

A Review of Land and Forestry Law in Vanuatu and Their Implications for Designing Forest Based Emission Trading Activities in Vanuatu

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Draft

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Abstract

The Vanuatu Carbon Credit Project is aiming to create or preserve carbon sinks to assist in their climate regulation role in a way that also contributes to the development and welfare of the people of Vanuatu. To achieve this end it will be necessary to put in place legal instruments to help protect areas of forest in Vanuatu for the long term. There are several legal mechanisms in Vanuatu that could be employed to do this. This paper analyses five methods and concludes that leasing the land or the establishment of a community conservation area are the two best methods available. To reach this conclusion the law relating to land, forests and timber in Vanuatu is examined. Of particular interest is the provision that specifically affirms carbon sequestration as a forestry right. As well as legislation, custom plays an important role in the law of Vanuatu and some of the implications of this are discussed.

1 Introduction

1.1 Background: Forests and Climate Change

Deforestation is a significant cause of climate change – about 40% of the historical emissions of CO₂ over the last two hundred years are from changes in land use and land management, most of which has been deforestation.³ The world's remaining forests store roughly 50% more carbon in their biomass, deadwood, litter and soil than there is carbon in the atmosphere.⁴ Tropical deforestation is still a significant source of green house gas (GHG) emissions and accounts for up to 25% of global emissions,⁵ making it the largest source of emissions in some developing countries. The current annual rates of deforestation in Brazil and Indonesia alone are estimated to equal four fifths of the emission reductions generated under the Kyoto Protocol's⁶ first commitment period.^{7,8} If these emissions are not reduced, they have the potential to undercut any reductions in industrial emissions and frustrate the objectives of the United Nations Framework Convention on Climate Change (UNFCCC).^{9,10} Deforestation also has significant negative impacts on soil quality, biodiversity, local livelihoods and indigenous communities, and destabilizes climate and weather by disrupting historical hydrological cycles, albedo, and large-scale circulation patterns.¹¹ On the other hand forest conservation,

³ Millennium Ecosystem Assessment (2005), *Ecosystems and Human Well-being; Synthesis*

⁴ Food and Agriculture Organization (2005), *Global Forest Resources Assessment 2005, progress towards sustainable forest management*, FAO forestry paper number 147, 2006.

⁵ Using 1990 as the baseline and taking into account emissions of carbon dioxide, methane, nitrous oxide, and other chemically reactive gases that result from deforestation and subsequent uses of the land. See Houghton, R.A. (2005) 'Tropical deforestation as a source of greenhouse gas emissions' in Moutinho P. and Schwartzman S. (eds.) *Tropical deforestation and climate change*.

⁶ FCCC/CP/1997/L.7/Add.1 Decision 1/CP.3, 'Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change', Annex, reprinted in 37 ILM 22 (1998), entered into force 16 February 2005, (hereinafter Kyoto Protocol)

⁷ The first commitment period of the Kyoto Protocol refers to the years 2008 – 2012 during which time industrialized countries listed in Annex B to the Kyoto Protocol have made a commitment to reduce their GHG emissions by 5.2% on average calculated against their emissions during 1990. Commitments of individual countries range significantly from a plus 10% and plus 8% increase for Iceland and Australia respectively to a minus 8% cut within Europe.

⁸ Santilli M., Moutinho P., Schwartzman S., Nepstad D., Curran L., Nobre C., (2005) 'Tropical Deforestation and Climate Change', *Climate Change*, 71: 267-276.

⁹ UN Doc Distr General A/AC.237/18(Part II)/Add.1, 15 May 1992 (hereinafter the UNFCCC). The UNFCCC entered into force on 21 March 1994 and currently has near universal membership with 191 countries having ratified it.

¹⁰ Trines E. *et al* (2006) *Integrating agriculture, forestry and other land use in future climate regimes: Methodological issues and policy options*. The main objective of the UN

¹¹ Marland, G. *et al*. (2003). The climatic impacts of land surface change and carbon management, and the implications for climate-change mitigation policy. *Climate Policy* (3) 149-157.

sustainable management, planting, and rehabilitation of forests can mitigate GHG emissions and increase carbon sequestration, protect biodiversity and deliver a range of socio-economic benefits.¹²

While rates of net deforestation are decreasing due to increased afforestation and reforestation activities, rates of gross deforestation average 13 million ha per year and do not appear to be decreasing.¹³ Rates of deforestation and modification of primary forests are also alarmingly high at 6 million ha per year, and also do not appear to be decreasing.¹⁴ If these rates continue, approximately 15% of existing forests will be lost by 2050, and approximately 70% will be lost within the next 200 years.¹⁵ This rate is higher for primary forests, with 19% expected to be lost or modified by 2050 and 84% expected to be lost or modified within the next 200 years if current deforestation rates continue.¹⁶ However this loss is not expected to be uniform across all countries. According to the Millennium Ecosystem Assessment scenarios, forest area in industrialized regions will increase between 2000 and 2050 by about 60 to 230 million ha. At the same time, the forest area in the developing regions is expected to decrease by about 200 to 490 million ha.¹⁷ This means that between 10% and 22% of forests in developing countries can be expected to be lost by 2050.¹⁸ Some of these areas are already under threat from deforestation, but others may have little or no historic rates of deforestation.

The UNFCCC

Neither the UNFCCC nor the Kyoto Protocol contain any mechanisms to award emission reduction credits for activities that reduce emissions from deforestation in developing countries, or create any other incentive to protect intact forests. The creation of such a

¹² Food and Agriculture Organization (2005), *Global Forest Resources Assessment 2005, progress towards sustainable forest management*, FAO forestry paper number 147, 2006.

¹³ *ibid*

¹⁴ *ibid*

¹⁵ This is based on global average gross deforestation rate of 13 million ha per year and a total global forest cover of 3,952 million ha taken from Food and Agriculture Organization (2005), *Global Forest Resources Assessment 2005, progress towards sustainable forest management*, FAO forestry paper number 147, 2006. The calculation is based on a linear loss of forest over time which is an oversimplification. However, the 2050 estimates fit within the range of deforestation estimates produced by the Millennium Ecosystem Assessment discussed below.

¹⁶ Based on FAO 2005 estimates that primary forests make up 36% of total forests and are being lost at a rate of 6 million ha/year. See Food and Agriculture Organization (2005), *Global Forest Resources Assessment 2005, progress towards sustainable forest management*, FAO forestry paper number 147, 2006

¹⁷ Reported in the IPCC fourth assessment report, working group III, chapter 9 forestry.

¹⁸ The FAO has estimated there was approximately 2,101 million ha of forest in Africa, South America, Central America, the Caribbean, South and South East Asia, and Oceania (excluding Australia and New Zealand) in 2005, and 1,851 million ha in Europe, North America, Australia and New Zealand (809 million of which is in Russia). See Food and Agriculture Organization (2005) *Global Forest Resources Assessment 2005, progress towards sustainable forest management*, FAO forestry paper number 147, 2006.

mechanism is currently being discussed within the UNFCCC¹⁹ and will undoubtedly play a role in the negotiations of an international agreement replacing the Kyoto Protocol in 2013.

Vanuatu and the UNFCCC

The Vanuatu Carbon Credits Project (VCCP) was initiated in late 2006 in response to a request within the UNFCCC for pilot studies of potential incentive mechanisms that could be applied within developing countries to reduce emissions from deforestation (and forest degradation). The objective of the VCCP is to develop and test different incentive mechanisms in Vanuatu to gain a better understanding of how different mechanisms would work in practice in Vanuatu and other developing countries. Funding for the VCCP has been kindly provided by the UK Global Opportunities Fund and the Victoria University of Wellington, New Zealand. This current paper forms part of the ongoing work on the VCCP.

1.2 Outline

The first part of this paper focuses on rights with respect to land, forests and timber. Forest and timber rights are governed by a range of statutes; which are complicated by having different schemes for leased and customarily owned land. As a result, how these rights are exercised will differ depending on whether the land is controlled by i) the customary owners, ii) leaseholders, and iii) the government.

The second part of the analysis looks at how carbon rights could fit within existing Vanuatu law and what the nature of those rights could be.

Finally, the paper discusses the existing methods for protecting areas of forest for use in carbon sequestration projects. Five mechanisms that could be used to protect an area of land are identified. These include setting aside land as a national park, establishing a conservation area, establishing a community conservation area, or leasing the forest for a period of up to 75 years. Forestry covenants can also be applied to place limitations on what can occur on the land. The strengths and weaknesses of each mechanism are analysed and two methods are suggested as being particularly good for fulfilling the aims of the Vanuatu Carbon Credit Project. Leasing the forests from customary owners may be the best way to guarantee that the area would remain as carbon stocks for up to 75 years. Leases also allow the community to get direct financial benefit from the lease and it is proposed that the community as holders of the carbon sequestration rights sell the carbon credits directly. Community conservation areas are suggested as another effective method to maintain carbon stocks over the long term in a structure that requires a conservation management plan and establishment of a committee to oversee the project.

¹⁹ The discussions were initiated by a proposal put forward at the 11th Session of the Conference of the Parties ('COP') to the UNFCCC by the Governments of Papua New Guinea and Costa Rica. See <http://www.rainforestcoalition.org/documents/COP-11Misc01-AgendaItem6.pdf> (accessed 30 June 2007).

2 Land Rights

2.1 Overview

Vanuatu inherited its legal system from the British and is based on the principles of common law. Land is deeply important to Ni-Vanuatu and customary law has been a significant influence on Vanuatu's legal system. Unlike many other ex-colonies, the land and all associated rights were not vested in the Crown or Government, but in the native people as customary owners. This was entrenched in the 1980 Constitution, Chapter 12. The main sections of Chapter 12 set out that the land belongs to indigenous custom owners and that only indigenous citizens who have acquired their land in accordance with a recognized system of land tenure can own it in perpetuity.²⁰

Article 74 states that land is to be governed in relation to custom. Custom does not relate to a specific set of rules or practices, but is a fluid way of dealing with land.²¹ The following quotes are included to illustrate the flexibility of custom and the importance of land:

'Custom is not a legal system which was set once and for all, but a system of attitudes and values which are differently expressed in different islands at different times. However the relationship between a man and his land in Vanuatu is the most fundamental and most permanent aspect of Melanesian culture.'²²

'Melanesian custom governing land tenure may be defined as having great strictness in principle and great flexibility in practice'²³

'Starting in the mid-1960s, land became the most important political issue in Vanuatu and the catalyst for the nationalist movement which would carry the country to independence in 1980.'²⁴

²⁰ Constitution 1980, Chapter 12, Arts73-75:

'Land Belongs To Custom Owners 73. All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

Basis Of Ownership And Use 74. The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

Perpetual Ownership 75. Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.'

²¹ Arutangai, S. (1987) *Vanuatu*, p261, in Crocombe, R (ed) *Land Tenure in the Pacific* (3ed) University of the South Pacific.

²² Bonnemaision, J. (1984) *Social and Cultural Aspects of Land Tenure*, p1, in Larmour, P (ed) *Land Tenure in Vanuatu* University of the South Pacific.

²³ Bonnemaision, as above n2, p5.

²⁴ Van Trease, H. LTIV(1894) *The History of Land Alienation*, p24, as above n2.

Land can be owned collectively by customary owners or by the government. There is no concept of freehold title although it can exist in limited areas including the two main urban areas.²⁵ Land and all associated rights can be leased to individuals, groups or companies under the Land Leases Act. Customary ownership, government controlled land, leases, and restrictions on land transfers are discussed in turn.

2.2 Customary Land

The concept of land ownership was in existence well before the arrival of western systems of land tenure. Land ownership was based on groups with a common descent. Land could not be bought but could be transferred after war, adoption or as a gift.²⁶ Traditionally Ni-Vanuatu viewed owning the land and using the land as two separate things where individuals and small family groups could have individual usage rights to the land without 'ownership.' While customary rules for ownership vary across the country, ownership is normally entrusted to individuals or small family groups.²⁷

The 1980 Constitution vested all land to Ni-Vanuatu in perpetuity. In Vanuatu law today there is no requirement for land to be registered by customary owners in the same way there is for leases or customary land in neighbouring Papua New Guinea or the Solomon Islands.²⁸ As a result there is no mechanism for knowing who owns which areas of customary land without investigation on the ground. This can lead to problems when preparing to negotiate leases especially in rural land.²⁹ This has been reported as an issue when attempting to determine owners of land perceived as valuable:

'In Vanuatu there have sometimes been considerable difficulties in establishing the rightful owners of the land, and claims and counter-claims abound. This has created incentives for logging agreements to be made without community consultation as alternative ownership claims often arise when the land is perceived as valuable.'³⁰

An example of the complexity in dealing with customarily owned land is shown in the following forestry project.

²⁵ Freehold Titles Act 1994, s2.

²⁶ Arutangai, S. as above n1, p267.

²⁷ Tacconi, L. (1997) An Ecological Economic Approach to Forest and Biodiversity Conservation: The Case of Vanuatu, *World Development* Vol 25 No 12 pp 1995-2008, 2002.

²⁸ Vanuatu Land Tenure Thesis p73 [Get citation from Bob or Sean]

²⁹ Foreign Investment Advisory Services, March 2005, Vanuatu National Investment Policy, p14. 'The Department will facilitate the investor to identify the customary owners through the completion of an identification of customary land ownership form. Identification may require a ruling under the Land Tribunal Act of 2000 if ownership is unclear.'

³⁰ Centre for International Economics, (1998), *Establishment of a Protected Area in Vanuatu: ACIAR Project 9020* p 13.

Case Study – Sustainable Forestry and Chainsawmills in Vanuatu Project

The project involved providing portable sawmills to customary land owners so that they could establish small logging operations on their land. It was a combined effort by the Foundation for the Peoples of the South Pacific (FSP) and the Vanuatu Department of Forests as an alternative to large-scale logging. The project initially consisted of portable sawmills followed by chainsawmills being used by individuals and groups as an affordable way to conduct logging in the community. Initially there was small-scale success as communities embraced the chance to engage in sustainable forestry management. However problems emerged when issues of land ownership and management were raised. One finding of the project was that the individual nature of land holding made community management 'very difficult':

'Land tenure in Vanuatu is based on customary title but land is generally held individually, rather than on a family or clan basis as is the case in PNG and Solomon Islands. Accordingly it is very difficult to arrange unified management of any significant area of forest.'³¹

The project report goes on to say that while land is held individually, user rights exist for all members of the community, so when the portable sawmills were brought in and some land value increased there was a tendency towards jealousy and conflicts over land, as well as an increased desire for sole ownership by the operators.³²

'Melanesian societies are strongly hierarchical, with variations in rank, power, knowledge and wealth. The arrival of new technology, and associated wealth and knowledge, can upset the traditional structures and create new tensions. In Vanuatu this is frequently manifested in increases in land disputes, jealousy and intra-community tension.'³³

While the legislation surrounding ownership of land appears to answer questions of ownership, on a practical scale there are difficulties in the way land ownership is exercised as there can be an identified family or group with rights to an area of forest and other groups with use rights that exist alongside the rights of the owners.

2.3 Government controlled land

Chapter 12 of the Constitution begins by stating all land is owned by the customary owners, but it also allows the government to acquire land if it is in the public interest³⁴ and to

³¹ Wyatt, S. (1996) *Sustainable Forestry and Sawmills in Vanuatu*, p7, *Rural Development Forestry Network Paper 19d Summer 1996* Regent's College, London (available online at www.odifpeg.org.uk).

³² Wyatt, S. as above n30, p7.

³³ Wyatt, S. as above n30, p7.

³⁴ Constitution of Vanuatu, 1980, Art 80. 'Notwithstanding Articles 73 and 74 the Government may own land acquired by it in the public interest'

redistribute it to other customary owners.³⁵ These provisions have been translated to regular domestic law.

The Land Reform Act declared that all land that the Anglo-French administration had considered state land was vested in the government.³⁶ This consisted of rights to the land but not decisively ownership of the land itself, which is implied by the need for consultation and compensation if the government wants to use public land 'for development or public purpose.'³⁷

However the Land Reform Act goes on to say in the following section 'Declaration of Land as Public Land':

'The Minister may at any time on the advice of the Council of Ministers and after consultation with the custom owners declare any land to be public land.'³⁸

The Lands Acquisitions Act sets out the process the government can acquire land for the public interest. Conceivably the government can acquire land even if customary owners would be unwilling to lease it.³⁹

The government has wide-reaching powers to obtain land or the use of land for 'the public interest'. If the government of Vanuatu so wishes, land could in theory be acquired for a carbon forestry project if there was consultation with the owners and, depending on the mechanism, compensation may need to be paid for the land. Although the government has these rights it had not exercised them for conservation purposes⁴⁰ and it is not advocated that they do so for a carbon forestry project.

2.4 Leased land

Land can be leased for a period of up to 75 years. Leases are administered under the Land Leases Act by the Government on behalf of the customary owners. This system allows the government to oversee lease transactions in accordance with article 79 of the Constitution, which requires government permission before land transactions can occur between Ni-Vanuatu and non-indigenous citizens.⁴¹

³⁵ Constitution of Vanuatu, 1980, Art 81.

³⁶ Land Reform Act, 1980, s9.

³⁷ Land Reform Act 1980, s11.

³⁸ Land Reform Act 1980, s12.

³⁹ Tom Tavalala, Y.D. (Unpublished) Brief on land-related laws of Vanuatu.

⁴⁰ As of 2004. See Tom Tavalala, Y. D. & Hakwa, M. T. (2004) *Review of environmental legislation and policies in Vanuatu*, SPREP, Samoa.

⁴¹ Constitution of Vanuatu, 1980, Art 79.: '**Land Transactions** (1) Notwithstanding Articles 73, 74 and 75 land transactions between an indigenous citizen and either a non-indigenous citizen or a non-citizen shall only be permitted with the consent of the Government.'

Anyone can lease land, including individuals, the government and companies. Leases are evidenced by registration in the Land Leases Register and can be transferred, mortgaged, subleased or disposed of in a will subject to the Land Leases Act.

2.5 Restrictions on land ownership and transfers of land

Only Ni-Vans and the government can own land and there is no system of freehold (at least rurally), so in that respect land sales and transfer are highly restricted. However the lease system allows individuals to deal with the land in a manner similar to a traditional common law system.

3 Forest rights

3.1 Overview

Forestry law governed by statute is limited to commercial forestry operations. The major piece of legislation is the Forestry Act, which sets out the full process from approval to negotiate, to applying for timber permits. Other rights to use and access forests (including for domestic use) are found in custom, and for leased land rights are found in the Land Leases Act and the Forestry Rights Registration and Timber Harvest Guarantee Act (FRRTHG Act).

The main way to have forestry rights is to either have ownership of the land or have forestry rights specifically included in a lease over the land. Outside of that it is possible for the leaseholder to grant forestry rights to anyone with or without consideration.

Forest rights can be included in the bundle of rights leaseholders acquire under the Land Leases Act;

‘... the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease together with all implied and expressed rights belonging thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.’⁴²

These rights can also be transferred under the Forestry Act from customary owners to those looking to undertake commercial forestry operations. This process is briefly outlined in section 4 on timber rights.

Forestry rights can be subleased by a primary leaseholder under the FRRTHG Act. This is done by a process of:

- ‘(a) filing the instrument of transfer with the Director of Land Records for registration in the Land Leases Register; and
- (b) registration of the transfer under the Land Leases Act [CAP 163] in the register of the lease which the forestry right affects; and
- (c) registration under that Act of the transferee as the holder of the forestry right.’⁴³

A forestry right does not confer exclusive possession of the land onto the right holder.⁴⁴ It does confer exclusive possession of the right itself. There would be significant problems if carbon rights could be granted multiple times over the same area of forest. Although this is not a legal possibility, there has been a case in Vanuatu where the same timber had two

⁴² Land Leases Act 1983, s14.

⁴³ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s5(2).

⁴⁴ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s7.

permits issued for it.⁴⁵ It has also been noted that if timber permits are not secure then carbon rights will not necessarily be either.⁴⁶

The above can be expected to apply to carbon sequestration rights, which are characterized as a type of forestry right under the Forestry Rights Registration and Timber Harvest Guarantee Act. This is discussed in more detail in section 5.

3.2 Customary rights of access and use of forests

One of the principles of forestry administration found in the Forestry Act is that ‘the rights of custom owners and other Ni-Vanuatu with customary interests in forests must be recognised.’⁴⁷ There is no specific mention in the Act as to how this group is defined. These rights include ‘the felling of trees or removal of timber or other forest products by custom owners for sale to Ni-Vanuatu in accordance with current customary usage.’⁴⁸ This comes from the interpretation section of the Forestry Act for commercial forestry operations and means that Ni-Vanuatu can use the forest without requiring the same licences and permits if such rights are exercised in accordance with custom and if the products are for domestic sale. If products are for international sale the provisions of the Forestry Act regarding licences apply.

Traditionally, while a group owns the land an individual will own what they plant on the land.⁴⁹ However, this can not be used to gain ownership of land. If land is leased for a specific purpose, such as for use as a garden, this will not constitute a transfer of ownership and activities that signify land ownership – such as the planting of coconuts or breadfruit (perennials), may not be allowed.⁵⁰

Another key feature of customary rights is that the group who have customary rights to forests is a larger group than the individuals or family that ‘own’ the land. This means that the number of people who would need to be consulted about carbon projects is potentially large.

⁴⁵ *Cap Quiros Ltd v Kalmet* [2003] VUCA 20 <http://www.palci.org/cgi-bin/disp.pl/vu/cases/VUCA/2003/20.html>.

⁴⁶ Ricketts, A. (date unknown) *Initial Legislative Study*, unpublished.

⁴⁷ Forestry Act 2001, s4.

⁴⁸ Forestry Act 2001, s3.

⁴⁹ Bonnemaïson, J. as above n2, p3.

⁵⁰ Sope, B. (c.1974) *Land and Politics in the New Hebrides*, p 8, South Pacific Social Sciences Association, Fiji.

4 Timber rights

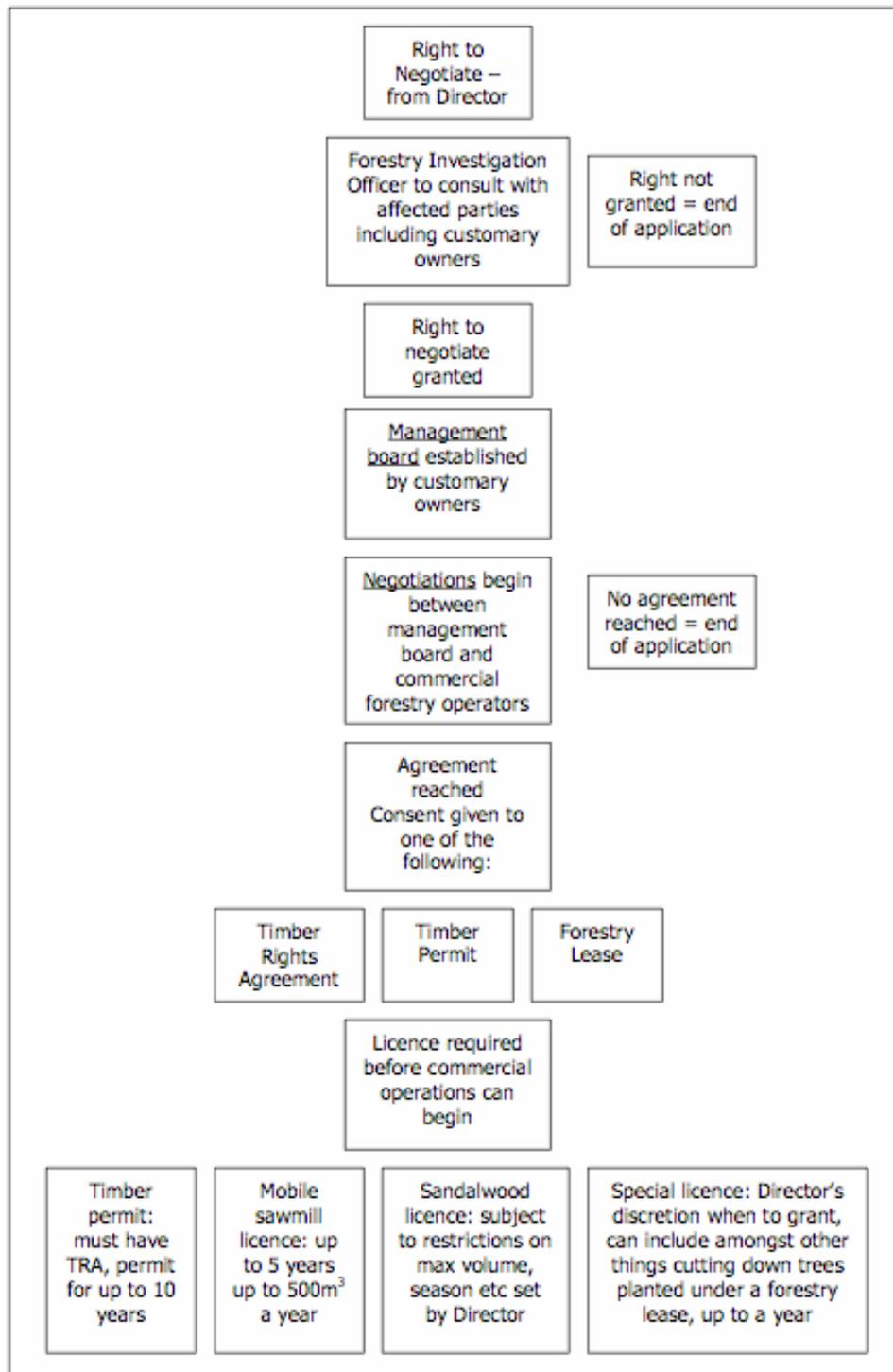
'The ownership of timber rights on land is determined in accordance with custom.'⁵¹ However this is much the same as all land rights and indeed ownership of the land itself. The Forestry Act requires non-custom owners or commercial forestry operators to obtain licences and permits in order to have timber rights for commercial forestry operations.⁵² The only exception to this is if trees are to be harvested for supply to other Ni-Vanuatu.⁵³

The process for acquiring timber rights is set out in the Forestry Act. It consists of several requirements all of which must be met. Before the process can begin, a right to negotiate must be granted by the Forestry Board and then the Forest Investigation Officer will consult with the custom owners and other groups before granting the right. Once this has been established negotiations can begin between the prospective operator and a management board decided upon by the customary owners. This is summarised in the diagram below.

⁵¹Author unknown (date unknown) *Forestry Operations* publisher unknown. [Get citation from Bob or Sean]

⁵² Forestry Act 2001, s31.

⁵³ Forestry Act 2001, s3.



Consent may be given by the owners for either a 75 year Forestry Lease or a 10 year Timber Rights Agreement (TRA).

A Forestry Lease gives the leaseholder rights to the forest with the purpose: ‘to establish, maintain and harvest timber from a crop of trees.’⁵⁴ The full implications of a forestry lease are discussed in the final section of this paper as a conservation mechanism.

A TRA requires approval from the Forest Board who has discretion to grant a year-long timber permit for small areas or approve the TRA.

The final step is to obtain a licence, which can be one of four types granted under the Forestry Act. This step is required regardless of the type of agreement made under part 4, which are the TRA, forestry lease or timber permit discussed above.⁵⁵ The four types of licence are: timber licence, mobile sawmill licence, sandalwood licence and special licence. The one of significance for this report is the special licence, which allows the Director to authorise forestry operations that do not fit under any of the other licence types. This would allow commercial forestry operations to take place on the land but without the requirement for a TRA that is needed for a timber licence. Licences granted under this Act are non transferable⁵⁶ and subject to the Vanuatu Code of Logging Practice.⁵⁷

Regarding exclusivity, there is nothing to stop more than one group applying for rights to negotiate for timber rights over the same piece of land.⁵⁸ However, the actual right to harvest an area can only be granted to one operation.

⁵⁴ Forestry Act 2001, s30.

⁵⁵ Forestry Act 2001, s2(4): ‘The two main requirements for any commercial forestry operation are: (a) an agreement under Part 4; and (b) a licence under Part 5.’

⁵⁶ Forestry Act 2001, s34.

⁵⁷ Forestry Act 2001, s43.

⁵⁸ Forestry Act 2001, s17.

5 Carbon Rights

5.1 Forestry Rights Registration and Timber Harvest Guarantee Act

Definition, Granting and transfer of Carbon Rights

The Forestry Rights Registration and Timber Harvest Guarantee Act (FRRTHG Act) defines a 'forestry right' in relation to land to include 'a carbon sequestration right in respect of the land'. A 'carbon sequestration right' is defined as follows:

'in relation to land, means a right conferred by agreement or otherwise to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land;'⁵⁹

These rights vest with the customary owners of the land, and with individuals that hold leases over land. The FRRTHG provides for forestry rights (including carbon sequestration rights) to be granted as follows:

'3.(1) The proprietor of a lease registered under the Land Leases Act [CAP 163] may, by instrument in writing in the prescribed form, grant a forestry right over the land, or a part of the land, comprised in the lease.

3.(2) The instrument must indicate clearly:

(a) the nature of the forestry right and the period for which it is to be enjoyed; and

(b) whether the forestry right is to be enjoyed by the grantee exclusively or in common with the grantor or any other person (e.g. the custom owners of the land).'⁶⁰

Once granted the Forestry Right must then be registered with the Land Records Department.⁶¹ If the rights are transferred by a lease, they revert to the original land owners once the lease expires. Forest Leases are discussed in more detail in section 6.1.

As well as a forestry right the FRRTHG Act allows that a carbon sequestration right could be considered a *profit a prendre*⁶² or a legal right to enter and take from the land.

⁵⁹ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s1.

⁶⁰ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s3.

⁶¹ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s3(3).

⁶² Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s6. 'Forestry right deemed to be a profit for certain purposes

6. (1) A forestry right is taken to be a profit for the purposes of section 70 of the Land Leases Act [CAP. 163].

Scope of carbon sequestration rights

The scope of the carbon sequestration right is very broad, and extends beyond strict legal rights associated with the carbon to also include commercial interests as well as any other types of beneficial rights that may be associated with the carbon. By allowing for rights with respect to existing and future trees the carbon sequestration rights are also applicable to regeneration and reforestation projects as well as those projects that involve the protection of existing forest.

While the definition of carbon sequestration right clearly applies to carbon credits based on *sequestration* of carbon, further examination is needed to determine whether or not it applies to carbon credits based on *emission reductions* generated by reducing rates of deforestation or forest degradation. The distinction between emission reductions and carbon sequestration is made as emission reduction credits are characterized as the absence of greenhouse gases in the atmosphere whereas carbon sequestration is normally associated with the storage of carbon in biomass. However, the definition of ‘carbon sequestration right’ under the FRRTHG should still be seen to cover both emission reduction credits as well as sequestration credits, as emission reductions generated by storing carbon in forests that would otherwise be destroyed should be considered another ‘benefit ... of sequestration’. In other words, one of the benefits of maintaining carbon in existing trees is that it prevents carbon from being released into the atmosphere.

5.2 Forestry Act

The Forestry Act does not specifically refer to carbon sequestration rights. A ‘forest product’ is defined as ‘timber and any other material yielded by a forest’ and it is unclear whether or not carbon sequestration rights (as well as emission reduction rights) fall within the catch all of ‘any other material yielded by a forest’. If carbon credits are considered a ‘forest product’ under this definition, the sale of carbon credits would be considered a ‘commercial forestry operation’⁶³ that must go through the negotiating and license process in the Forestry Act.⁶⁴ For the process please see the diagram in section 2.4. This characterization would create some conflicts with the FRRTHG, which contains different provisions for the granting and transfer of carbon sequestration rights. In terms of the relationship between the Forestry Act and FRRTHG, the Forestry Act is superior. However, the Forestry Act (somewhat confusingly) states:

(2) A forestry right is taken to be a profit for the purposes of paragraph 71(1)(a) of the Land Leases Act [CAP. 163] and that paragraph applies in relation to a forestry right as if a reference to ‘obsolete’ were a reference to ‘abandoned’. To avoid doubt, paragraphs 71(1)(b) and (c) do not apply in relation to a forestry right.’

⁶³ Forestry Act 2001, s3 states ‘**commercial forestry operations** means: (b)the removal of timber or other forest products from a forest for the purpose of its sale, or the sale of its products;’

⁶⁴ Forestry Act 2001, s15. ‘Commercial forestry operations may be conducted only in accordance with an agreement made under this Part.’

'This Act does not in any way limit the Forestry Rights Registration and Timber Harvest Guarantee Act No 28 of 2000 and if there is any inconsistency between the 2 Acts, this Act prevails.'⁶⁵

Given the lack of explicit reference to carbon sequestration rights in the Forestry Act, and given the Forestry Act does not intend to limit the FGGTHG in any way, it is unlikely that the more specific treatment of granting and transferring carbon sequestration rights in the FRRTHG Act would be overruled by the later, more general provisions of the Forestry Act.

5.3 Conclusion

Vanuatu legislation defines carbon sequestration rights as a forestry right under the FRRTHG Act, but also opens up the avenue that it could be considered a *profit a pendre*. It may also be possible to consider carbon rights within the definition of a 'forest product' under the Forest Act, which would place it in the same category as timber and require the same process of consents. However, this classification is less clear and may be unlikely. In either instance, the customary owners of the land would be the prima facie owners of any carbon rights and have the ability to assign these rights to third parties unless decided otherwise by the government.

⁶⁵ Forestry Act 2001, s72(4).

6 Land Conservation Mechanisms

To date, Vanuatu has protected only a small fraction of its forests – as of 2004 only 3% of mid-to-high forest and 0.7% of low forest were in protected areas.⁶⁶ The mechanisms discussed below examine different ways that areas of forest in Vanuatu could be protected for use in a forest carbon project.

6.1 Forestry Leases

Forestry Leases are granted by customary owners under the Forestry Act⁶⁷ and in accordance with the Land Reform Act and is registerable in accordance with the Land Leases Act.⁶⁸ These grant leaseholders rights over the forest for that period. This does not extend to the right to harvest the trees; a separate licence is required for this. The purpose of a forestry lease is not related to conservation:

The purpose of a forestry lease is to establish, maintain and harvest timber from a crop of trees.⁶⁹

In a nutshell, forestry rights are leased from the customary owners for a distinct area. All rights relating to forestry then become the leaseholders for a period of up to 75 years. The FRRTHG Act also governs forestry leases and as a result forest leases explicitly refer to carbon sequestration rights. This could fit well with the Vanuatu Carbon Credits project in that it gives a set term that cannot be cancelled at any time. The customary owners get the financial benefit of the lease payments without the obligation to manage the area.

Case Study – Erromango Kauri Protected Area

The Australasian Centre for International Agricultural Research (ACIAR) established a project (ANREI/90/20) to create a protected area of land in Vanuatu.⁷⁰ This project used economic analysis to analyse the value of forests in Vanuatu and look at the mechanisms around establishing a protected area. Amongst other things, this project set up the Vanuatu Biodiversity Conservation Trust Fund to pay lease payments for the Erromango Kauri Protected Area. A similar arrangement could be used in the Vanuatu Carbon Credit Project to ensure that the land is protected for 75 years.

⁶⁶ International Tropical Timber Association (2005) *Status of Tropical Forests 2005* online April 2007 <http://www.itto.or.jp/live/PageDisplayHandler?pageId=272&sid=210>.

⁶⁷ Forestry Act 2001, s30(1).

⁶⁸ Forestry Act 2001, s30(5).

⁶⁹ Forestry Act 2001, s30(3).

⁷⁰ Centre for International Economics, 1998, Establishment of a Protected Area in Vanuatu: ACIAR Project 9020.

6.2 Community Conservation Areas

Community Conservation Areas (CCAs) are established by the Environmental Management and Conservation Act 2002. The purpose of the Act is to ‘provide for the conservation, sustainable development and management of the environment of Vanuatu, and the regulation of related activities.’⁷¹

A potential CCA is defined in the Act as a site which:

- (a) ‘possesses unique genetic, cultural, geological or biological resources; or
- (b) constitutes the habitat of species of wild fauna or flora of unique national or international importance; or
- (c) merits protection under the Convention Concerning the Protection of World Cultural and Natural Heritage.’⁷²

A community may request that an area is declared a CCA to the Director of the department responsible for the environment. The Director is given a list of roles that may be requested by the community wishing to establish the CCA, these roles include identifying the area,⁷³ evaluating conservation options proposed,⁷⁴ and importantly, for the purpose of this paper; verifying rights and interests in the proposed CCA land.⁷⁵ Before the CCA can be registered the Director must be sure that the objectives of the CCA are consistent with sound conservation practices, a conservation, protection or management plan has been developed to ensure the objectives are achieved, and that there is certainty as to the CCA. By certainty, the CCA must be geographically defined and consent and approval gained from everyone with a right and interest in the land.⁷⁶

⁷¹ Environmental Management and Conservation Act 2002.

⁷² Environmental Management and Conservation Act 2002, s35.

⁷³ Environmental Management and Conservation Act 2002, s36(b).

⁷⁴ Environmental Management and Conservation Act 2002, s36(d).

⁷⁵ Environmental Management and Conservation Act 2002, s36(c).

⁷⁶ Environmental Management and Conservation Act 2002, s37(2): ‘The Director must ensure that:

(a) the objectives of the proposed Community Conservation Area are identified, and are in accordance with sound conservation practices; and

(b) the boundaries of any proposed Community Conservation Area are accurately identified; and

(c) consent and approval are obtained from all persons having rights and interests in any land that is to be included in the proposed Community Conservation Area; and

(d) an appropriate conservation, protection or management plan is developed for the area to ensure the achievement of identified conservation objectives.’

CCAs require registration in the Environmental Registry (set up by the Act).⁷⁷ Once registration has taken place the landowner or the CCAs management committee are responsible to develop and implement the conservation plan⁷⁸ with the technical or financial support of the Director⁷⁹ (of the Department responsible for the environment). The process allows a community to consider the consequences of protecting an area and establishes, with government assistance plans for managing and conserving an area which could include carbon sequestration although this is not explicitly mentioned.

There are no explicit limitations to what activities can occur in a CCA other than activities must be in accordance with 'sound conservation practices'. In practice limitations may be defined at the management plan stage or it may be unnecessary to define as (theoretically at least) CCAs have the support of the entire community who are in effect giving up their rights to exploit the forest in exchange for conservation.

The main difference between CCAs and National Parks is that while National Parks are 'set up... through a formal statutory body, CCAs are set up at the request of local communities and managed by such communities.'⁸⁰ There is no expiration date on CCAs so in theory they could continue as long as they still had the customary owner's support.

CCAs can be cancelled at any time by request to the Director but only after the request from a landowner followed by consultation with customary owners and finally deregistration in the Environmental Registry.⁸¹ Depending on the nature of the consultation with land owners, if the CCA can in practice be unilaterally cancelled at will by the land owners it may not produce long term and legally robust protection. However, while relevant, this point should not be overstressed. Irrespective of the theoretical legal robustness of a mechanism, community support is essential for any protection measures to work effectively over the long term. Combining CCAs with Forest Leases should combine the community participation and government approval of a carbon project with the increased legal certainty of protection for a fixed period of time under a fixed term lease.

This is where the carbon project could have most impact. If the project will involve offering communities a chance to chose to protect their forest in exchange for financial or other benefits then this should be an effective mechanism to do it. This is because of the high level of community involvement throughout the establishment of CCAs, the voluntary surrender of forestry rights and the retention of ownership and control of the land throughout. As the case study on Vathe indicates this mechanism can be successfully implemented and managed.

⁷⁷ Environmental Management and Conservation Act 2002, s37.

⁷⁸ Environmental Management and Conservation Act 2002, s39(1).

⁷⁹ Environmental Management and Conservation Act 2002, s39(2).

⁸⁰ Tom'Tavala, Y. D. and Hakwa, M. T. as above n17, p30.

⁸¹ Environmental Management and Conservation Act 2002, s38.

Case Study – Vathe

The first registered CCA was Vathe owned by customary owners and run for the protection of the local area from logging. The area was established in 1993 and registered under the EMCA in 2004. It is on land owned by the Sara and Matantas villages, and the first years of establishing the area were spent resolving ownership disputes between these two groups.⁸²

A management plan has been put into action that allows the continued customary usages associated with the land as well as the conservation of important native species. The plan also controls fishing and hunting in the area.⁸³ Importantly the management committee for the area has the authority to enforce the rules surrounding the area, they can impose fines, community service, and even take people to Court.⁸⁴

6.3 National Parks and Nature Reserves

The National Park Act 1993 was enacted to ‘make provision for the declaration of national parks and nature reserves; for the protection and preservation of such areas; and for the matters connected therewith.’⁸⁵ This Act supersedes all other written law, save the Constitution.⁸⁶

However one academic has stated that the main weakness of this Act is that it has been made redundant by later legislation since both the Forestry Act and Environmental Management and Conservation Act provide mechanisms for protecting areas of land.⁸⁷ Significant protected areas like Vathe and Erromango that are being protected using mechanisms other than National Parks are evidence of this.

The Act describes the areas of land that may be protected under this Act as being those which are in their natural state. The Act does not specifically deal with forest that is not in its natural state and may require conservation effort. The proposed site must meet one or more of the following criteria; have unique eco-systems, genetic resources or physical or biological formation; have habitat of threatened species of outstanding value; have outstanding natural beauty; or have archaeological or other scientific or environmental significance. In addition the park must also be for promoting scientific study and public enjoyment.⁸⁸

⁸² Royal Forest and Bird Protection Society NZ (date unknown) *History of Vathe Conservation Area* online April 2007 www.forestandbird.org.nz/vanuatu/history.asp.

⁸³ Royal Forest and Bird, as above n72.

⁸⁴ Royal Forest and Bird, as above n72.

⁸⁵ National Parks Act 1993.

⁸⁶ National Parks Act 1993, s23.

⁸⁷ Ricketts, A. as above n37.

⁸⁸ National Parks Act 1993, s2(1). ‘Declaration Of National Parks And Nature Reserves

The Act provided for the establishment of a Board responsible for making recommendations to the Minister about which areas in Vanuatu would be suitable for National Parks.⁸⁹ After consulting customary owners, the Minister can make a declaration that an area is a national park or reserve. A management plan is then required and a local committee can be set up to oversee the running of the park. Although section 13 of the Act says the management committee 'may' be set up the subsequent sections setting out the duties of the committee and places where National Park Board authority can be delegated to the committee suggests that this is indeed a mandatory requirement.

The establishment of national parks or nature reserves requires a low level of customary owners participation as it allows the Minister to declare any land to be a national park.

It would be possible for the government to declare areas of customary land as national parks for the purpose of carbon projects. Theoretically an area set up under this legislation would have an unlimited term that could not be cancelled at the landowner request, something no other mechanism can offer. However, it is not clear that this would be an option in practice.

As of 2004 the National Park Board had not been established and no protected areas had been created under the Act.⁹⁰ So while this may seem a legally appealing method of land

2. (1) The provisions of this Act shall have effect for the purpose of protecting and preserving in their natural state, as national parks or nature reserves, areas of Vanuatu, which-

(a) have unique eco-systems, genetic resources or physical and biological formation; or

(b) constitute the habitat of threatened species of animals and plants of outstanding value from the point of view of science and conservation; or

(c) have outstanding natural beauty; or

(d) have any archeological or other scientific or environmental significance;

and for promoting scientific study and enjoyment thereof by the public.'

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(c) have outstanding natural beauty; or

(d) have any archeological or other scientific or environmental significance;

and for promoting scientific study and enjoyment thereof by the public.'

⁸⁹ National Parks Act 1993, s8(1).

⁹⁰ Tom Tavala, Y. D. and Hakwa, M. T. as above n17, p30.

protection the lack of implementation and emergence of other means of protecting land may have made this Act ineffectual.⁹¹

6.4 Conservation Areas

Conservation areas are created under the Forestry Act. They apply only to areas of forest and are created by Ministerial declaration at the request of custom owners of the land. Although the name is deceptively close to community conservation areas, they are governed by different legislation. The definition of a Conservation Area is set out below:

‘50. Declaration of Conservation Area

If, in the Minister's opinion, an area of forest has particular scientific, cultural or social significance or other special value for the present community or for future generations, the Minister may, on the request in writing by the custom owners of the land, declare the forest to be a Conservation Area for the purposes of this Act.’⁹²

The Forestry Act specifically prohibits logging from occurring in a conservation area⁹³ and specifically sets out the maximum sentence for the offence, which consists of a fine and/or imprisonment. The value of the logged trees and compensation for any damage caused by the logging must be paid to the Director who may also have the logging equipment confiscated.⁹⁴

This potential enforceability is one of the strengths of this mechanism. However, while the Act does provide some ‘teeth’ to a mechanism, it is also very simple to end a conservation area which may undermine its effectiveness to guarantee a particular area of land is maintained by the customary land owners for the long term.

⁹¹ Author unknown (date unknown) *Carbon Credits – overview of Vanuatu forestry legislation*, unpublished. [Get citation from Bob/Sean]

⁹² Forestry Act 2001, s50.

⁹³ Forestry Act 2001, s51. **‘Prohibition of commercial forestry operations in a Conservation Area** While a declaration of a Conservation Area remains in force, commercial forestry operations must not be conducted in the forest the subject of the declaration.’

⁹⁴ Forestry Act 2001, s70(3): Any person who conducts logging in a Conservation Area in contravention of section 51 is guilty of an offence punishable on conviction by a fine not exceeding VT 500,000 or imprisonment for not more than 6 months, or both.
And: Forestry Act 2001, s70(6): (6) In addition to any penalty imposed for an offence under subsection (2), (3), (4), (5) or (6), a person convicted under one of those subsections:
(a) must pay to the Director the value as determined by the court by which the person was convicted of any tree in respect of which the offence was committed, and of any damage done in the course of the offence to any land; and
(b) is liable to confiscation of any forest products the subject of the offence, and of any vehicle, machinery, tools or other equipment used in connection with the offence.

‘52. Cancellation of declaration

A declaration of a forest as a Conservation Area may be cancelled by the Minister on the request in writing by the custom owners of the land the subject of the declaration.’⁹⁵

There is some overlap between the Forestry Act and the Environmental Management and Conservation Act 2002 (EMCA), which could lead to confusion especially if other groups are not aware of this.⁹⁶ When compared to community conservation areas or national parks, there is a lack of guidance as to how conservation areas should be managed or planned for.

For the purpose of a carbon credit project, this main benefit of this mechanism that it does not have the same strict registration requirements as a forestry lease or community conservation area. However, as with CCAs there is a risk that the Conservation Area could be cancelled at will by the local community and does not provide independent legal guarantee of long term permanence. The lack of need to consult with the local land owners before the Conservation Area is cancelled may make it weaker than CCAs. However, as noted above, the possibility of combining this with a Forestry Lease could also be explored.

6.5 Forestry Covenants

Under the FRRTHG, forestry covenants can be attached to compel the lessee to maintain an area of forest for a carbon sequestration project. A ‘forest covenant’ is defined as

‘in relation to land, means any covenant, whether positive or restrictive in effect, contained in a forestry right or a variation of any such covenant, and includes any such covenant that imposes obligations requiring:
(c) the provision of access to or maintenance of trees or forests on the land that is the subject of any carbon sequestration right;’⁹⁷

Forest covenants also bind assignees but ends on termination of the forestry right to which the forestry covenant relates.⁹⁸

⁹⁵ Forestry Act 2001, s53.

⁹⁶ Tom Tavalala, Y. D. and Hakwa, M. T. as above n17, p30.

⁹⁷ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, s1.

⁹⁸ Forestry Rights Registration and Timber Harvest Guarantee Act 2000, ss8 and9:

‘Forestry covenants to bind assignees

8. (1) Despite any rule of common law or equity, a forestry covenant contained in a forestry right is binding on the assignees and personal representatives of the covenantor and on all successors in title of the covenantor to the land.

9. A forestry covenant ends on termination of the forestry right to which the forestry covenant relates.’

A forestry covenant could be used by anyone with a forestry right to guarantee that the area will remain in use as a carbon sink. The strength of this mechanism is that owners can choose to place a restriction on their land to maintain carbon stocks.

7 Conclusion

There are a number of different approaches that could be used to establish legal protection over areas of forest that may be used to generate tradable carbon credits. Issuance of a lease to a carbon buyer is one possible approach, and could ensure legal protection for up to 75 years. Community Conservation Areas, Conservation Areas, and Forest Covenants are other mechanisms that could be used. One possible appeal of the CCA is that it contains a structure to ensure local community support and can also bring in government assistance develop and put in place a management plan.

The nature of carbon rights in Vanuatu may be the deciding factor as to which approach is taken. If customary owners or leaseholders can get direct financial benefits from carbon credits they may wish to protect areas of forest for that purpose. This is the model being suggested for the Vanuatu Carbon Credit Project. Given the definition of carbon sequestration rights as owned by customary owners the best way to get community buy-in will may be the lease mechanism that gives income directly to the people as well as the non-material benefits that the community gain from having intact forest.

Vanuatu land law often has the requirement to consult customary owners on all matters relating to the use of the land and its resources. Whichever mechanism is deemed to be the most suitable for the carbon sequestration projects, community participation and support must be incorporated early on into the project. The sawmilling example was included to make the point that regardless of the exact legal mechanism used it is the social ramifications of carbon credits that will need a significant amount of effort. This will be more important if carbon rights are considered a property right attached to the forest as there may be competing claims of ownership. To get community buy in, there will need to be an equitable degree of revenue sharing between the government or project and customary owners.