FOREST CARBON RIGHTS: Analysis of REDD+ and forest carbon rights in Fiji

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DELIVERABLE 3: FINAL REPORT

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Abbreviations and technical terms

ALTA	Agricultural and Landlord and Tenant Act
BS	Benefit Sharing
BSM	Benefit Sharing Mechanism
CoF	Conservator of Forests
CI	Conservation International
CCICD	Climate Change International Co-operation Division
CRS	Carbon Rights Study
CSOs	Civil Society Organizations
EIA	Environment Impact Assessment
ER	Emission Reduction
ERP	Emission Reduction Program
FCPF	Forest Carbon Partnership Facility
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit (German Society for International Cooperation)
ILGs	Incorporated Land Groups
IRDF	Integrated Rural Development Framework
LDA	Land Development Authority
MMRD	Ministry of Maritime and Rural Development
NAP	National Adaptation Plan
MoE	Ministry of Economy
MoF	Ministry of Forestry
NCCP	National Climate Change Policy

NDMC	National Disaster Management Council
NDP	National Development Plan
NDRMP	National Disaster Risk Management Policy
NGOs	Non-Government Organizations
PES	Payment for Ecosystem Services
REDD+	Reducing Emission from Deforestation and Forest Degradation (plus)
RSC	REDD+ Steering Committee
SPC	Secretariat of the Pacific Community
TLTB	*iTaukei* Land Trust Board
UNFCCC	United Nations Framework Conventions on Climate Change
VCS	Verified Carbon Standard
VER	Verified Emission Reduction
YMST	Yaubula ("Natural Resources") Management Support Team

Executive Summary

Fiji does not have a dedicated legislative framework that recognises forest carbon rights as property. Neither does it legally articulate forest carbon rights ownership. It is generally accepted that the inference arising from the application of common law principles, Fiji being a common law country, that ownership of forest carbon rights lies with the owners of the land through the nexus of landownership, forest trees and sequestered forest carbon. Despite this absence of specific legislation, Fiji does have relevant legislation that will assist with the implementation of REDD+, such as that addressing sustainable forest management and special lease conditions under TLTB anticipating provisioning for REDD+ activities.

This study identifies a suitable legal option for Fiji's carbon right regime, having carefully considered the three options proposed in the 2012 Trenorden Report in the context of national and international developments in policy and law in the period since 2012. The major development in Fiji during the period 2012-2019 has been the adoption of the Constitution of the Republic of Fiji in 2013, while globally the world has seen the advent of the Warsaw Framework for REDD+ in 2013 and the Paris Agreement in 2015 – both events and decisions occurring under the umbrella of the UN Framework Convention on Climate Change. In terms of policy development, this study takes into account the various plans, policies and frameworks developed by the Government of Fiji under the auspices of its commitment to the UNFCCC and the related UN Convention on Biological Diversity.

Context is important, and thus local culture, landownership and expectations are significant factors in any consideration a legal approach to carbon rights ownership and the legal framework for the facilitation of REDD+ activity in Fiji. Customary ownership under registered land-owning units is the dominant land typology, accounting for 89.9 percent of Fiji's total land area, with the rest classified as State and private freehold lands. Ownership of customary land is inalienable, but it is available to public access through leasing and licences. The identified option considers the different types of legal provisioning of leases and licences and evaluate whether these legally impacts the ownership of forest carbon rights. Where there are competing land use rights created under existing laws such as under the *Forest Act* and/or *Mining Act*, this study proposes administrative solutions under the identified option.

Having proposed a definition of forest carbon rights for Fiji's context, the identified option recommends that to engage in a REDD+ project activity on their land, landowning units lease their own land through a legal entity of choice, which in turn becomes a licensed entity for the purposes of carbon trading by way of application to the Conservator of Forests. The use of this entity avoids the separation of tenure from property interest in forest carbon rights but allows separate dealing of the latter through licence. The entity is also responsible for maintenance and management of the forest.

Management and regulation of Fiji forest is primarily under the domain of the *Forest Act 1992* which is proposed to be replaced by a new Forest Act, currently proposed in the form of *Forest Bill No 13/2016*. The Bill is currently in progress through Parliament. Given this development and the practical need to

respect forest carbon right as a property right attached to land, this study suggests what might be an appropriate proposal to be incorporated into legislation.

Furthermore, the study identifies the responsibilities of existing institutions and their linkages which is harnessed to meet framework expectation of funding bodies to enable verification, transfer and trade in carbon credits. The functional linkages of the landowners, licensed entity, TLTB, Ministry of Lands and the Ministry of Economy are vital in this regard. The administrative support and involvement of other relevant Ministries at different levels of this process is also acknowledged as necessary.

Finally, having considered all the above, the identified option incorporates the feasibility of a smooth transaction, registration, valuation and trading of carbon rights under the dictates of standards procedures of the UNFCCC and provides a summary position of the way forward for the proposed legal framework with clear identification of the responsible parties.

I. Introduction

The concept of forest carbon rights resulting from forest sequestration is not defined under the laws of Fiji nor is it proposed as part of the Forest Bill Number 13 of 2016, which is yet to be passed by the Parliament of the Republic of Fiji. The pursuit of Fiji's REDD-Plus Policy[1] and preparedness under its national Emissions Reductions Programme ('ERP'), demands a clear coherent definition that is enabled by a purposive and comprehensive legal framework. Such legal framework should allay the concerns of carbon traders by establishing an institutional presence and facilitating orderly process to ensure certainty and market credibility for the trade in emissions reductions. Given the inherent connection Fijians have to their land, the success of the ERP under REDD+ including strategies to reduce emissions resulting from deforestation and forest degradation requires the maintenance of clear and secure land tenure rights under any implementing legal or policy framework.

This study is premised on the Fiji REDD-Plus Policy which aims to provide a framework to facilitate access to all available financing instruments for REDD+ from both market and fund-based sources. Thus, Fiji intends to pursue a 'hybrid' approach to REDD+ financing which will enable both national and sub-national or project-scale activities to be adopted.[2]

Fiji's REDD-Plus Policy states that the following activities are eligible for inclusion under Fiji's national REDD+ programme:[3]

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);
f) Combination linking afforestation/reforestation with REDD.

This study uses as its premise for consideration of carbon rights tenure that REDD+ activities in Fiji would be project based and comprise activities a), b), and c) listed above or a combination thereof.

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.

[1] Fiji REDD-Plus Policy 2011
[2] Fiji REDD-Plus Policy, p 7
[3] Fiji 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: (1) reducing emissions from deforestation; (2) reducing emissions from forest degradation; (3) conservation of forest carbon stocks; (4) sustainable management of forests; and (5) enhancement of forest carbon stocks (Dec. 1/CP.16, para. 70).

With other Pacific Island countries, Fiji has endorsed the Pacific Island Regional Policy Framework for REDD+ (Regional Framework).[4] The Regional Policy 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…".[5] Paragraph 4.6.3 of the Regional Policy 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."*

The analysis in this study provides a review of existing laws in terms of policies, legislations and regulations to help ascertain Fiji's best possible legal option to proceed on the road to a fully-fledged REDD+ program, in order to implement its proposed strategy option under the ERP programme. Following a close analysis of different land typology and stakeholder consultation, the study has carefully considered the application of possible legal options for forest carbon rights ownership in the Fijian legal context and identifies its preferred legal framework for REDD+ mechanisms particularly around the transfer of legal title to emissions reductions in Fiji. In so doing, this final report of the study recognizes that not all aspects of REDD+ require new legislative intervention for implementation. Some aspects can be implemented administratively while new logistical institutional arrangements and procedural aspects will however require legislative or regulatory amendments and clear policy directions.

II. Background

Conservation International, through the financial aid of the Forest Carbon Partnership Facility ('FCPF') and leadership of the REDD+ Unit under the Ministry of Forests, is assisting the Fiji Government to implement an Emission Reduction Program ('ERP') under the United Nations Framework Convention on Climate Change (UNFCCC) and Kyoto Protocol. A key element in implementing the ERP particularly for the implementation of performance-based payments, is the determination of who owns the carbon sequestered in forest trees and a legal and policy framework that will support ERP titles and transfers. In 2012, a comprehensive study was undertaken by the Secretariat of the Pacific Community and GIZ under its regional project called "Climate Protection through Forest Conservation in Pacific Island Countries". The report titled "REDD+ and Forest Carbon Rights in Fiji: Background Legal Analysis" ('the 2012 Trenorden Report') aimed to:

A. Explain the relevance of carbon rights to a national REDD+ scheme in Fiji;
B. 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

[4] The Pacific Islands Regional Policy Framework for REDD+ was prepared with support from the Secretariat of the Pacific Community and GIZ, and was adopted by the Heads of Agriculture and Forestry Services at its Fifth Regional Meeting in Nadi, Fiji, 24-27 September 2012.
[5] Pacific Island Regional Policy Framework for REDD+ (September 2012), p. 8, para. 4.3.2.

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; and

C. Identify some options for clarifying the ownership and allocation of carbon rights in Fiji.

The 2012 Trenorden Report provided a comprehensive study on the different laws and policies currently in place in Fiji that could provide the legal framework for the ERP. However, bearing in mind that carbon rights is a new type of right, these laws and policies may not be very effective hence the Report recommending three main options for an enabling legal and policy framework.

In early 2019, Conservation International commissioned two separate studies to assist the Fiji Government in enabling the ERP, one of which is to revisit the 2012 Trenorden Report and identify gaps to enable the Government of Fiji to a) assign property rights to forest carbon and b) to transfer Emission Title to a third party while respecting the land and resource tenure rights of the potential rights-holders, including *iTaukei* and non-*iTaukei*. The rationale behind this is that in the intervening years since the 2012 Trenorden Report, new laws have been passed by the Parliament of the Republic of Fiji, most notably, Fiji's new 2013 Constitution. Aspects of the 2012 Trenorden Report's findings have been inputted into a proposed Forest Bill (Bill No 13 of 2016) for the management of forest resources which is currently in passage through Parliament.

For consistency and legal currency, this necessitates a review of initial findings and recommendations to provide a current premise to consolidate recommendations towards successfully implementing Fiji's ERP. Being critical components of the ERP, benefit-sharing mechanism (BSM) and carbon right study (CRS) are anticipated to support the final leg of the REDD+ Readiness phase for Fiji.

III. Study Objectives and Tasks

The objectives of the current study are as follows:

1. Assess: (a) existing land and resource tenure right (including legal and customary rights of use, access, management, ownership, exclusion, etc.); and (b) categories of rights- holders present in the Accounting Area (including *iTaukei*, non-*iTaukei*, private sector, and other relevant communities).

2. (a) Assess the scope of current legislation(s), regulations and policies in relation to forest carbon rights, its definition and ownership. (b) Identify the options to legalize / formalize the allocation of rights to forest carbon.

3. Identify the legal options or sub-arrangements with potential land and resource tenure rights holders available to transfer the ER title by the Program Entity to third parties (developers) where underlying tenure is owned by another.

4. Evaluate the options to see which one(s) will feasibly allow for the ease of transacting, registration of, valuation and the trade of rights to carbon for commercial dealings.

5. Provide (a) a summary position on a proposed legal framework for national adoption in relation to forest carbon rights; and (b) a road map to get there.

The current study undertook the following studies to ensure the above objectives were accomplished:

1. Review laws and bylaws associated with land and resource tenure and management Conduct an in-depth literature review, particularly focusing on policy, legal and regulatory provisions of the country pertaining to forest and land management;

2. Consultation with local communities, *iTaukei* Land Trust Board, Land Banks, Ministry of *iTaukei* Affairs, the REDD+ CSO platform, and key stakeholders, government departments to identify legal provision options essential to enable the Fiji government to transfer ER title to third party. Consultations will be facilitated by the REDD+ Unit and CSO Platform;

3. Assess gaps in existing forest ownership legislation related to forest carbon and recommendations on appropriate ways for these gaps to be addressed through legislation and other channels (i.e., a roadmap) so that forest carbon rights can be legally and equitably assigned to forest owners and the Program Entity is able to transfer emission title to third parties ; and

4. Identify effective ways through which policies, institutions and laws can be adapted to encompass forest carbon ownership in a way that will ensure benefit flows for forest-dependent communities. This could be supported by discussions with different international and national forest sector stakeholders, academics and legal experts.

IV. Nature of Forest Carbon Rights

Trees absorb and store carbon and therefore act as a 'sink' for carbon dioxide in the atmosphere. The international community has 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 are and 'carbon rights' are emerging as a new component in the 'bundle of rights'[6] that constitute property rights over forest and land. Carbon is now a commodity and can be traded in the form of carbon credits.

What's 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.

[6] Ownership 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.

'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 Carbon Units (VCUs) are issued. These are held in an account in the name of the Project Developer or Carbon Credit Broker, in a carbon registry operated by independent registry operators, namely Markit (New York), and APX (California).
Carbon credits are equal to a reduction or removal of one metric tonne of carbon dioxide equivalent (tCO_2e) by a project and are issued with a unique serial number so they can be tracked through carbon registries.

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+.[7] 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.[8]

For the purposes of this report, 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').

VCS definition of 'carbon right'
The VCS requires the project proponent to demonstrate 'proof of right', namely that they hold the 'right to all and any GHG emission reductions or removals generated by the project or program during the crediting period or verification period, as the case may be'. It is distinct from but may be held through project or program ownership. : VCS Program Definitions, Ver. 3.
The developer can do this by showing that they hold the rights to the emissions reductions generated by the project either under a statute or otherwise by law, under a contract or other agreement (e.g. a lease) with the landowner, or through the implementation of laws that require activities be undertaken or incentivize activities that generate GHG emission reductions or removals.
: VCS Standard: Version 3.7, para. 3.11.1

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

[7] For 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.
[8] UNFCCC, COP Decision 1/CP.16 (Cancun Agreements), para. 72.

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.

Carbon Pools
A reservoir of carbon that has the potential to accumulate (or lose) carbon over time, which for AFOLU projects or programs encompasses aboveground biomass, belowground biomass, litter, dead wood, soil and wood products.

Carbon Stock
The quantity of carbon held within a pool, measured in tonnes of CO_2

Program Definitions: VCS Version 3.7

a. Carbon pools

Forest carbon can be divided into five carbon pools.
The five carbon pools specified under the IPCC 2006 Guidelines are as follows:

- above-ground biomass
- below-ground biomass
- dead wood
- litter
- organic soil carbon. [9]

Forest carbon rights include the carbon found in these five pools. They are described in Table 1.

Table 1: Forest Carbon Pools and their definitions[10]

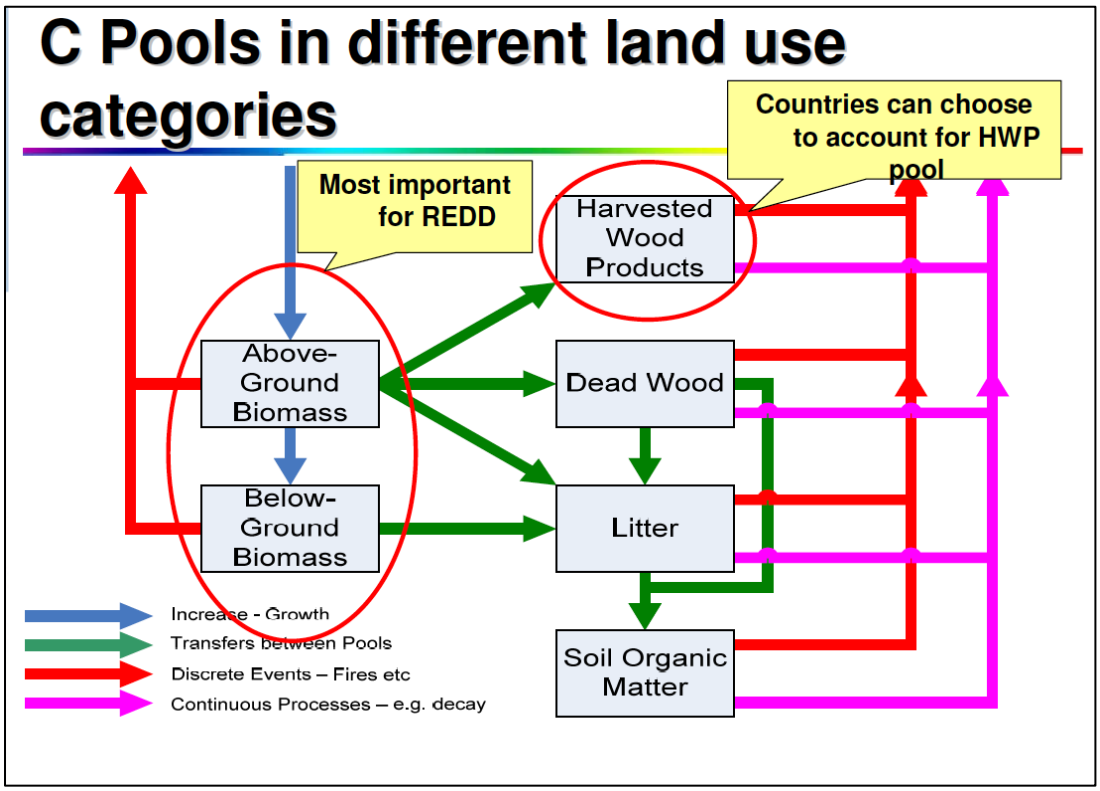
Carbon Pool	Description
Above ground biomass	Living biomass above the soil, including the stem, stump, branches, bark, seeds and foliage
Below ground Biomass	Living biomass of live roots, sometimes excluding fine roots of less than 2mm diameter because these often cannot be distinguished empirically from soil organic matter or litter
Dead Wood	Non-living woody biomass not contained in the litter, either standing, lying on the ground or in the soil. Dead wood includes wood lying on the surface, dead roots, and stumps larger than or equal to 10cm in diameter or any other diameter used by the host country for its UNFCCC national inventory accounting
Litter	Non-living biomass with a size less than a minimum threshold diameter (e.g., 10 cm) chosen by the host country for its UNFCCC national inventory accounting,

[9] The UNFCCC has requested that REDD+ countries estimate and report emissions and removals from five forest carbon pools when preparing their national greenhouse gas inventories. The UNFCCC has asked countries to use the most recent IPCC guidelines, as adopted or encouraged by the COP, as a basis for estimating anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks (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.
[10] Program Definitions: VCS Version 3

	lying dead, in various states of decomposition above the mineral or organic soil, including litter, fumic and humic layers. Live fine roots (of less than the threshold diameter for belowground biomass) are included in litter where they cannot be distinguished from it empirically
Soil organic carbon	Organic carbon in mineral and organic soils (including peat) to a specified depth chosen by the host country for its UNFCCC national inventory accounting and applied consistently through the crediting period. Live fine roots (of less than the threshold diameter limit for belowground biomass) are included with soil organic matter where they cannot be distinguished from it empirically. In organic soils, soil organic carbon encompasses the entire depth of the organic layer (i.e., up to the depth of the mineral substrate). In the case of peatland, this depth can be several meters

Forest carbon pools are used for accounting purposes for completion of National Greenhouse Gas Inventories. The diagram in Figure 1 indicates how the various carbon pools develop and the movement of carbon stocks, in the context of national accounting for greenhouse gas (inventories). [11]

Figure 1: Carbon Pools in Forests: sources and transitions



[11] Sourced from Srivastava, N., (2008) IPCC Guidelines and REDD Monitoring and Verification at IPCC Task Force on Inventories, IPCC National Greenhouse Gas Inventory Programme , Rome 26-28 November 2008 retrieved from: www.fao.org/forestry/16663-0d866304c10b8384d90eb4fdef89867df.pdf

b. What are the benefits of carbon rights ownership?

Ownership of forest carbon rights carries with it both benefits and risks. It is beyond the scope of this report 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 incorporates 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.

c. 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 20 to 100 years.[12] 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 (eg: that they will not permit or that they will regulate sustainable logging, to clear the area of scrub to reduce wildfire risk, to monitor the area, etc).

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

[12] The VCS AFOLU framework requires a minimum commitment period (crediting period) of 20 years, with a maximum of 100 years: see VCS Standard, Version 3.7, 21 June 2017, para. 3.8.1. The baseline to be reassessed every 10 years: see AFOLU Requirements, Version 3.6, 21 June 2017, para. 3.1.10.

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

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

To insure against the possibility that the forest carbon might be released, voluntary forest carbon accreditation schemes (e.g. the Verified Carbon Standard) require the project proponent or the central administrator to set aside a certain number of carbon credits from the project into a buffer account in order to manage these risks ('a reversal buffer').[15]

d. 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 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.

i. 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, eg. an individual or a landowner clan or group, and
- the boundaries of the land that will form the project area.[16]

Thus, it is important that Fiji develop a clear policy and legislative framework for identifying and regulating carbon rights, not only in the interests of funding, but because carbon project developers and investors want to know exactly who owns and controls the carbon in the forest, the additions to which is the underlying resource that will be traded. Project developers and investors want an assurance that the carbon has not already been sold to someone else, and that it will not be sold to someone else in the future once they have 'bought' it (known as 'double-counting').

It is not necessary for a country to clarify carbon rights for all elements, only those which involve project-based activities and market funding.

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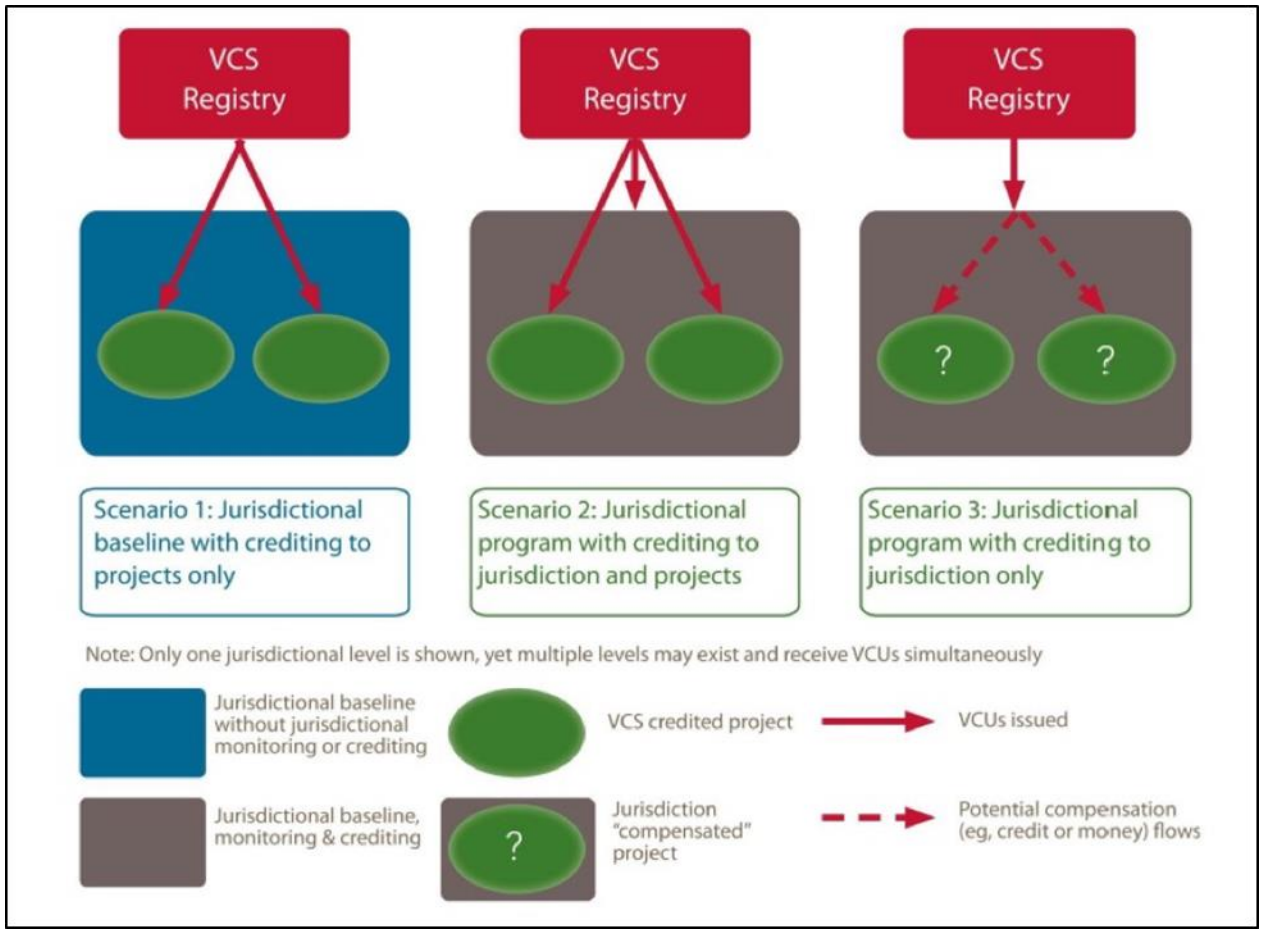
[14] For example, under the forest carbon scheme in Australia, if carbon is released through an intentional or negligent action by the project proponent, the proponent can be ordered to buy back an amount of carbon credits up to the total number of credits that the forest carbon project would have earned: see *Carbon Credits (Carbon Farming Initiative) Act 2011*, (Cth) s 90.
[15] For example, the Verified Carbon Standard requires credits to be placed into a Jurisdictional Pooled Buffer Account managed by the VCS Association, containing non-tradable jurisdictional and nested REDD+ buffer credits for covering the risk of unforeseen losses in carbon stocks across the jurisdictional REDD+ program and REDD+ project portfolio: VCS Program Definitions, Version 3.7.
[16] For example, the VCS AFOLU Requirements require a project proponent to provide a map of the project area, the geodetic coordinates of the project area boundary, the total size of the project area, and details as to its ownership: VCS AFOLU Requirements: Version 3.6, para. 3.4.1.

e. The context for defining carbon rights

i. 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 subsequent section of this report. Figure 2 below contains a decision tree illustrating this process. [17]

Figure 2: Accounting and Verification Framework for Jurisdictional and Nested REDD+ (JNR)



[17] https://verra.org/project/jurisdictional-and-nested-redd-framework/

ii. Consistency with Fiji's Constitution

Any policy and legislative scheme for the determination of ownership of forest carbon rights and the implementation of REDD+ in Fiji must be in conformity with the Constitution of Fiji, in accordance with the rule of law. This is a critical element of the context in which the legal rights to forest carbon is to be decided. The rights provided and guaranteed in the Constitution are addressed below in section VI.

iii. 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.[18]
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 for Fiji to the development of a framework for forest carbon rights are: The United Nations Framework Convention on Climate Change (1992) and The Indigenous and Tribal Peoples Convention, (1989) (ILO 169).

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.

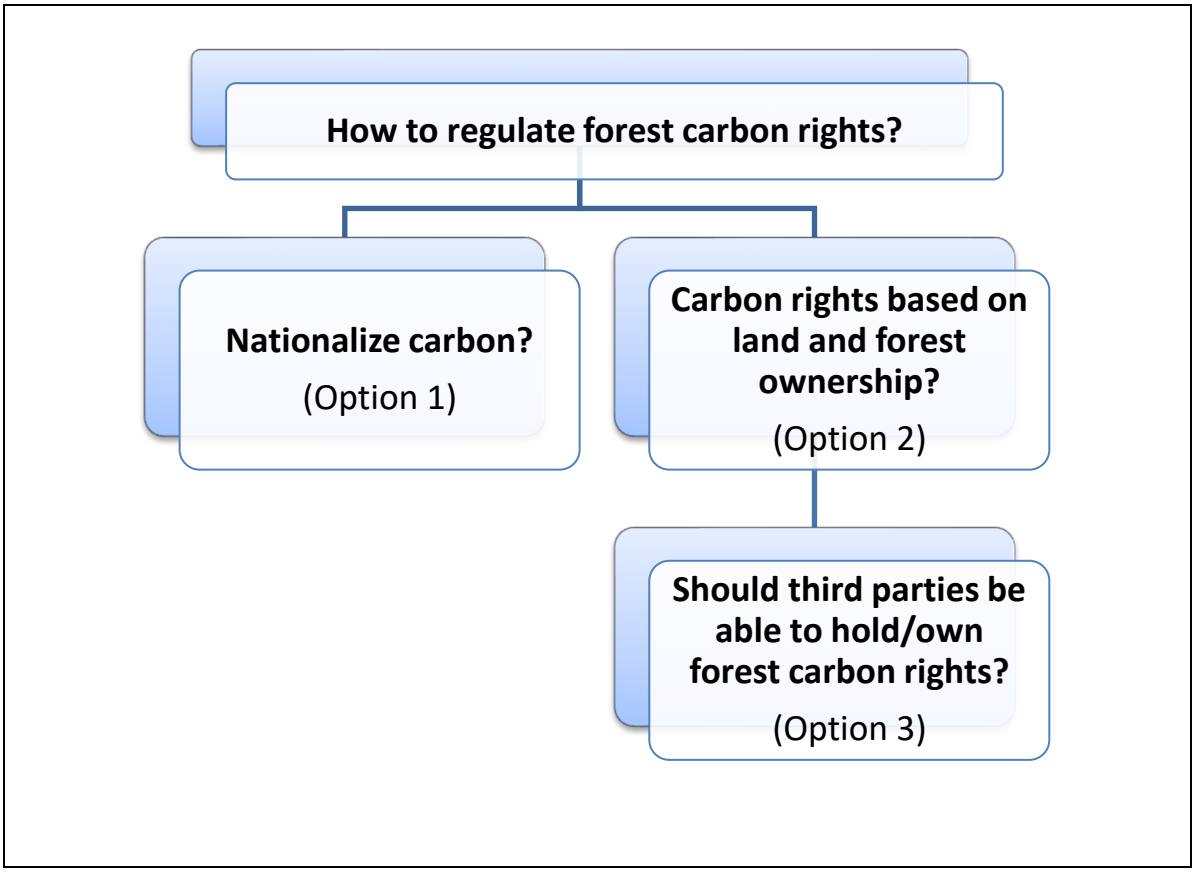
iv. Guiding policy principles for developing a legal framework for forest carbon rights

In analysing the Options presented for developing a framework for forest carbon rights, the study team 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.

[18] Pacific Islands Regional Policy Framework for REDD+, para. 4.6.4.

Figure 3: Decision tree for developing forest carbon rights



V. Summary of 2012 Report

The 2012 Trenorden Report describes the relevance of carbon rights for REDD+ and identifies options for the ownership of forest carbon rights. It is in the context of Fiji's policy decision to take a 'hybrid' approach to REDD+ financing which will enable both national and sub-national or project-scale activities to be adopted. The 2012 Trenorden Report examines the correlation between carbon rights and the presence of emission reduction biomass. It identifies forest carbon right as the legal right of a person in relation to forest over which he has control or owns, to exploit the economic benefits of: (1) the carbon stored in the forest; and (2) sequestering carbon in the forest.

Clear and secure land tenure rights is recognized as key to a successful carbon emission programme. In this respect, clear identification and discussions on different land typology is categorically analyzed with regard to the fact of approximately 89% of the land in Fiji being owned by indigenous landowners (*iTaukei*) and registered under respective landownership units. Approximately 90% of *iTaukei* land is forested. Much of this land is registered in the *Register of iTaukei Lands* with boundaries recorded (even if some provinces are not yet formally surveyed), with living members of the landowning units recorded in the

Vola ni Kawa Bula (VKB). Under the current legal system 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+ policy. One of the choices is between the various options for ownership of carbon rights. The following options were outlined in the 2012 Trenorden Report:

1. The first 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.

The 2012 Report Summary

Option 1: State takes ownership of forest carbon rights

Option 2: Landowner of forest land owns forest carbon rights

Option 3: Separate forest carbon rights from the land to enable 3rd party ownership

Conclusion: Adopt simplest and readily understood approach; ie, Option 2

2. The 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: (1) a contract or MOU to sell verified emissions reductions, (2) a license to use the forest carbon rights (based on the existing forest concession model), or (3) a lease together with a collateral contract. Should this option be selected a policy choice will have to be made in favor of a preferred approach; contract/MOU, license or lease.

3. The 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.

It was argued that the lease model in the second option offered 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. The 2012 Trenorden Report found that adoption of *any* of the options would 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, and in conclusion asserted that there is merit in adopting the simplest and most easily understood approach, with clear rights and duties set out in legislation.

VI. Post 2012 Report Changes

a. Relevant Fiji Legislative and Policy Changes

Given this study brief, legal analysis of a new property right in forest carbon and its legal encapsulation, is undoubtedly complex amidst the existing policies, legislations, regulations and procedures within the natural resource access and sustainable development sector. As a later legal development in time, whatever course is adopted, in the interests of implementing the intended approach as intended, it will be necessary to ensure harmonization with existing laws. In all practicality, this will be achieved through amendments of the diverse laws, especially those pertaining to property rights, obligations, duties and restrictions to render logical application.

Laws and policies have continued to evolve in Fiji post-2012 particularly in resource management, conservation and environment protection. Fiji has not implemented through the enactment of a legislation the recommendations of the 2012 Trenorden Report although the Ministry of Forestry has addressed carbon rights in the Forest Bill, Bill No. 13 of 2016 (Forest Bill), the passage of which has stalled. There have not been any proposed amendments to other legislation to complement the approach to carbon rights articulated in the Forest Bill.

This study has critically, albeit briefly, considered current laws and policies of Fiji in the context of the introduction of carbon rights for the intention of successfully implementing REDD+ activities. Annexed to this report is a table listing relevant laws and policies with comments in relation to whether action may be needed in the interests of harmonization. The table does not purport to be comprehensive and is included as a suggested starting point towards achieving harmonization in laws and policies for the purpose of achieving benefits from REDD+ activities for Fiji.

b. Changes in Resource and Tenure Rights and Categories of Rights Holders (if any)

Since publication of the 2012 Trenorden Report, Fiji has seen major legal developments, some of which were intended for sustainable management of forest in areas of resource access and development. Further, there are also developments grounded in national policy development through comprehensive 5 Year and 20 Year National Development Plans, articulating clear policy, goals and strategies within the framework timeline. Under the plan it is evident that Government provides distinct policies favouring conservation and sustainable management on one hand and the reforestation through plantation forest on the other.[19]

Constitutional Guarantees

- Customary ownership of land protected
- No acquisition of land except by law and with just compensation
- Landowners to have fair share of royalties from mining

[19] See 5YR-20YR National Development Plan, "Transforming Fiji", Ministry of Economy, Republic of Fiji, November 2017. National Chapter 3.2.14-Forestry p.117.

The Promulgation of Fiji's new Constitution, signed into law on 6 September 2013, is a fundamental legal change, that inter alia, essentially guarantees freedom from compulsory or arbitrary acquisition of property unless in accordance with a written law and purposively for public purpose.[20] The section further provides ring fenced protection that every person has the right not to be deprived of property by the State. Where acquisition is permitted, compensation has to be agreed between the parties or alternatively the payment of "just and equitable" compensation as determined by a Court or Tribunal having considered all the relevant factors, must be made. Further, the Constitution protects ownership of *iTaukei* lands, Rotuman lands and Banaban lands, confirming that ownership shall remain with the customary owners of the land and prohibiting permanent alienation whether by sale, grant, transfer or exchange save to the State under the public acquisition provisions.[21] It is noteworthy that a land grant to the State may revert to its customary owners if that land is no longer required by the State, thus reaffirming the principle of inalienability of customary landowners' rights.[22]

In this regard, the Constitution elucidates that all ownership of land, all rights and interests in land leases and land tenancies continue and cannot be diminished nor adversely affected by any law.[23] A benefit sharing mechanism is espoused in the Constitution in that customary and freehold owners of land and registered *iqoliqoli* (customary fishing grounds) rights holders have a constitutional entitlement to a fair share of the royalties resulting from a grant by the State to extract minerals from land and seabed.[24] It is noted that this arrangement is predicated on a rights basis despite the unequivocally stated State ownership of all minerals in or under any land or water.

Further development can be found in the Forest Bill which is currently under legislative passage. Intentioned as a Bill to replace the *Forestry Act* 1992, the Forest Bill entitled as an *"Act to provide for the management of Fiji's forests and other related matters"* devotes a prescriptive section 33 to REDD+ activities and their registration, with related definitions of forest carbon, forest emissions and REDD+. Most importantly, the Forest Bill in its current version provides that the Minister may make regulations to give effect to the proposed Act for control of activities involving forest land, forest resources and forest products.[25]

c. Land Typology, Instruments and Forest Ownership

It is noted that Fiji's economic and commercial development history has largely been premised on accessing *iTaukei* land provisioned through long term leasing. Most agriculture and forest plantations are implemented through leasing arrangements by the iTaukei Land Trust Board (TLTB) under *iTaukei Lands Trust Act 1940*. Thus, leasing of *iTaukei* land has been largely the instrument of choice for access to land, subject to availability. Second, leasing recognizes and preserves the inherent condition of inalienability

[20] Constitution of the Republic of Fiji, 2013 s27.
[21] See Section 27 of the Constitution of Fiji 2013.
[22] See Section.8, State Lands Act 1945.
[23] See Section 29 of the Constitution of Fiji 2013.
[24] See section 30 of the Constitution of Fiji 2013
[25] See clause 50 of Forest Bill No 13/2016.

of *iTaukei* land, except to the State.[26] Similarly, land access through leasing has also been possible for State and freehold land. The effect of leases on the respective land types and their legal impact on forest ownership is summarized in Table 1.

Under current Fiji law based on common law principles, the ownership of carbon in forest trees on any land remains with the landowner unless the land is leased, and the terms of the lease allow the lessee to own the sequestered carbon. Thus, the right to the carbon in forest trees on land whether owned by the State, *iTaukei* landowning units or other owners (freehold land) remains with the respective owner including where the land has been leased (unless otherwise stated). Similarly, forest products may not be removed without the lessor's consent and payment of royalties as directed by the lessor.[27]

On freehold land, the owner holds the carbon rights in any forest trees growing on the land. This follows the common law principle coupled with all-encompassing statutory definition of land such that the owner of the freehold land also owns the carbon rights on the land. Examples of available categorical dealings with land (with impact on forest) for *iTaukei* land under the leasing regimes of TLTB and Land Bank are tabulated in Table 2.

Table 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)**	*iTaukei Land Trust Act* *iTaukei Land Trust (Leases and Licences) Regs*: Reg 12	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)
***iTaukei* Agreement for Lease for Special (Re-Afforestation Purpose)**	*iTaukei Land Trust Act* *iTaukei Land Trust (Leases and Licences) Regs*: Reg 12	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	*Agricultural Landlord and Tenant Act*: s 8	forestry/plantations (agriculture includes forestry: ALTA s2)	The Lessor reserves the right to search for, cut and carry away all indigenous trees (Cl (23))

[26] See Part 2, iTaukei Land Trust Act 1940
[27] See reg 21(1) of State Lands Leases and Licenses Regulations.

			Felling payment due to Lessor based on volume of plantation timber felled (Cl (31)). REDD+ clause (Special Condition 4)
Lease for Agricultural Purpose (ALTA)	*Agricultural Landlord and Tenant Act*: s 8 (4); *iTaukei Land Trust Act* *iTaukei Land Trust (Leases and Licences) Regs*: Reg 12	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	*iTaukei* Land Trust Act *iTaukei Land Trust (Leases and Licences) Regs*: Reg 12	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	*iTaukei Land Trust Act* *iTaukei Land Trust (Leases and Licences) Regs*: Reg 12	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.)
Land Bank Lease	*Land Use Act*: s 8 and *Land Use Regulations*: Reg 13	various	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)) 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

Source: Table sourced from 2012 Trenorden Report

d. Protected Forest Areas through Payment for Ecosystem Services (PES)

Fiji is a party to the UN Convention on Biological Diversity and is therefore required to develop a National Biodiversity Strategy Action Plan that upholds the three pillars of the convention (i.e. biodiversity conservation, sustainable use, equitable benefits sharing), and to align to Aichi Target 11 that calls for at

least 17% of terrestrial and inland water areas to be conserved by 2020.[28] The Government of Fiji affirmed its commitment to Aichi Target 11, and the Protected Areas Committee (PAC) (established under the *Environment Management Act 2005*) defined a set of proposed terrestrial protected areas to advance toward a national target of placing 17% of the nation's land area under protection, or 310,590 hectares.[29] The Fiji Protected Areas Committee, has sought to implement the Aichi Targets[30] and under the auspices of this Committee PES projects have been implemented.

CBD COP 10 Decision X/31 on Protected Areas elaborated a number of themes relevant to REDD+. Of the ten "Issues that need further attention" climate change was number 2 where the CBD19:

> *14. Invites Parties to:*
>
> *d. Identify areas that are important for both biodiversity conservation and for climate change mitigation and/or adaptation, including carbon sequestration and maintenance of carbon stocks, and where appropriate protect, restore and effectively manage and/or include them in the protected areas systems …*
>
> *e. Support and finance the conservation and management of naturally functioning ecosystems and in particular, protected area systems in contributing to carbon sequestration and maintenance of carbon stocks as well as to ecosystem-based approaches to adaptation to climate change …;*
>
> *f. Further develop tools … for the planning of protected-area networks and climate-change mitigation and adaptation measures, that combine … biodiversity, natural carbon storage and other ecosystem services and as appropriate, vulnerability assessments for terrestrial as well as marine and costal protected areas*;[31]

There is a clear connection between the protection of forest biodiversity and the implementation of REDD+ in the interests of mitigating climate change impacts. Many of the forest protection schemes in operation (Sovi Basin, Kilaka Forest, Drawa Rainforest Conservation Project, Emalu Project) were established as PES schemes.

Worthy of note is that the two programmes (REDD+ for climate change mitigation and Protected Areas for biodiversity protection) have similar aims in practical terms and thus collaboration between the two responsible authorities would be sensible, in the interests of public and landowner comprehension, not to mention achievement of the twin goals. In passing, the team also notes the long lead time that was needed to establish the above-mentioned PES projects and other challenges.[32]

However, perhaps the fact that the PES projects were established in the absence of any specific legislative framework contributed to the challenges experienced. In light of these experiences it is suggested that a

[28] Mangubhai, S., & Lumelume, R. (2019). Achieving forest conservation in Fiji through payment for ecosystem services schemes. *Pacific Conservation Biology*. https://doi.org/10.1071/pc18057
[29] Policy Brief: Advancing Transaction Tools for Conservation and Climate Resilience in Fiji (SPC)
[30] CBD COP 10 Decision X/31 (2010) available at: http://www.cbd.int/decision/cop/?id=12297
[31] Weaver, S., Payton, I., & Herold, M., (2011) Fiji REDD+ Strategy Workshop Report (SPC/GIZ) at 50.
[32] See: Mangubhai, S., & Lumelume, R. (2019). Achieving forest conservation in Fiji through payment for ecosystem services schemes. *Pacific Conservation Biology*. https://doi.org/10.1071/pc18057

specific legislative framework and clear administrative process and support for the implementation of REDD+ activity would provide encouragement for adoption by landowners.

e. International Developments

At the international level, under the auspices of the UNFCCC, there has been much activity since the 2012 Report. Relevant decisions of the Conference of the Parties to the UNFCCC are summarised in the table below:

Table 3: Overview of Key Decisions Relevant for REDD+ since December 2012 [33]

Date	Key Decision Number	Meeting Location	Overview Key Decision
Dec 2012	1/CP.18	Doha	Agreed outcome pursuant to the Bali Action Plan
Nov 2013	9/CP.19	Warsaw	Work programme on results-based finance to progress the full implementation of the activities referred to in decision 1/CP.16, paragraph 70
	10/CP.19		Coordination of support for the implementation of activities in relation to mitigation actions in the forest sector by developing countries, including institutional arrangements
	11/CP.19		Modalities for national forest monitoring systems
	12/CP.19		The timing and the frequency of presentations of the summary of information on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected
	13/CP.19		Guidelines and procedures for the technical assessment of submissions from Parties on proposed forest reference emission levels and/or forest reference levels
	14/CP.19		Modalities for measuring, reporting and verifying
	15/CP.19		Addressing the drivers of deforestation and forest degradation
Dec 2015	16/CP.21	Paris	Alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests
	17/CP.21		Further guidance on ensuring transparency, consistency, comprehensiveness and effectiveness when informing on how all the safeguards referred to in decision 1/CP.16, appendix I, are being addressed and respected

[33] Adapted from table in CMNUCC. (2016). Key decisions relevant for reducing emissions from deforestation and forest degradation in developing countries (REDD+). In CMNUCC (Ed.), *Decision booklet REDD+* (p. 44). CMNUCC. Retrieved from http://unfccc.int/land_use_and_climate_change/lulucf/items/6917.php

	18/CP.21		Methodological issues related to non-carbon benefits resulting from the implementation of the activities referred to in decision 1/CP.16, paragraph 70
Dec 2015	Paris Agreement		Action to conserve and enhance sinks and reservoirs of greenhouse gases as referred to in Article 4, paragraph 1 (d), of the UNFCCC, including forests. (Article 5 para 1) Action to implement and support, including through results-based payments, the existing framework as already agreed under the UNFCCC for policy approaches and positive incentives for activities relating to: • reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and • alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non-carbon benefits associated with such approaches. (Art 5 para 2) Recognized the importance of adequate and predictable financial resources, including for: • results-based payments … for the implementation of policy approaches and positive incentives for reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks (*ex-ante* payments); • alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests; Reaffirmed the importance of non-carbon benefits associated with the above approaches; Encouraged the coordination of resources (public and private, bilateral and multilateral resources), such as the Green Climate Fund, and alternative sources in accordance with relevant decisions by the CoP.

VII. Addressing Competing Uses of Land: barriers to the use of forest carbon rights for REDD+ activities

Clear and secure land tenure rights have been identified as one of the key elements for successful conditional payment schemes promoting forest conservation, including strategies for reducing emissions from deforestation and forest degradation (REDD+). Further, there is procedural consensus that REDD+ is a performance-based mechanism where funds will be used to compensate developing countries for the reduction of forest carbon emissions as compared to a national baseline. There is a need to clearly articulate the various land typology under Fiji's real property law systems and to identify possible competing interests where the operation of existing laws can be contrary to the very essence of forest conservation resulting in limited or no application of forest carbon mechanisms.

Table 4: Landownership in Fiji

Land tenure		**Areas in Hectares**	**% of total land area**	
			% of *iTaukei* land[34]	% of total land area[35]
***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 only[36]

A landowner seeking to exercise their forest carbon property rights may be prevented, under existing laws, from participating in a REDD+ project. This will be the case where a third person holds an existing right over the same land or forest resource, such as a timber permit, or mining license or lease.

[34] The accuracy of the figure in the '% of iTaukei land' column is dependent on the accuracy of the relevant area figure* in the adjacent column.
[35] The 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.
[36] Sourced 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.

a. Forest authorizations

Forest areas cover approximately 60 percent of Fiji's land mass. The areas of forest by land typology are set out below in Table 5.

Table 5: Forest Cover across various land tenure systems

LAND TENURE	FOREST (Hectares)		Total Forest Area	%Total Area of Forest
	Closed Forest[37]	Open Forest[38]		
***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 Report

As a general principle, a forest license remains valid during the currency of its term unless cause is shown for its suspension or revocation. Usually, a justifiable cause for its suspension or revocation may be found in non-compliance with the relevant laws. As an exception, a license or permit may be revoked in circumstances where there is need of the land by the landowning group for their own use, maintenance or support. In such cases, notice is given to the concession holder to surrender the required portion of the land under concession, only and after it is logged.[39] Given the concession period has not run, it is expected that the concession holder would seek compensation for the early surrender of the license unless the concession holder is also the landowner. Thus, any landowning group seeking early termination of a license to enable them to carry out their own REDD+ activity would incur a possible financial liability in the form of compensation.

b. Mining authorizations

In the case of mining, all minerals and crude oil are the property of the State which has the full liberty to enter any lands in Fiji and to search and dig for and carry away all minerals on or in the land[40] unless the land is within a declared Government protection area[41] or is within one of the classes of land closed to prospecting or mining[42]. The law provides that a prospector or miner, armed with the relevant authority and information may enter any lands (except closed lands, ie, a reserved forest is a closed land where prospecting may still be allowed but only with the consent of the Conservator of Forests) and carry out

[37] Closed Forest: Natural forest with State cover by trees and / or ferns 40-100% and ground coverage by, palm and / or bamboo over 20%.
[38] Open Forest: Natural forest with State cover by trees and / or ferns 10-40% and ground coverage by, palm and / or bamboo 50-80%.
[39] See clause 48 of standard of *iTaukei* Forest Concession Agreement (TLTB) 2012.
[40] See section 3 of the Mining Act 1965.
[41] See s 5, Mining Act 1965.
[42] See section 11 of Mining Act 1965. Note that at subsection 1 (h) the classes of land include 'any reserved forest, declared as such under the provisions of the Forest Act 1992, except with the consent of the Conservator of Forests and by subsection 1 (i) land may be closed by order of the Minister '.

operations.[43] Overall, the Mining Act has priority over the *iTaukei* Lands Trust Act[44] and the State Lands Act[45].

In the case of unalienable *iTaukei* land, a prospector's right[46] issued entitles the holder to enter upon any land that is not closed lands, to prospect minerals upon notice to the landowner and upon notice also to the TLTB and the Divisional Commissioner. The prescribed rights include the right to remove naturally growing trees subject to certain exceptions, although the Director of Mines is authorized to impose restrictions on the clearing of trees if it is considered that the clearing the trees is likely to interfere with a watercourse or cause soil erosion.[47] Compensation under the *Mining Act* is payable for damages caused to the surface of the land and improvements including plantations as a result of prospecting, mining and other operations carried out by the holders of mining tenements as prescribed under the Act.[48] This compensation component is unlikely to extend to damages caused to naturally growing forests.

The Minister has the authority to declare any area a government protected area, in which mining cannot occur without the Director's consent.[49] The purpose for such declaration is to preserve specific minerals or specific areas from development for the purposes of either reserving them for the future or specific development or in some cases to avoid disturbances to the occupational rights of the owners and occupiers of the land concerned.

A mining lease can be voluntarily surrendered for a fee at the behest of the mining tenement holder, provided all terms, covenants, and conditions have been fulfilled and the tenement holder has given a month's notice.[50] Given the significance of mining for economic development, it is highly unlikely that the Director of Mining would consent to the surrender of a tenement to facilitate a REDD + project.

An application can be made to make a REDD+ site protected under section 5 but the maximum area allowable under this provision is small in project terms; only 250 ha.

c. Leases

Regarding leases of *iTaukei* land, the TLTB, under its powers of administration, may only resume a lease upon notice if the land required for a commercial development is materially different from the purpose of the lease under the original grant for which town planning consent has been approved.[51] It is unlikely that this provision would apply to lands where town planning consent is not required; ie, those lands beyond urban areas. Once *an iTaukei* land lease is registered, it is subjected to the provisions of the *Lands Transfer Act 1971* and as such may be voluntarily surrendered by the lessee[52] (which would most likely occur only by way of agreement with the TLTB).

[43] See Section 11 of Mining Act 1965.
[44] See s7 of *iTaukei Land Trust Act 1940*
[45] See s7 of State Lands Act 1945
[46] See s23 Mining Act 1965.
[47] See s24(1) Mining Act 1965.
[48] See s40 Mining Act 1965.
[49] See s5 Mining Act 1965.
[50] See section 21 M/Act and Regulation 88 of the Mining Regulations.
[51] See Regulation 15 of TLTB Leases and License Regulations.
[52] See s.62 Land Transfer Act 1971.

In summary, *the Forest Act* 1992 takes away from the landowners the authority to grant a right to harvest forest produce excepting that certain customary rights over forest land (and the foreshore and the territorial waters of Fiji) are reserved for the *iTaukei* subject to the relevant Minister upon notice prohibiting absolutely the felling or removal of any timber.[53] In the case of leased *iTaukei* land, rights may only be exercised by *iTaukei* with the consent of the lessee.[54] Under ALTA instruments of tenancy for agroforestry, the lessee, under standard form agreement, shall permit the members of the landowning unit to traverse the land for the exercise of customary hunting, fishing and gathering. This right is not provided in other standard forms of leases although generally the right to enter the land and take timber, sand and gravel is preserved. Further competing use can also be observed from the continuing exercise of customary rights and interest of the landowning unit and that of other forest users from the community.

Should customary rights continue to coexist with other rights and interest on foreshore and on land whether under concessions, mined or leased, it is crucial that these are recognized with the implicit obligation on the landowner to maintain the carbon stock in the forest to maximize sequestered carbon potential. It is noted that these rights would be preserved under the Forest Bill. Under Fiji's international law obligations, the recognition and continued observance of customary rights must continue subject to the limitation in the interests of both landowners and REDD+ developer, where the land is subject to REDD+ agreement. It is further suggested that a moratorium on forestry harvesting can be an incentive to landowners for it will render continuing observance and exercise of some of their customary rights and interests. Lessons from other project developments suggest disconnecting people from the land may lead to social conflicts eroding continuing project support and possibly of affecting long-term viability.

VIII. Identifying and evaluating the possible options to formalise/legalise the allocation of rights to forest carbon

a. Option 1: State Ownership of Forest Carbon Rights

One of the options is for the state to assume ownership of forest carbon rights, through legislation. Carbon is sequestered in trees and other vegetation through photosynthesis, and in soil through the organic matter of dead trees and other vegetation being incorporated into the soil. Under the Constitution of Fiji, all minerals are owned by the State (but landowners have a right to a fair share of the royalties paid to the State for the extracted minerals).[55] It has been suggested that, in similar vein, the State of Fiji might assert ownership of all sequestered carbon. If that is feasible, then the State would be able to licence persons to undertake REDD+ projects with payment of compensation as appropriate under the *Mining Act* to landowners.

[53] See s.21 Forest Act 1992
[54] See s.21 (1)a) and (b) of Forest Act 1992
[55] Constitution of Fiji, Art 27

This option is problematic. Under common law, the right to stored carbon lies with the owner of the tree or soil in which the carbon is stored and thus with the landowner on whose land the tree is growing all the soil is contained. The exception is where the landowner has leased the land to a lessee, in which case the rights associated with landownership, excepting the right of alienation and the right to minerals, pass to the lessee unless other rights have been reserved to the landowner by the lease agreement. By the Constitution of Fiji, customary ownership of land (whether *iTaukei*, Rotuman or Banaban) is respected in perpetuity and the land may not be permanently alienated, except by acquisition for public purposes in accordance with a law of Fiji, for agreed or just and equitable compensation promptly paid.[56] The ownership of land gives the owner a bundle of rights with respect to that parcel of land which ordinarily would include the right to stored forest and soil carbon.[57] It follows that acquisition of a landowner's forest carbon rights by the Fiji would be contrary to the Constitution unless authorised by the *State Acquisition of Lands Act 1940* and upon the prompt payment of agreed or just and equitable compensation.

Although this study concerns the proposed legal framework for national adoption in relation to forest carbon rights, since it was raised in the opening remarks by the Ministry of Forestry at the Inception Workshop, we will now consider briefly whether carbon might be considered a mineral, and thus the rights to it be claimed by the State pursuant to the Constitution and under the Mining Act 1965. Before we proceed, we note that although not yet law, the Forest Bill purports to address forest carbon and forest carbon trading,[58] defining "carbon" as a *"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",* and "forest carbon" as "carbon stored in forest biomass", that is in *"all organic matter which contributes in the form of various greenhouse gases, for example carbon dioxide and methane to climate change"*.[59]

While the Constitution provides that all minerals in or under any land or water are owned by the State, it defines "minerals" as including *"all minerals extracted from land or seabed and including natural gases"* without further elaboration. This would not include carbon (assuming it is a mineral) sequestered in trees. Under section 2 of the *Mining Act*, "to mine" means *"to disturb, remove, cart, carry, wash, sift, smelt, refine, crush or otherwise deal with any rock or earth by any mode or method whatsoever for the purpose of obtaining any mineral therefrom".* This definition would seem not to have contemplated the unlikely concept of mining carbon from trees, and thus forest carbon is unlikely to be a mineral, or at least not one that either the Constitution or the *Mining Act* presently contemplates as being capable of being mined.

While the *Mining Act* definition of "minerals" is inclusive and open to other mineral substances being included in the definition, it does not specifically mention carbon. Carbon is an element and a constituent of a number of minerals and hydrocarbons. The pure carbon minerals diamond and graphite, being

[56] Constitution, Art 28 and 27
[57] See the inclusive definition of 'land': Interpretation Act 1967
[58] Clause 33, Forestry Bill no. 13 of 2016
[59] Clause 2, Forestry Bill No. 13 of 2016

particularly structured forms of carbon, are included in the definition of "minerals". Soils are traditionally rich in carbon.[60] Carbon in soil appears to be stored by minerals in the soil, particularly aluminium and iron in tropical soils.[61] We do not know whether the organic substance 'carbon' as opposed to its discreet forms, is accessible by mining and there is probably no desire by states to 'mine' organic carbon and no demand for organic carbon; the evident demand is that it be stored in ever greater quantities to minimize global warming. It is therefore unlikely that organic carbon, as distinct from its mineral forms of graphite and diamonds, is a mineral within the meaning of the Constitution or the *Mining Act*.

Carbon is not a mineral and cannot therefore be claimed by the State under the Constitution or the *Mining Act*. However, it is open to the State to declare under the *Mining Act* that carbon is a mineral and proceed thereby to assert ownership in the rights to carbon in the land, regardless of ownership. The State would need to consider however, whether the adoption of such a course is consistent with the Cancun Safeguards, the Safeguards set out in the Pacific Islands Regional Policy Framework for REDD+,[62] Fiji's REDD+ Policy, the rights of *iTaukei* under the ILO Indigenous and Tribal Peoples Convention No. 169 ratified by Fiji in 1998, and the principle underlying the constitutional protection of customary ownership of lands (and all rights implied by that ownership).

b. Option 2: Landowners control rights to sequestered carbon

The evaluation of this option is premised on the initial brief of this study that forms the position considered the most attractive for Fiji in the 2012 Report. This in part reflects the thinking to allow the possibility of emissions reductions trade in the hands of third parties that could be a government entity, landowners' representative entity, NGOs or a private investor whilst maintaining control of tenure in the hands of the landowners. This thinking largely influenced the current position and underlies the theory in the accompanying diagram articulating the logical steps to be followed.

Earlier canvassed under section 8 of the 2012 Trenorden Report, this section reiterates how a landowner could undertake a REDD+ project on their land. This is based on an assumed legislative and regulatory position to be enabled under the Forest Bill in which the *iTaukei* landowners' position is unaltered, saving ownership of forest carbon rights on their land being recognised as part of the landowner's rights. Following the option set out in particular at section 8.2 of the 2012 Trenorden Report, the underlying premise of this option is to include all that is suggested in the current Forest Bill.

[60] See: http://theconversation.com/how-carbon-farming-can-help-solve-climate-change-86087 accessed 28 April 2019
[61] Kramer, M. G., & Chadwick, O. A. (2018). Climate-driven thresholds in reactive mineral retention of soil carbon at the global scale. *Nature Climate Change*, *8*(12), 1104–1108. https://doi.org/10.1038/s41558-018-0341-4 Also: https://phys.org/news/2017-11-huge-carbon-soil-minerals.html;https://www.futurity.org/soil-minerals-carbon-1948892-2/ [accessed 28 April 2019]
[62] Pacific Islands Regional Policy Framework for REDD+ (SPC, 2013) at para 4.6.1 September 2012

With a suggested minimum area for REDD+ projects of 5,000-10,000 ha,[63] this option requires that landowners amalgamate land and form an incorporated body (landowner entity), which can then apply for a REDD+ licence, comprising the approval to host a REDD+ project. Subject to the operational procedures of TLTB *Leases and Licenses Regulation* (per *iTaukei Land Trust Act 1940*), the landowner entity then leases land from the landowning units. Given that it is the landowning units who pay the initial premium to the TLTB which TLTB ultimately pay and distribute to landowners (less administration fees), there is an argument that, with the common membership of landowning units as also members of the leasing entity, members of the aggregated landowning units could jointly obtain TLTB agreement to waive the payment of lease premium (as this money ultimately ends up in the hands of landowning units). This possibility of waiver and hence financial benefit could be a sufficient incentive for landowners to take the initial steps of considering an owner-operated REDD+ project on customary owned lands.

Operationally, a number of landowners, under this option would form an incorporated body and obtain one or more forest ecosystem restoration licences similar to the logical construct of the landowning unit(s) obtaining a forest concession in an active participatory role for their aggregated forested area. The licence(s) in this instance would be a statutory one and therefore attract legal traction in the implementation of its terms on both parties. Further, it is the authorized legal entity in its representative capacity that would enter into an emission reduction purchase agreement with a buyer which would fund the necessary activities.

Through contractual arrangements between the parties to the project agreement, critical terms such as the inherent maintenance and continued recognition of customary rights and interests in the project area can be negotiated. In this regard, there is some assurance of project association from the customary owners' perspective and at the same time, permanence of the forest is guaranteed through management and control by the customary owners over the long term duration of the project lease. Once the additional carbon sequestered (above the baseline) has been measured, verified and recorded, the forest carbon rights held by the landowners (and leased with the land to the lessee (Entity)) have generated emissions reduction units or credits against the forest reference levels (carbon credits). These credits may be traded, or under the terms of a REDD+ licence, transferred to the State to be either traded or the subject of externally funded ex-post performance payments. In either event, a percentage of the proceeds of sale or performance payments would flow to the Entity (comprising the landowners). While a matter of interest for the benefit sharing mechanisms for Fiji, it is noted in passing that the TLTB is unlikely to impose the usual ten per cent levy on payments for traded emissions reduction (carbon credits) to a landowning entity.[64]

It is the consultants' view that this option remains the simplest and most easily understood approach to project-based REDD+ activities in Fiji. It would allow the land and its forest carbon rights to be held for a defined but lengthy period by an entity in which landowners have shares and comprise the equity ownership. Depending on the preferred choice of the majority of the entity's membership, either the

[63] Comment by Mark Lambert (Terra Global Capital) in Q and A session following his presentation at REDD+ Regional Workshop, Nadi, Fiji 23 October 2012. He stated also that project size depends on forest type, baseline driver (number of carbon credits likely to be generated), and that aggregating multiple REDD+ projects would save costs, eg; if operating under the Verified Carbon Standard (VCS).
[64] Comment noted at the Validation Workshop 24 June 2019

entity itself, an NGO or other person(s) can be engaged to implement the REDD+ activities (service provider) under contract. The contractor might have to be licensed (forest management licence) under legislation (Forest Act) to carry out the REDD+ activity on the land, resulting in the contractor having both a contractual duty to the landowners' entity and a statutory duty to the licensor (regulator). The REDD+ contractor (service provider) would then be required to comply with the conditions of the licence and the legislation, or arrange to transfer the licence and the contractual obligations to another service provider with the necessary consents (of eg; the Conservator of Forests, as well as the Entity). The service provider would be in a similar position to the grantee of a mining lease/licence or forest licence, being bound to comply with the lease/licence conditions and the duties under the relevant legislation.

It is suggested under this option that the necessary system to provide for REDD+ licences could be incorporated into the Forest Bill for a new Forest Act, with appropriate regulations providing for the detailed scheme and process (the licensing, generation, validation, verification and registration of Fiji's carbon certificates standards and procedures for project implementation and approval under REDD+).[65] As mentioned above, this option, in the Consultants' view is recommended as being more appropriate for Fiji, as it is a model that is readily understood (based on forest concession model) with landowners retaining an interest in and control over their land and associated forest carbon rights through their corporate entity which is the landowning representative entity.

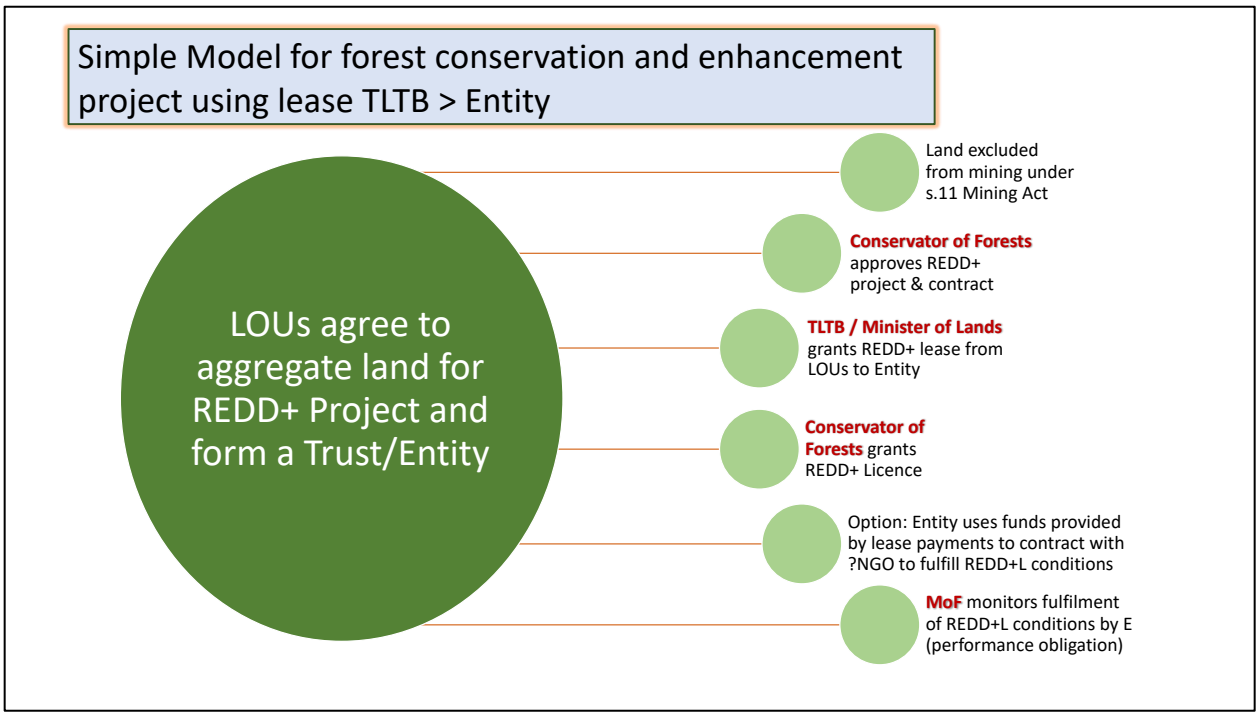
The above approach suggests the landowners would aggregate their lands (as necessary) by agreement between themselves, perhaps with district or provincial level assistance. Once an Entity has been formed a REDD+ licence would be obtained and provided to TLTB or the Land Bank for the purposes of the grant of a lease to the Entity. An alternative approach is for landowners to register their interest in a REDD+ activity with either the REDD+ Registrar or TLTB, with the REDD+ Registrar/Conservator of Forests or the TLTB (perhaps with TLTB and district-level assistance through the relevant Provincial Council office) administratively bringing landowners (and their land) together to engage in a REDD+ project. Under this approach, decisions concerning aggregation of land would lie with the TLTB or Conservator of Forests/REDD+ Registrar, and not the landowners.

A similar approach on designated lands (Land Bank land) by landowners would be available through the Land Use Unit under the *Land Use Act 2010*. However, as control and administration of all designated land rests squarely with the Land Bank, the landowner's role in the decision-making regarding aggregation is non-existent. Decisions on the designation of Land Bank land for utilisation lie with the Prime Minister. Thus, any decision concerning aggregation of land for a REDD+ activity through the Land Bank would not lie with the landowner.

The model outlined in the preceding two paragraphs (registration and district-level assistance) might also be considered appropriate for national or sub-national level REDD+ activities that do not involve aggregation of lands for a larger project.

[65] As per clause 33 (4) of Forest Bill No 13 (2016)

Figure 4: Simple Model for Forest Conservation and Enhancement Project using Conservation Lease



c. Option 3: Forest carbon rights as a property right separated from land ownership

In accordance with the common law principles embraced in Fiji (as argued in the 2012 Trenorden Report) landowners currently own forest carbon property rights in Fiji.[66] A necessary consideration is whether non-landowning third parties such as private investors, companies and foreign individuals should be allowed to control or buy forest carbon rights (as distinguished from verified carbon emission reductions) from landowning groups. If such an option is considered and deemed feasible at the national level for logging companies, REDD+ developers and carbon brokers, it will undoubtedly require legislative change. In essence, this option legally represents the creation of a dichotomy separating land tenure ownership as legally distinct from the ownership of carbon right thus enabling trade of verified carbon emission reduction potential for forest carbon rights by persons, corporate entities and organizations who do not have ownership of the land.

The law in Fiji allows for interests in or restrictions over land to be created. These run with the land and include covenants and profits à prendre with the distinction that an easement gives another person the right of user over the land and a covenant is a restriction binding the landowner either to do something or refrain from doing something. Under Fiji's *Land Transfer Act 1971* when an easement or profit a prendre is created, the same may be registered in the Register of Titles against the grant, title or lease[67] and also noted on the relevant certificates of title, grant or lease[68] but will be only binding against a prior lessee or

[66] See preliminary discussions at Chapter 4; pp 26-36.
[67] See Land Transfer Act 1971, s.49.
[68] See Land Transfer Act 1971 s.50

mortgagee where they have consented. Similarly, an easement and a profit à prendre may be varied or surrendered with an appropriate notation on the relevant certificate of title.

The use of the above legal concepts however is problematic, especially in the conveyance of carbon rights because it amounts to the use of old property rights concepts to embrace a new property right where the fit may not be perfect. For example, it is arguable that forest carbon rights cannot be a profit of the land as a profit historically involved the taking of naturally occurring elements from another's land for the taker's use. Carbon rights conceptually involves retention and not removal. The use of profit à prendre as the facilitating vehicle is therefore inappropriate. The use of easement in gross to access carbon right similarly runs into a problem as the issue is whether carbon right constitutes a use of land.

Legal commentaries share similar sentiments regarding the above including reservations in relation to incorporating new property interests into the basic common law framework and responding to the consequential impacts.[69] Further, such an exercise would involve systemic modification to property concepts that would necessitate highly complex adjustments of entitlements and expectations that would need to be approached cautiously with judicious circumspection.[70] Thus it is suggested that creating a carbon right as a new statutory interest is preferable to aligning it with preconceived categories of common law servitude.[71] By articulating the carbon right as a new form of statutory interest, unique in status and form, its *sui generis* character is more accurately reflected.[72]

As highlighted in Option 1, the idea of legislative separation of *iTaukei* land may also be problematic given its inherent legal protection offered under the Constitution and section 5 of the *iTaukei Land Trust Act*. The exception to prohibition on alienation of *iTaukei* land is alienation to the State, for a public purpose. If a separate property right were to be created by Parliament through legislation, possibly contrary to Fiji's Constitution and other global and regional safeguards already mentioned, thus creating a legal dichotomy of land tenure and ownership of carbon, Fiji would need to amend the *iTaukei Land Trust Act* to permit landowners to permanently alienate the forest carbon rights attached to their land.

This course could be unsettling for *iTaukei* landowners, unless the rationale and overall benefits thereof were comprehensively explained to them and their agreement obtained, in conformity with the principles of free, prior and informed consent recognised by Fiji in its 1998 ratification of the ILO Indigenous and Tribal Peoples Convention No. 169 and the spirit of that document.

d. Results of Consultation

In presenting a synthesis of responses from stakeholder consultations, the Consultants are mindful of the limited nature of consultations, as a result of the compressed timeframe and the physical and financial limitations to gathering views of community stakeholders and landowners in general.

Representatives of landowning groups currently involved in REDD+ projects and representatives from the Ministry in the *iTaukei* and the *ITaukei* Affairs Board within their respective divisions were part of the inception workshop and continued high level discussions for the purposes of the carbon rights study. Given the nexus between carbon rights studies and benefit sharing mechanisms (BSM) studies in parallel

[69] See Michael Heller, The Boundaries of Private Property (1999) 108 Yale Law Journal 1163.
[70] See Hepburn S, Carbon Right as a New Property: The benefits of statutory verification, 2009 (31)2 Sydney Law Review 239.
[71] See Hepburn S, Carbon Right as a New Property: The benefits of statutory verification, 2009 (31)2 Sydney Law Review 239.
[72] Ibid.

progression, part of the discussions in the BSM study invariably involved forest carbon rights ownership and its commercial provisioning for trade in emission reduction. The consultations undertaken as part of that study have also informed our discussions on forest carbon rights.

Owning to its legal nature, the general understanding of carbon rights as a proprietary interest is low in the community especially amongst landowning units. In any discussion, quite reasonably, landowners want to understand the calculable basis of the benefits of forest carbon rights and REDD+ activities on their land and how an equitable benefit sharing of emission reductions can be implemented. In this context it is material to recall, acknowledge and consider the principle of free, prior and informed consent, and how discussions might be instituted respecting this principle. From the discussions thus far, adduced views point to the fact that no single grand gesture in terms of compensation will achieve acceptance unless there is a comprehensive solution addressing both legal rights/ownership and benefits sharing that recognises and fully engages the multi-multidimensional nature of the concept of carbon rights. For this to be achieved it recommended that there be transparent collaboration between government agencies, landowners and developers at the operational level.

Numerous comments from stakeholders, including landowning units have highlighted that collaborative options towards ownership of forest carbon rights is far more reliant on political commitment than the mere creation of a new legislation. Discussions have identified and highlighted procedural changes necessary to some of the existing Acts pertaining to natural resource access and development, and in some cases existing pieces of legislation that need to be better implemented and enforced to avoid fragmented measures which can result in inconsistent and incomplete results. Furthermore, polarisation of interests between the various leading agencies (resulting in the 'silo' effect) affects capacity and delivery and overwhelmingly drains limited available resources, leading to undermining of confidence by landowners/the community in dealing with leading agencies. Hence, commitment to the reduction of emissions through REDD+ will require a new level of commitment and enhanced service capacity.

The three options as suggested were also discussed in terms of the institutional arrangements. To this end, the various government agencies, statutory bodies, NGOs, landowning unit reps and other stakeholders provided the tabulated views below in Table 6.

e. Recommended Option

As evident from the discussions, Fiji's unique land tenure system comprises a dual juxtaposition of customary and western model of property concepts, operationalised with considerations that straddle both models. This can present problems where synchronicity is required for compliance for example, with the rules of international funding bodies, national institutions and all national laws. Option 2 carefully navigates the safeguards for emissions reductions under the UNFCCC given the backdrop of the *sui generis* nature of forest carbon rights as property rights inherent to landownership, particularly customary ownership.

The preference for Option 2 is judiciously made fully aware that the global-to-local governance of forests pertaining to reduction of carbon emission under REDD+ poses complex and critical questions of social equity. The associated legal complexities and framework therefore warrants careful assessment of balancing of rights, responsibilities, benefits and costs. As evinced from submissions during our

discussions with landowner representatives and government agency staff, the participation of customary owners is essential to an equitable and acceptable REDD+ scheme. Where the status quo of tenure and carbon rights ownership is maintained, it is safe to assume the protection and priority of customary ownership. The consultancy team is of the view that adherence to existing tenure and accompanying rights should be used as the basis for the interaction of customary owners and indigenous communities with REDD+ mechanisms.

It is further noted that REDD+ interacts with customary ownership in two keyways. Firstly, the fact that much of the forest land that will become part of the REDD+ projects in Fiji is likely to be customarily owned and/or occupied *iTaukei* land, and that project life and continued support will be ineffective in the absence of the full participation of customary land owning units, especially considering the control required for the continued permanence obligation. Second, REDD+ may pose threats to customary landownership where there is insecure land tenure with inadequate protection from the State in relation to priority permitted activities on land that are inconsistent with the purposes of forest protection and sustainable conservation, such as mining and logging. Option 2 is also favoured in the current context of continued connection of landowning units to their customary estate, hence a REDD+ programme will be efficacious when customary owners are active participants in decision making and are allowed continued access to forest and its resources.[73]

[73] See for example: Elspeth Halverson 'Reflecting on the linkages between REDD+, Forest Tenure and Indigenous People's Rights: Encouraging progress and challenging gaps' (31 May 2019) accessed at : https://www.un-redd.org/single-post/2019/05/30/Reflecting-on-the-linkages-between-REDD-Forest-Tenure-and-Indigenous-Peoples-Rights-Encouraging-progress-and-challenging-gaps

Table 6: Advantages and Disadvantages of Forest Carbon Rights Ownership

QUESTIONS		GROUP 1	GROUP 2	GROUP 3	Group 4	GROUP 5
Advantages	**Nationalize forest carbon rights**	aligns with carbon accounting, allows state to distribute benefits to those that contributes	easy process - MOF will be doing the trading, calculation / mathematics is clear, Government have facilitated support to the programme	market access at international & national level, national safeguards for resource owners - safety net system, legislative mechanism to reserve ownership	easy to quantify because availability of national data information, government can manage using existing mechanism	Easy to quantify, easy to sell, easy to trade
	forest carbon rights based on land & forest ownership	easily accepted because of land tenure system, landowners buy in, incentive to contribute to ERP	direct benefits, self-determination from landowners	landowners do not have a say in the buying price (cost)	motivate land users/owners to sustainably manage forest, existing legal framework protecting ownership of land and forest, have access to other non-carbon benefits, improve livelihoods through alternative livelihood program from state and other stakeholders	equitable sharing, appreciation value of resources, secure lease term for sustainability
Disadvantages	**Nationalize forest carbon rights**	landowners not be receptive as no incentive to contribute to the initiative	unclear distribution of benefits to LOU, national ownership of carbon like minerals, fear of being dispossessed of rights	acceptance by resource owners (ownership), choose their own market	demoralizing of landowners (contentious, dispute etc), unequal distribution of benefits (allocation of who owns what)	takes away/ deprive landowner right benefits
	forest carbon rights based on land & forest ownership	lack of data for sub-national level for reference, benefit only to landowners	no institutional arrangement and capacity to facilitate this process	communities resource owners vulnerable to exploitation to the "carbon cowboys"	high risk of disputes, no agreed formula for the calculation of carbon benefit for individual owners, lack of capacity and resources for negotiation etc, third party involvement (leaseholders)	Mixed reactions and disputes

IX. Identifying the Options for the registration, transaction in, valuation and commercial trading of forest carbon rights

The discussions have shown that in order to understand the various issues associated with carbon rights, it is important to be clear about the different legal concepts involved. Especially, the conversion of forest carbon rights and its emission reduction potential to commodity. Further, its consequent determination as a property right giving rise to subsequent commodity for trading involves a political process requiring the linking of service providers and beneficiaries, and the commitment to develop enabling legislations and aligned policies, contractual arrangements and institutional services for monitoring and certification.[74]

To this end, this study maintains in the preferred option (Option 2) the inherent common law principle linking ownership of forest carbon rights to the trees and thus to the land with ownership ultimately vesting in the relevant registered *iTaukei* customary landowning unit (for iTaukei land). Thus, there may not be any need to register or record the ownership of forest carbon rights. In order to maintain consistency with other existing dealings in property rights of the registered landowning units in relation to the forest and land, the recommendation offered is that a potential REDD+ investor is licensed through the Conservator of Forests (CoF) and the licensee uses the land (including the forest carbon rights) to produce emission reductions /carbon credits. It follows that emission reductions from forest carbon are then measured and reported to the REDD+ Registrar in the Ministry of Forests. After they are verified, the Registrar records the volume of emission reductions in the Register as carbon credits.

By legislation the REDD+ Registrar progressively transmits the emission reductions/carbon credits to the Climate Change and International Co-operation Division (CCICD) within the Ministry of Economy. The CCICD is the designated authority for Green Climate Fund (GCF) and Adaptation Fund[75] and it then makes the appropriate entries in its Register and in the process notifying both the licensee and the CCICD. As the body designate, CCICD aggregates carbon credits nationally, and reports to the funding body (GCF or FCPF (or other) for the purposes of claiming performance finance; or trades the carbon credits in the global market. Through return notification CCICD/MOF is notified of payment with payments being deposited in Fiji Development Bank to credit of the Conservator of Forest with notification also sent to the CCICD.

The Forestry Board decides upon the amount of percentages to be paid to REDD+ licensees. Under prevailing benefit sharing mechanism of TLTB and the Land Bank, this is paid individually to the *iTaukei* landowning units or to the registered landowning unit Trusts (Entity) for designated *iTaukei* lands under the Land Use Unit of Ministry of Lands respectively. Surrounding communities that are not necessarily landowners but within the vicinity of the project areas are also earmarked for lost opportunities to the forest areas and its products through the REDD+ project. This payment may be provisioned through the Provincial Councils for the region in the interests of the devolution of responsibilities to the local level.

[74] Powell, L., White, A. and Landell-Mills, N. 2002. Developing Markets for the Ecosystem Services of Forest, Washington DC: Forest Trends.

[75] See Fiji National Climate Change Policy 2018-2030

After the foregoing analysis, there is informed optimism towards the Bill in its current form, once passed; it will no doubt provide a much needed enabling basis for the recognition of forest carbon rights, its ownership and the provision of trade in reduction in carbon emission. There is also the added promise of comprehensive regulatory provisioning that will no doubt afford security and certainty to willing parties trading in carbon rights emission reductions. Should the final passage of the Forest Bill becomes problematic or delayed through its passage process, then all pragmatic attempts should be made in the interest of time to replicate what is being proposed under the Bill into a stand-alone piece of legislation by excising all the relevant provisions of the Bill including potential for comprehensive Regulations.

It should be noted that this study has refrained from recommending in detail how the benefits of REDD+ activities might be shared nationally, being mindful that there is a separate study precisely on this topic.

From the recommended option 2, the need to register or record the ownership of forest carbon rights may be redundant since the option advocates that ownership of carbon rights remains with and be part of land ownership as per the operation of common law. However, this is not to obviate the need to have a credible national transactional registration system that systematically record the exercise of verified emission reductions, with such trade guaranteed by Government through an appropriate entity. This process should clearly record the names of entity that has exercised their carbon rights and the locality to avoid double counting.

Recording requirements for above would be separate from the approval of process of REDD+ as shown in the diagrammatic illustration of implementing steps of Option 2 above and the ultimate registration of the projects. It is envisaged that the proposed regulations under the Forest Bill is ideally placed to cater for the requirement needs of licensing, generation, validation and verification as foreshadowed under section 33(4) of the Bill.

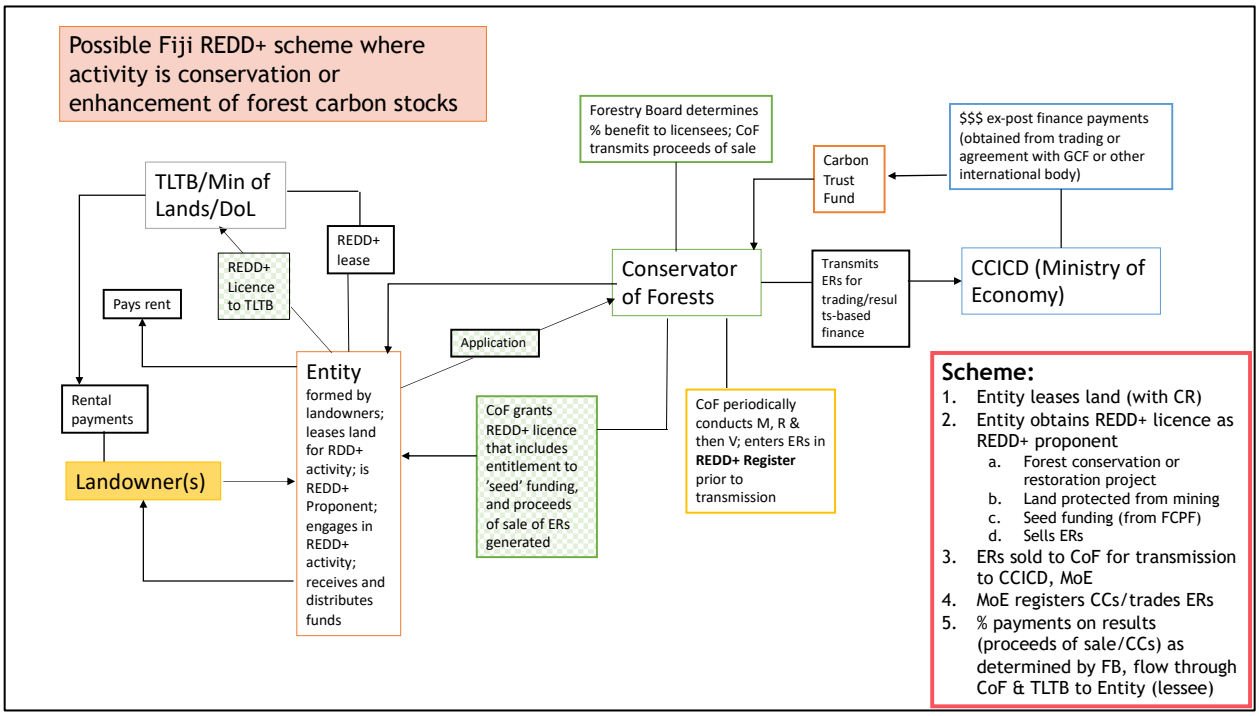
As suggested the Conservator of Forests and the TLTB together with the State would be the main players in facilitating emission reduction trade between the entity and potential buyers. The Conservator of Forests also plays the significant role in ensuring that the obligations of maintaining the forest are observed by the entity or the responsible body entity or persons, should it the landowner entity opt to assign this task externally.

Initially, it is expected that a national REDD+ registry will capture core information for each reduction emission activity including the registration of REDD+ projects. Also, the registry in tracking activities will indicate performance in reducing tonnes of carbon and resulting credits issued.

Finally, the need for a National REDD+ registry able to facilitate the electronic transactions of recording and tracking emission reduction programs both at national level and project level. This would call for internal provisions on how project implemented REDD+ schemes are properly tracked and accounted in the overall national database. Secondly, the register will record and track the issue of REDD+ units or result based payments for example, carbon credits, whether issues nationally or through the voluntary markets. Tracking and validation are essential to ensure environmentally integrity across different

national REDD+ initiatives and to promote transparency in benefit sharing with stakeholders. The registry ultimately will be linked to the national MRV system.

Figure 5: Model of Fiji REDD+ Scheme



X. Proposed legal framework for forest carbon rights

This section considers the legal framework context of Fiji in light of the identified option in the preceding sections of this report. The primary legal framework should be included in the Forest Bill, and there will be consequential amendments to other existing legislation. In this context we note that a Climate Change Act is proposed. This new legislation may be part of the legislative framework for REDD+ (while the principle legislative framework would be contained in the new Forest Act), but we are not able to comment further.

a. Necessary amendments to legislation for smooth transition

For consistency, the legislative proposal for the recognition, ownership and trade in forest carbon rights will require amendments of some existing land and resource related legislations and regulations for smooth implementation. To this end, amendments to the Property Law Act in relation to a precise definition under the Act is fundamental. Similar amendments to existing provisions of related Acts must

also be instituted for the sake of completeness and thorough maximum delivery. These are tabulated in Table 7 below.

Table 7: Recommended consequential amendments to existing legislation

Proposed/Issue	Recommended Action	Act /Regs/Policy	Commentary
DEFINITION of Carbon Rights	Suggested Addition	*Forest Bill (No 13) 2016*	New definition must tie in CR nexus in relation to land Definition to include "*exclusive legal rights to obtain a 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*"
Definition of carbon stock	Review	*Forest Bill (No 13) 2016*	This is necessary because of the definition of REDD+, but it could lead to confusion if it means the same as forest carbon. Clarity is required.
Definition of land	Amendment	*Property Law Act Cap (1971) Cap 130*	To maximize consistency. Interpretation of "land" including all estates in land to include "carbon rights" Require the inclusion of suggested definition of carbon rights in *Forest Bill* to create consistent application to all land typologies
Clarification of ownership of carbon rights	Amendment	*Forest Act (1992) Cap 150*	Current reading of section 12 seems to infer that for the purposes of harvesting, trees in that plantation belongs to the lessee. This should not be inferred. Suggest amendment for clarification and harmonization to the suggested definition of carbon rights.
Clarification of current inclusive definition of land.	Harmonize with suggested new definition of carbon rights and the possible conflict in the inalienable transfer of iTaukei land except through lease or licence	*Land Transfer Act (Cap 131)*	The current inclusive meaning of land in s 2 implies that where land is transferred under the provisions of Cap 131, it is assumed that forest carbon rights will also be transferred. Implication of current definition of Cap 131 is that it is contrary to the recommended option as it would permit alienation of forest carbon rights separate from the land, under licence approved by the Board of TLTB per section 8 and 9 of *ITaukei Land Trust Act (1940) Cap 134*. Harmonization with proposed definition of land under PLA and Forest Bill is suggested.
Clearance and Confirmation that REDD+ project lands be closed off from prospecting and mining activities	Amendment to add REDD+ project areas into land closed to prospecting and mining for the duration of the lease	*Mining Act (1966) Chap 146*	Section 11 of Cap 146 to be amended to include current and designated REDD+ areas in the list of lands closed to prospecting and mining activity

Furthermore, relativity of the different concepts within ERP warrants seamless co-existence that interrogates consideration aspects of this study. The study of benefit sharing mechanisms demands such correlative assessment. This report recognizes that forest carbon rights and benefit sharing mechanism are two different concepts but closely related. In legally defining forest carbon rights as a new property interest and confirming its ownership, this study is the first step in that process. Whilst the recognition is critical, much of the expected process, particulars and procedures for implementation is anticipated as Regulations to the proposed principal Act. This will no doubt facilitate the desired coverage and implementation of the requirements of the identified legal option.

XI. A Roadmap for Success

It will be obvious from the narrative above that a number of steps will need to be taken to confirm that ownership of forest carbon rights lies with the landowner as part of the bundle of rights constituting landownership. This study brief is in relation only to a legal framework. In passing the team have noted that a Climate Change Act is proposed, but that is separate from this study and we have not considered its place within a proposed legal framework for implementing the recommendations of this report.

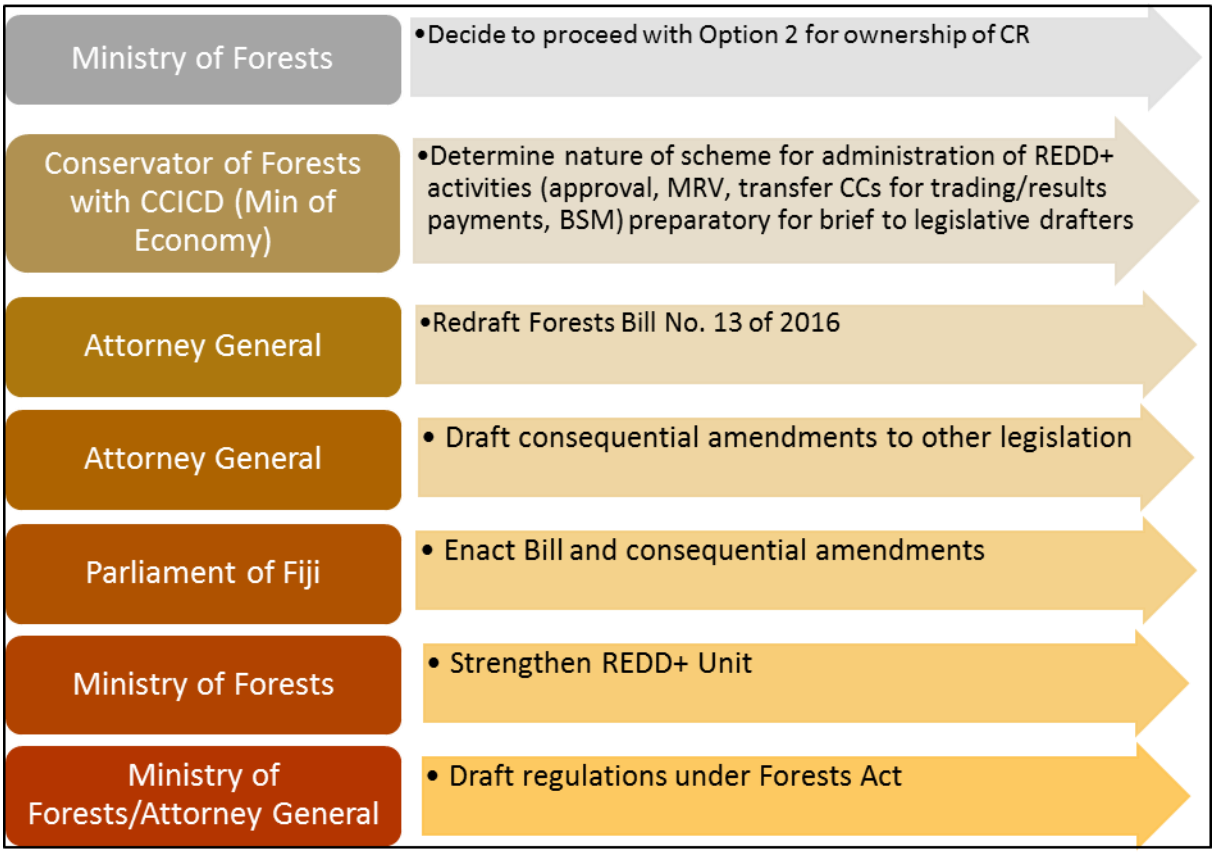
In the diagram at Figure 6 below we have set out a suggested roadmap for the steps necessary to implement the recommendation and develop a framework to inform the legislative drafters in the Office of the Attorney General, who would act on the instructions of the Ministry of Forests. The authorities responsible for the achievement of each step are indicated on the left side of the diagram, with the steps themselves succinctly set out from the first (at the top) to the last, on the right side. No timelines have been incorporated into the Roadmap, as the team has not been informed of any desired deadline for implementation of a REDD+ scheme administratively and legally, nor is it within the study terms of reference to establish timelines for each authority to complete its work. As will be evident, the initial step for the Fiji Government is to determine whether it agrees with the recommendation of this report and thence decide to proceed to confirm in legislation that ownership of forest carbon rights runs with ownership of land.

The remaining steps in the Roadmap are self-evident, having regard to the contents of this report, although some further explanation of the second step is offered. The nature of the scheme in all its elements will have to be determined by the Ministry of Forests. It is suggested that discussions in formulating the details of the scheme should include the Climate Change and International Cooperation Division of the Ministry of Economy, as the Fiji National Climate Change Policy 2018-2030 infers if not suggests, that this Division will have responsibility for sourcing global funds for climate change mitigation and adaptation activities and may well have a role in respect of international verification standards and the reporting and registration of carbon credits/emission reductions at the international level, through Fiji's Nationally Determined Contributions, Low Emission Development Strategy or otherwise.

It must be noted that the Roadmap does not include all responsible authorities who should be involved in developing the framework; for example, it seems evident that TLTB and the Land Use Unit, Department

of Lands should be included in discussion toward the final framework preceding the development of legislation. The successful implementation of carbon rights ownership and REDD+ activities will require inter-agency/Ministry cooperation for a unified approach in the context of Fiji's particular landownership typologies and the predominance of *iTaukei*-owned land.

Figure 6: Roadmap for REDD+ Implementation



XII. Conclusion

Efforts to develop REDD+ mechanisms especially the fundamental notion of forest carbon rights ownership, its definition and its successful treatment under a legal framework under this study has no doubt introduced an added layer of complexity to an already complicated debate about rights to land, forest and natural resources. Especially, where customary land and customary tenure is formally recognized and protected by law and the constitution alike. To ensure consistency and compatibility among the parties, a common definition must be established for the term carbon rights and its ownership. This report, in its discussions through the various sections, has offered a working definition to this effect explaining the rationale behind it.

This study for reasons discussed recommends ownership for forest carbon rights vests with the landowners. Having articulated the options for carbon rights ownership, this study further identifies a framework of ER transfer though the instrument of a lease used in tandem with a legal entity of choice.

By application to and through approval of, the Conservator of Forests, the entity is granted a license under which the entity is responsible for complying with duties and responsibilities of maintaining and managing the forest. These duties and responsibilities may be contracted out to other parties by the entity. The functional linkages between the TLTB/Ministry of Land, Ministry of Forest and the ultimately the Ministry of Economy see finality to a process where national and international rules and conditions are met for eventual documentation and processing of forest carbon for trade.

Successful implementation of the recommended legal framework will require application across sectoral boundaries with clear definitions to overcome barriers to the avoidance of deforestation and forest degradation. This means inconsistencies within existing pieces of land and resource legislations must be removed and the legislations harmonized to deliver consistency. For this reason, amendments to particular aspects of existing laws are suggested. Furthermore, this study proposes the legal provisioning of its identified option under the principal ambit of the Forest Bill No. 13 of 2016 (or any revised Forest Bill), being an Act to provide for the management for Fiji's forests and other related matters.

Other alternative options in vesting forest carbon ownership to the State and allowing third party ownership carbon were canvassed and found inappropriate. Substantial compensation payout by the State for the expropriation of forest carbon rights from landowners and its particular effect on Fiji's obligation under international law precludes State ownership. Third party requirement will demand a legal dichotomy between tenure and ownership of carbon rights which is impossible under the inalienable provisions for all *iTaukei* lands.

Carbon rights and benefit sharing mechanism are two different concepts but are closely related. In legally defining forest carbon rights by recognizing it as a property interest and confirming its ownership, this study is the first step in a process of allocating and distributing benefits flowing from REDD+ implementation amongst its stakeholders.

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Annex 1: Relevant Laws and Policies: Issues that may need to be addressed

Issues to address	Relevant Law/Regulation/Policy	Recommended Action/Status re: harmonization for REDD+	Comments
Legislation that addresses drivers of deforestation	Forest Act 1992 Note; Forest Bill will repeal the Forest Act 1992 when it is enacted into law.	DEFINITION	Require appropriate definition of forest: the definition inserted in *Forest Bill No 13 of 2016* is consistent with the Convention on Biological Diversity and is sufficient for REDD+ purposes.
Harmonizing laws across the sector to address drivers of deforestation	*Agricultural Landlord and Tenant Act (1966)*	HARMONIZATION	• Subject to, amongst other things, to the provisions of the *Forest Act* and *Mining Act* (1965) see s 59. • Planting of permanent and semi-permanent crops are subject to consent of landlord (s.40) & Schedule Part 1 • Prior Notice to be given to landlord for certain improvements including clearing of land. See Schedule Part 2.
	Land Conservation and Improvement Act (1953)	HARMONIZATION	Provides that Board exercise general supervision over land and water resources. Board has power to make orders including: • Conservation orders including prohibition and restriction on cultivation of specific crops • Closing orders where in the opinion of the Board where land has become despoiled including prohibiting cutting down or destruction of vegetation • Orders requiring works for conservation of land. (Unclear whether this also extends to ordering of regeneration of forest) • Powers to make closing order is dependent on Board forming an opinion that land has become despoiled area.
	Environment Management Act (2005)	HARMONIZATION	Provides that National Environment Council includes • PS Forest, Lands, Mineral Resources, Agriculture, TLTB. *ITaukei* Affairs as members • The Protected Areas Committee of the NEC (not legislated) aims to implement CBD, implementation of PES protection of lands and similar goal to REDD+ protection of forest • Requires the approving authorities to assess proposed development activities to determine whether likely to cause significant environmental or resource management impact-in which case an EIA shall be prepared, and EIA provisions then apply.
Legislation that MAY NOT deter Drivers of Deforestation	Mining Act (1965)	SUPERCEDING Application	This could be addressed either by amendment of section 11 to exclude land on which REDD+ project has been approved/registered OR a declaration be made that specified land is protected from mining Activity

Issues to address	Relevant Law/Regulation/Policy	Recommended Action/Status re: harmonization for REDD+	Comments
Legislation that is POSSIBLY NEUTRAL regarding Drivers of Deforestation	*Land Development Act (1961)*	NEUTRAL	• Establishes Land Development Authority having duty to promote and assist investigation, formation and carrying out of projects for the development, improvement and settlement of land –see section 3 • LDA or local development Boards per section 26 have power to approve land development, improvement and settlement schemes for the processing and marketing of produce-see section 3(3)(e)
	Forest Bill (No 13) of 2016	NEUTRAL	In relation to the encouragement of the harvesting of timber BUT also encouraging sustainable forestry(one of the AIMS of REDD+ and REDD+ activities.
	Town Planning Act (1946)	NEUTRAL	Does not address development/land use outside planning scheme areas (town areas only) NOTE- Land use and planning outside town, peri-urban, and village confines is not addressed by legislation or regulation/by-laws
Post 2012- Policies that are CONSISTENT	National Biodiversity Strategy and Action Plan (2017-2020)	CONSISTENT	
	Rep of Fiji National Adaption Plan: A Pathway towards Climate Resilience (2018)	CONSISTENT	Critical of Fiji's poor record on environmental legislation /regulation, implementation and enforcement (see above)
	A Green Growth Framework for Fiji: Restoring the Balance in development that is sustainable for our future (2014)	CONSISTENT	• Renewed efforts are being made to encourage afforestation and conservation of natural forests. These initiatives recognize the role of forest in climate change mitigation and adaptation efforts. • The reducing emission from deforestation and forest degradation (REDD+), ridge to reef, and forestry protected areas management are some examples of activities which focus on sustaining the natural forest resources • To encourage reforestation and replanting there is an urgent need to look at innovative benefit sharing arrangements as an option to formal leasing to foster ownership by and partnership with communities • A separate regulatory framework governing the mahogany industry is a challenge for effective management of all Fiji's forest resources. Investment regulations also need to look to be modified to attract additional investment in plantation development.
	National Climate Change Policy 2018-2030 (2018)	CONSISTENT	•
Policies that might CONFLICT	5 Year and 20 Year National Development Plans: Transforming Fiji 2017	POTENTIAL CONFLICT	It is noted that plantations may also have potential for REDD+ activities.
	NDC Implementation Roadmap (2017-2030)	POTENTIAL CONFLICT	Does not mention REDD+ intentions/goals/projects
	Low Emission Development Strategy 2018-2050	POTENTIAL CONFLICT	Does not mention REDD+ activities or include them as part of Fiji's achievement of lower emissions strategy