⁹⁵Reserved forest is closed land, but prospecting and mining may occur therein with the consent of the Conservator of Forests: see s11 Mining Act.

The extent of current mining tenements in Viti Levu, the largest island of Fiji, is indicated in **Map 12.1**¹⁹⁶:



Map 12.1 Mining tenements on Viti Levu, 2012 (Source: Fiji Mineral Resources Department)

A prospector's right¹⁹⁷ issued under the *Mining Act* entitles the holder to enter upon land to prospect for minerals upon notice to the landowner, and in the case of unalienated iTaukei land, upon notice also to the TLTB and to the Divisional Commissioner (with whose directions the prospector must comply).¹⁹⁸ The right includes the right to remove naturally growing trees subject to certain

exceptions, although the Director is authorised to impose restrictions on the clearing of trees if he considers that it is likely to interfere with a watercourse or cause erosion.¹⁹⁹

The following table sets out the varieties of mining tenements available under the *Mining Act* which could affect the use of land.

Table 12.1 Mining Leases and Licences

Type of permit/ approval	Issued under	Duration	Issued by	Comments
Prospecting licence	s 26 Mining Act	max 5 yrs extendable	Director	Upon notice to landowner/ TLTB Area less than 400 ha For specified minerals
Special prospecting licence	s 30 Mining Act			Area >1300 ha

¹⁹⁶<http://www.mrd.gov.fj/gfiji/> Last accessed 14/10/12.

¹⁹⁷S 23 Mining Act.

¹⁹⁸S 24(1) Mining Act.

¹⁹⁹S 24(1) (c) Mining Act.

Type of permit/ approval	Issued under	Duration	Issued by	Comments
Permit to mine	<i>s 31 Mining Act</i>	2 years	Director	Extendable (1 year each application)
Mining lease	<i>s32 Mining Act</i>	5-21 years	Director	May be extended for <21 years
Special mining lease	<i>s 37 Mining Act</i>		Director, subject to approval of Minister	
Special site right	<i>s 38 Mining Act</i>		Director	In respect of access to water, land for passageways, disposal of earth and tailings, etc.
Road access licence	<i>s39 Mining Act</i>		Director	Construct and use roads

Compensation is payable for damage to the surface of the land and improvements thereon (including plantations) by any prospecting, mining or other operations carried out by the holder of a mining tenement under the provisions of the *Mining Act*²⁰⁰, but this is unlikely to extend to damage to naturally occurring forest trees²⁰¹.

The Director has authority, for cause, to suspend or cancel a tenement²⁰². Mining tenements may be transferred with the written approval of the Director and where necessary, the prior consent of the Minister²⁰³ and are transmissible to the personal representative of the tenement holder upon death, bankruptcy or unsoundness of mind²⁰⁴.

Royalties are payable to the Director of Mineral Resources.

The Mining Act has priority over the *iTaukei Land Trust Act*²⁰⁵ and the *State Lands Act*²⁰⁶.

The Minister has the authority to declare any area a 'Government protection area' in which mining cannot occur without the Director's consent²⁰⁷. The purpose of such a declaration is "to preserve specific mineral or specific areas from development for the purposes of either reserving them for future or specific development or in some cases to

avoid disturbance of the occupational rights of the owners or occupiers of the land concerned"²⁰⁸.

Mining leases may be voluntarily surrendered upon payment of a fee provided that all terms, covenants and conditions have been fulfilled and the tenement holder having given at least a month's notice²⁰⁹. It is a condition of a mining lease that the lessee will "vigorously and continuously prosecute mining operations thereon with reasonable diligence and skill to the satisfaction of the Director", with 6 hours' work per day for 200 days per year being deemed to constitute 'continuous' operations²¹⁰. The existence of this condition, which is not unusual in mining laws where the State owns the minerals, indicates the economic imperative of mineral extraction.

It is therefore unlikely that the Director of Mineral Resources, who must approve every dealing in a mining tenement²¹¹, would readily consent to the surrender of a tenement to facilitate the development of REDD+ activity. However, application could be made to have the area of a REDD+ development declared a protected area under s5 of the *Mining Act*, although the maximum area of land that may be protected under this provision is 250ha.

²⁰⁰S 40 Mining Act.

²⁰¹They are unlikely to constitute 'improvements': see s2 Mining Act.

²⁰²S 65 Mining Act.

²⁰³S 46 Mining Act.

²⁰⁴S 48 Mining Act.

²⁰⁵S7 iTaukei Land Trust Act.

²⁰⁶S3 State Lands Act.

²⁰⁷S 5 Mining Act.

²⁰⁸See s 5(3) Mining Act; and Ministry of Lands and Mineral Resources website: <http://www.mrd.gov.fj/gfiji/mining/invstgd/land.html>

²⁰⁹S 21 Mining Act and Reg 88 Mining Regulations.

²¹⁰Reg 40 Mining Regulations.

²¹¹S 46 Mining Act.

12.4 Leases

All leases for a period of more than one year must be registered on the relevant certificate of title²¹². Set out in **Table 8** is a summary of the leases available under Fiji laws, the existence of which would amount to an interest in land potentially in competition with a REDD+ project proposed for the land.

12.5 iTaukei Leases

The Board may resume a lease upon notice if the land is

required for development that is materially different from the purpose of the lease, and for which town planning consent has been obtained²²³.

Given that iTaukei leases are subject to the *Land Transfer Act*, they may be voluntarily surrendered²²⁴.

iTaukei leases may be reassessed every 5 years, but the reassessment is limited to the quantum of rent²²⁵.

Table 12.2 Summary of leases available under Fiji law

Type of lease	Issued under	Duration	Statutory party	Comments
iTaukei lease	<i>iTaukei Land Trust Act</i> Reg 6 <i>iTaukei Land Trust (Leases and Licences) Regs</i>	99 years max. ²¹³	TLTB	To be registered in Register of iTaukei Leases Subject to Land Transfer Act ²¹⁴
Agricultural lease/ contract of tenancy	Agricultural Landlord and Tenant Act	30 years max. ²¹⁵		Does not apply to iTaukei reserved land
Land Use lease	s 10 Land Use Decree 2010	99 years max.	Director of Lands	Leases are Protected Leases ²¹⁶ No question may be raised in a court of law ²¹⁷
Foreshore lease	s 10 Crown Lands Act	Quarry purposes: 30 yrs max ²¹⁸ . Other: 99 years max ²¹⁹ .	Director of Lands	Subject to express approval of Minister after notice and objections ²²⁰ Compensation to be paid to abutting iTaukei landowners ²²¹ Removal of forest produce needs written consent ²²² of lessor

²¹²S 54 Land Transfer Act

²¹³Reg 6 iTaukei Land Trust (Leases and Licences) Regs

²¹⁴S 10 iTaukei Land Trust Act

²¹⁵S 6 Agricultural Landlord and Tenant Act

²¹⁶Cannot alienate or otherwise deal with lease or register a caveat except with consent of Director of Lands; may not be subject of court proceedings except with Director's consent or at his suit : s 12 Land Use Decree

²¹⁷S 15 Land Use Decree

²¹⁸Reg 8 State Lands (Leases and Licences) Regs.

²¹⁹Reg 9 State Lands (Leases and Licences) Regs.

²²⁰S 21 State Lands Act.

²²¹S 22(3) State Lands Act.

²²²Reg 21(f) State Lands (Leases and Licences) Regs.

²²³Reg 15 iTaukei Lands Trust (Leases and Licences) Regs.

²²⁴S 62 Land Transfer Act.

²²⁵Reg 13 iTaukei Land Trust (Leases and Licences) Regulations.

12.6 Agricultural Leases (Agricultural Landlord and Tenant Act)

This Act does not apply to specified categories of agricultural land²²⁶ or to a contract in relation to agricultural land which is 'a licence granted in respect of any forest or any part thereof for any purpose and for any period'²²⁷. 'Agricultural land' includes land used for forestry.

A contract of tenancy (which includes a lease) may be terminated by agreement. A lease which is a contract of tenancy may be voluntarily surrendered²²⁸.

12.7 Right of iTaukei to exercise customary rights in the forest

The forest legislation takes away from the landowners the right, and the authority to grant a right to harvest forest produce, excepting that certain customary rights over forest land, the foreshore and the territorial waters of Fiji, are reserved for iTaukei, subject to prohibition by the relevant Minister, upon notice.

In the case of leased land customary rights may only be exercised by iTaukei with the consent of the lessee²²⁹. In practice, it is a standard condition of the ALTA instrument of tenancy for agroforestry that the lessee shall permit the members of the landowning units to enter the land for customary hunting, fishing and gathering²³⁰, but this is not the case in other standard form leases, although they do reserve to the lessor the right to enter the land to take timber, sand, gravel, etc.

Section 21 of the *Forest Decree* provides for the exercise of customary rights by iTaukei on iTaukei land and the right to exercise any rights established by iTaukei custom such as hunting, fishing or collecting fruits and vegetables growing wild. The rights in forest areas (including mangroves) specifically include the following:

- the exercise of any rights established by iTaukei custom to hunt, fish, or collect fruits and vegetables growing wild;

- the cutting or removal by any native in accordance with iTaukei custom of forest produce which may be necessary for the permanent abode of himself and his family, for the construction of temporary huts on any land lawfully occupied by him, for the upkeep of any his fishing stakes and landing places, for the construction and upkeep of any work for the common benefit of the iTaukei inhabitants of his village or for firewood to be consumed for domestic purposes.²³¹

This is further elaborated in the *iTaukei Land (Forest) Regulations* under the *iTaukei Land Trust Act* but the cutting and taking of timber is limited to the locality inside the District in which the person usually resides²³².

iTaukei customary fishing rights in Fijian waters are recognised under the fisheries legislation²³³.

Should customary rights continue to be permitted to be exercised on forest land subject to REDD+ activities? For consistency with its international obligations, the exercise of customary rights should continue to be permitted on iTaukei forest land. There is no reference to the exercise of customary rights by landowners in the standard form concession licence, but neither is any such reference necessary, as a concession is merely a licence to harvest timber; not a lease granting exclusive possession.

Land that is not sought to be leased (including mangroves) requires special consideration. Should customary rights continue to be exercised when there is an obligation on the landowner to maintain the carbon stock in the forest and maximise its carbon sequestration potential? The short answer is that to be consistent with international obligations these rights should be maintained, but perhaps subject to a limitation in the interests of both landowners and the REDD+ developer, where the land is subject to a REDD+ agreement.

²²⁶Reg 2 (a) Agricultural Landlord and Tenant (Exemption) Regs.

²²⁷Reg 2 (b) Agricultural Landlord and Tenant (Exemption) Regs.

²²⁸S 62 Land Transfer Act.

²²⁹S21(1)(a) and (b) Forest Decree.

²³⁰CI 27 standard form ALTA instrument of tenancy (TLTB, 2012).

²³¹S 21 Forest Decree.

²³²Reg 17 iTaukei Land (Forest) Regulations.

²³³S 13 Fisheries Act.

13 Registering and recording forest carbon rights

There will be no need to register or record the ownership of forest carbon rights if the policy decision is made for them to remain with and be part of land ownership.

If, on the other hand, the policy decision is that a property right should be created for forest carbon, separate from land ownership, to enable third parties to own forest carbon rights independently of the land which is their source, a system will have to be implemented for a transparent approach to ownership and for security.

If forest carbon rights are to be created and carbon credits traded, there will need to be a means of systematically recording who has exercised their carbon rights, and where, in order to avoid forest carbon being sold twice (double counting).

This recording would be separate from the approval process for REDD+ projects and the registration of these projects. Such a system is already foreshadowed under proposed legislation:

The licensing, generation, validation, verification and registration of Fiji forest carbon certificates, standards and procedures for project implementation and approval under REDD+ will be covered by way of Regulations.²³⁴

13.1 Registration of carbon rights on title

Should Fiji decide to adopt the approach of creating a separate property right for carbon rights, in the interests of transparency and security, the following would need to occur:

- a) The Conservator of Forests (or other appropriate authority) to approve the transfer of carbon rights; and
- b) Notation of the ownership/ transfer of carbon rights in the relevant Register and on the relevant land title.

13.2 Approval process for REDD+ projects

Approval of REDD+ projects most likely will be granted by

the Conservator of Forests²³⁵, prior to or simultaneously with the transfer of carbon property rights and contractual arrangements between the parties. This would involve an assessment of the environmental and social impacts of a proposed project.

13.3 A National REDD+ registry

Each REDD+ country will eventually require a national REDD+ registry, preferably in electronic form.

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

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

Tracking of activities and validation are essential to ensure environmental integrity across different national REDD+ initiatives and to promote transparency in benefit-sharing with stakeholders.²³⁶ Ultimately the registry will be linked with the country's MRV system.

Initially, Fiji may wish to implement a national REDD+ registry by capturing the core information for each emission reduction activity, including the registration of REDD+ projects. The registry would also track the activity, its performance in reducing tonnes of CO₂, and how many credits have been issued. This type of registry will ensure that there is no double counting of emission reductions from overlapping projects or emission reduction activities.

Given that it is likely to take many years to develop a fully-functioning registry, in the interim countries are relying on international registries that support the voluntary market, such as the Markit Environmental Registry.

²³⁴Draft Forest Decree.

²³⁵The Draft Fiji REDD+ Financing Guidelines v4 (December 2011).

²³⁶For a detailed description of the role of national REDD+ registries, and how they can be developed, see: Scholl, J., (ed.) 2001. National REDD+ Registries: An Overview of Issues and Design Options. KfW Entwicklungsbank.

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