



## **1. Introduction**

The ‘Summary of discussions (draft 1)’ (Scheyvens 2011) made available following the conclusion of the INA-IGES REDD+, PES and Benefit Sharing Workshop held at the March Girls Resort at Gaire (near Port Moresby, Papua New Guinea [PNG]), provides an excellent summary of the range of presentations by speakers and the main points made both in the presentations and in discussions at the ends of each session of this workshop.

It is not the intention of this Report to go over all the presentations again. Rather, this report picks up and develops further a number of issues arising from the proceedings of this workshop as seen within the context of the discussions held in four working groups. Each of these working groups had a focal theme and each presented a set of recommendations to the workshop (set out in Appendix 1). These focal themes were ‘Safeguarding PNG’s Resources’, ‘The State and Resource Owners’, ‘International Experiences’ and ‘Way Forward: Inclusion, Transparency and Coordination’.

Much of the PNG political, economic, socio-cultural and natural resource background is assumed in this report to be reasonably well-known and understood (Amos and Gowae n.d.) and so not restated here in any major way. The overview also does not deal with REDD+ as a separate issue since it has not yet become an official climate change instrument.

If not directly then at a deeper conceptual level there is some considerable overlap between the sets of recommendations and from this amalgam further comments will be made in this report on PES (Payments for Environmental Services) and Melanesian Carbon Property Rights.

## **2. Payment for Environmental Services**

Payments for environmental services involve schemes where payments or rewards are given by those who benefit from environmental services like clean and sufficient water, biodiversity, stable climate or aesthetic beauty to those who play a central role in providing or maintaining these services (Lee & Mahanty 2009: i; Wunder 2005). Using a sustainable livelihood framework suggests that livelihoods are not just about securing financial assets but also human, social, natural and physical assets and this presupposes the need to look broadly at how schemes may interact with the wider range of livelihood assets.

Coming from this perspective it is clear that PES schemes can and are impacting rural communities in important ways. Lee and Mahanty suggest (2009: i – ii; paraphrased below) that some critical issues can be taken from recent experiences:

- Rural or poor people will benefit from PES only if they can establish and maintain recognized and strong rights to resources;
- Many schemes are bringing additional income to rural households but the costs of participating in such schemes are high, income is lost from agriculture and other resource-use options and so the net benefits need to be worked out;
- Improving the status of natural assets is a central objective of PES;
- Where local institutions for coordination and cooperation are strong they can provide a strong basis for participation in PES and can manage the flow of benefits from PES schemes;
- Infrastructure development has been one way in which some PES schemes have delivered community-level benefits; and

- Though it can be argued that market efficiencies rather than social objectives should drive the design of PES schemes, the emerging evidence suggests that PES can have significant impacts on the livelihoods of rural populations and so help reduce poverty.

Some of the constraints, risks and opportunities presented by PES schemes include:

- Access and equity in PES schemes. Some areas of consideration include insecure tenure, small landholdings, high transaction costs, high investment costs, low awareness, education and technical capacity and who receives the benefits.
- Benefit sharing is obviously a significant part of PES schemes in that if done well it has the potential to affect the lives of many people. Many many different factors could come into play. How the benefit sharing is worked out to a level acceptable to all the parties involved and could be seen by some as a constraint or risk and by others as an opportunity.
- So how benefit sharing as part of a PES scheme is done is critically important because if done well it may be the factor that makes the difference between a community supporting a PES scheme or turning its back on it.
- Secure tenure and clear rights are clearly the keys to the development of an acceptable and equitable PES scheme. So an understanding good knowledge of resource tenure rights should be seen as the baseline information from which everything else flows.

To date PNG has no PES schemes in operation, nor are there apparently any being planned or about to be undertaken.

### **3. Melanesian Carbon Property Rights**

The importance of carbon and the ability of plants, the soil and water to sequester is becoming widely known around the world. The associated carbon property rights can be seen as an important element in the ways in which climate change challenges can be met.

When the insurance industry states clearly that carbon stored in forests (and, by implication on other resources) is a regulatory asset (Lang 2008) then resource owners, regulators, asset managers, lawyers and researchers know that this is a matter that is broadly accepted (see also Takacs 2009). That being so, it is then important to understand much more clearly who owns carbon property rights, if a national carbon property law regime exists that can and does incorporate carbon property rights as tradable assets.

In many ways carbon property rights transcend disciplinary boundaries (Prior and Boydell 2010) and are sometimes viewed as ‘new property’ (Hepburn 2009). The context of property rights is also critical (Boydell, Sheehan and Prior 2009). All these aspects are critical when the focus turns to carbon property rights in Melanesia.

Melanesian natural resource tenure systems are actively in existence, they are highly adaptive and inclusive and, importantly, they are recognized in national constitutions across Melanesia. They are not controlled by the state but by indigenous customary resource owner groups; across the region virtually all natural resources are not owned or controlled by the states but by the indigenous customary resource owner groups. The rights to land and soil, inshore waters and forests are all owned in the same way.

It then follows logically that if a clan owns the trees in a forest then it also owns the carbon sequestered in the trees in that forest.

What is urgently needed is a definitive study that will clearly establish what the current situation is in terms of who/what owns the carbon property rights in trees across Melanesia. Critical evidence will be needed when governments in Melanesian countries are tempted to take control of carbon sequestered in forests, forests over which the state has no rights. While national constitutions recognize customary ownership of these resources, this recognition is further strengthened by the state making payments for logging rights to sell on to logging companies.

#### **4. Discussion**

There are many points of importance and interest that could be followed up from the above information, all of them relevant to PNG's evolving situation. The INA-IGES Workshop once again highlighted a number of these issues though it is depressing that a large number of the recommendations from the last of these Workshops (INA 2008) has again been repeated in the 2011 Workshop suggesting that little or no progress has been made in the intervening period.

In this section and based in part on the information provided in points 2 – 5 above, I will focus further discussion on 'SABL', on 'Rights and responsibilities; proactive communities' and, finally, on 'Way Forward: transparency, inclusion and coordination'.

##### ***[A] SABL***

The SABL ('Special Purpose Agricultural and Business Leases') issue has been one of the emerging scandals in PNG in recent times. Individuals singly and in small groups have in purposeful ways made use of loopholes contained in s.11 and s.102 of the Land Act 1996 to disenfranchise many PNG customary landowners from large tracts of land and forests and to enrich themselves by selling the 99-year leases to outsiders. This loophole allows for the relatively innovative lease-leaseback provisions existing in the Land Act 1996 to clandestinely convert land from informal institutional arrangements and, through the services of the responsible Minister, put it into the formal sector (pers. comm., Prof. S. Boydell; Filer n.d.: 2).

This method enables 'customary landowners' grant a 99-year lease to the Minister (in reality, the state) at no rent; he then, in theory, leases it back to them for the same 99-year lease also at no rent. However, s.102 also allows the Minister to lease the land out to a third party, also at no rent. In practice and with virtually no public knowledge (even by many, most or all of the affected customary landowners), between July 2003 and early 2011 some 5.5 million hectares of land have been effectively alienated for 3 generations at no rent in what can be seen as a major land grab by outside investors. This amounts to some 11% of PNG's total land area (Filer 2011: 2). These activities also connect with a worldwide trend in land grabbing, some of which has been documented (see Cotula *et al.* 2010).

This outcome highlights some serious flaws in the Land Group Incorporation Act of 1974 (and not corrected in the recent draft revised legislation passed in 2009 and awaiting gazettal); these flaws are contained in establishing the burden of proof to verify the genealogies put forward as part of the ILG ('incorporated land group') process. This burden of proof has in very many, likely most, case not been followed

through. In very many cases there has been no attempt made to follow the legal incorporation process to verify this burden of proof as set out in the 1974 Act and so should not have been approved and registered; nevertheless they were.

This highlights the lack of basic monitoring and checking in those government departments required to check that all procedures have been followed and all requirements complied with and fulfilled; admittedly the financial and manpower resources to do such monitoring effectively have also not been made available to those departments. In this case the relevant government department is the Dept. of Lands and Physical Planning (DLPP) with tacit support from the Dept. of Agriculture and Livestock in the form of having the supporting documentation signed. In theory, again, the approvals process outside DLPP should have gone through the PNG Forest Authority (PNGFA) since all the large alienated areas in question are forested area and so would require PNGFA to issue 'Forest Clearance Authorities' (FCAs). In practice the PNGFA has taken a hard line on this issue and DAL proved to be rather more compliant.

While some NGOs were beginning to draw attention to this manipulation of the law, their efforts did not seem to gain much traction. However, since these so-called SABL leases have become public knowledge, it has become increasingly clear that a huge majority of customary resource owners knew nothing about these developments covering their ancestral lands and other resources. There is increasing evidence that very few (if any) customary landowners gave their 'Free, Prior and Informed Consent' ('FPIC') to these developments. Filer's recent case study of land grabbing (n.d.) sets out one set of circumstances that lead to the sale of all of Lavongai Island, New Ireland Province to an Singaporean firm for US\$1.6 million in 2009.

From all the above it is clear that the SABL situation is out of control and must be challenged in court and shown to be illegal and the areas of land involved revert back to the customary clan owners. Following the INA-IGES workshop in February 2011, the quick action by the NGO CELCOR through Mr. Damien Ase and his staff (CELCOR and FPP 2011) to alert both the UN system and other interested parties to this apparent travesty of justice has been a major factor in the announcement of a Commission of Inquiry into SABLs announced recently by the Acting Prime Minister. The terms of reference for the CoI and the CoI members have not yet been made public and no starting (or completion) time has been announced.

***[B] Rights and responsibilities; proactive communities***

PNG customary tenurial rights over land, forests and other natural resources are established by the kinship systems that apply to each social and linguistic grouping. So if these rights are inherited patrilineally, then these access and 'ownership' rights are passed on at birth from male ancestors through the male line. In matrilineal systems these rights are passed on in the female line (though males in each generation may do the actual managing). And there are many variations on these in combination.

The point made here is that while the holding of these rights is important for each individuals (so making their 'permanent' rights pre-eminent in any landownership determination, that is often forgotten is that these tenure rights are just as important for the maintenance, indeed the very existence of the landholding unit, usually a clan. Thus individuals have these rights but these are balanced by responsibilities. The latter are not only to one's immediate family through the provision of food, shelter

and security, but also to one's lineage and clan for security, survival and individual and community well-being.

Rights and responsibilities in terms of tenure and natural resource management are this inexorably linked. Where it is evident that these two characteristics have become decoupled and are being exercised separately then it is clear that there is a breakdown of the system and this leads inevitably to exploitation and manipulation. Examples of this are very clear in the SABL situation and the lack of free, prior and informed consent to any of those transfers of ownership of large areas of land and their resources. There are increasing amounts of evidence to show that there was no FPIC by any landowners, there is no evidence that this process was even attempted.

From the above it is clear that the current ILG processes are only partly being put into practice. This is due to a number of factors, including the following:

*(a) ILG Facilitation*

Individuals who are leading the facilitation work to set up and register ILGs are clearly not fully familiar with what they are meant to be doing. The focus is also on a question: are they working to help their land group communities to get themselves organized or are they being paid by logging and other companies to get through the process quickly without paying much attention to accuracy and establishing burden of proof? Another question is: are facilitators aware of the requirements under the Land Groups Incorporation Act 1974?

Individuals wishing to provide facilitation services to communities, clans or commercial enterprises should go through a certification process to ensure that they are aware of all the ramifications and legal requirements of the ILG process and requirements of how ILGs should operate after establishment. After a suitable phasing-in period only trained and certified ILG facilitators should be employed by commercial enterprises to carry out ILG facilitation and advisory services.

*(b) Individuals and Priorities*

Both the SABL situation and other related developments show that there are individuals, now often based in the capital or in other urban areas, who are acting purely for their own monetary benefit and riding rough-shod over the attendant rights held by customary resource owners through their customary clans (or land groups). Concerned and knowledgeable individuals and communities need to be vigilant in holding on to their natural resources and implement ways by which FPIC is a first and necessary step in considering any developments and where the rights on the land group are as important as those held by individuals.

*(c) Safeguarding PNG's natural resources*

Despite the enshrining of customary resource tenure rights in PNG's National Constitution, the state has been reticent in protecting these rights to the primary customary rights holders. One of the outcomes of this negligence has been in the almost non-existent resourcing of the Incorporated Land Group Registry in DLPP, both in terms of funds and manpower.

*(d) Enabling the ILG Registry to work better*

From an institutional point of view DLPP has neither the funds nor the manpower to carry out the important monitoring and checking functions that are critical parts of ILG process before and ILG application is approved and registration occurs.

The fact that the national ILG Registry has obviously not been able to function properly for some of the reasons mentioned above, this begs the question if there might be better ways to provide the necessary support to ILG processing, evaluation and monitoring.

One way forward could be to have the effective registries working at a provincial level with a link into a national registry to be maintained as a back-up system. At the very least the costs associated with the verification of ILG applications would be significantly reduced by a provincial focus. A provincial registry would also be that much closer to the land groups that want to register themselves as ILGs.

*(e) Lack of involvement of public servants in ILG process*

It is also likely that the other public servants who in the 1974 legislation are part of the checking and burden of proof processes at district and local-level government levels know little of what their responsibilities are under the legislation.

*(f) Revised Land Groups Incorporation Act 2009*

National Parliament passed a revised version of the Land Groups Incorporation Act in 2009. However to date this revised act – an outcome of the National Land Development Task Force – has not yet been gazetted and therefore is not in force. It would be a worthwhile exercise in the near future for some technically competent persons (including someone with competence in customary land tenure systems) to look through this new act in terms of the SABL and other developments that have taken place since it was drawn up.

***[C] Way Forward: Transparency, Inclusion and Coordination***

REDD+ appears to be an excellent instrument to encourage natural resource owners to manage their resources much more effectively. However, until this approach has become a legal international mechanism with the right number of signatories to enable it to work effectively, REDD+ remains a promising approach.

The link between the REDD+, PES (Payments for Environmental Services) and Benefit-sharing frameworks adds significant dimensions for customary resource owner communities the world over. In PNG this is even more important in that customary land groups hold natural resource ownership rights, not the state. In many other countries the state owns and controls all the rights to natural resources and individuals and groups are required to lease areas of land or forest from the state for shorter or longer periods; these leases often contain a range of restrictions limiting lessees to what they can do with those natural resources.

PES frameworks, too, have not yet been proven to provide effective incentives. Probably only when REDD+ becomes an official instrument and has the appropriate PES possibilities and procedures attached as a significant component will it be possible to make such as evaluation. In the meantime, in PNG at least, little information of any significance has been circulated among resource owner communities to canvas this kind of approach. When this is finally done and communities can make a better evaluation based on this information many communities are likely to be interested in PES and the attendant requirements.

In order to further strengthen the imperative of keeping forests standing (or at least significantly reduce deforestation), other supportive elements will be needed to further encourage this approach. These supportive elements need to include a range of

activities that both add income generation activities to a community and a range of new possibilities for employment within village communities.

Ways forward for customary resource owner groups and institutions and organizations that work to support them need to focus on approaches that both preach and practice transparency, inclusion and coordination.

These issues point to the great and urgent need for all parties to be involved in awareness raising and in enabling access to clear, unbiased and accessible information through every means possible. In the climate change context in PNG to date the related issues of awareness raising and access to information have been sadly lacking from the government side; this is an unfortunate situation given that the state owns or controls very little of the natural resources in the country. Who will step up?

## **5. Conclusion**

Many of the issues raised in this report are ones that were touched on either directly or indirectly, superficially or in depth, by presenters and discussants and in broader discussion during the INA-IGES Workshop in February, 2011. What is of some concern is that many of these issues were also raised, discussed and recommended on as outcomes of the previous INA-IGES Workshop.

A number of developments since that previous workshop – including the significant SABL developments – lead to the conclusion that customary resource owner groups now need to undertake a much more proactive approach that is protective of their tenure rights to a range of natural resources.

Customary land groups are therefore urged to work more proactively to find ways to protect themselves against some of the nastier methods being used by individuals to enrich themselves, often at the expense of members of their own clans. For landowner communities to act and react proactively they need to have access to much more and much clearer information.

## References

- Amos, G. and Gowae, G. n.d. PNG Country Presentation “Challenges and Expectations in Linking Sustainable Forest Management and Climate Change”.
- Boydell, S. and G. Small 2003 The Emerging Need for Regional Property Solutions – a Pacific Perspective. Brisbane: Pacific Rim Real Estate Society Ninth Annual Conference.
- Boydell, S., J. Sheehan, J. Prior, S. Hendy 2003 Beyond the bundle: expanding our understanding of contemporary Property Rights. Presentation to Pacific Rim Real Estate Society Ninth Annual Conference. University of Technology, Sydney: APCCRPR (Asia-Pacific Centre for Complex Real Property Rights).
- Boydell, S., J. Sheehan and J. Prior 2010 Carbon Property Rights in Context. *Environmental Practice*, 11: 105 – 114.
- CELCOR and FPP 2011 Violation of Indigenous Peoples’ Property Rights and the Right to Effective Remedy: The Rights of Corporations Privileged over the Rights of Customary Land Owners in Papua New Guinea. Report to the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People. Port Moresby: CELCOR and Forest Peoples Programme.
- Cotula, L., S. Vermeulen, R. Leonard and J. Keeley 2010 Land Grab or Development Opportunity? Agricultural Investment and International Land Deals in Africa. London: International Institute for Environment and Development.
- Filer, C. n.d. The New Land Grab in Papua New Guinea: A Case Study of Land Grabbing in New Ireland Province. [Draft]
- Filer, C. 2011 The Political Construction of a Land Grab in Papua New Guinea. Paper presented at the International Conference on Global Land Grabbing, 6 – 8 April, 2011. Future Agricultures Consortium, Institute of Development Studies, University of Sussex.
- Hepburn, S. 2009 Carbon Rights as New Property: The benefits of statutory Verification. *Sydney Law Review*, 31: 239 – 271.
- Institute of National Affairs 2008 Climate Change, Forests and Carbon Trading. Report from the Workshop. INA: Port Moresby.
- Lang, C. 2008 The insurance industry on carbon stored in forests: ”It’s a regulatory asset.” <http://www.redd-monitoring.org/2008/12/10>
- Lee, E. and S. Mahanty 2009 Issues Paper: Payments for Environmental Services and Poverty Reduction. Bangkok: RECOFTC.
- Prior, J. and S. Boydell 2010 Understanding property rights in carbon: A methodological inquiry. COBRA 2010 Legal Research Symposium.
- Scheyvens, H. 2011 INA-IGES REDD+, PES and Benefit Sharing Workshop: ‘Summary of discussions (draft 1). Typescript.

Takacs, D. Forest Carbon Law + Property Rights. Arlington: Conservation International.

Wunder, S. 2005 Payment for Environmental Services: Nuts and Bolts. CIFOR Occasional Paper No. 42. Bogor: CIFOR.

**Appendix 1: 2011 Workshop working group recommendations**

**Group 1: Safeguarding PNG's Resources**

**Main Risks**

**Action Points**

- |  |  |
|--|--|
| (i) Social risks – conflicts                                   | * Grievance process<br>* International Convention on rights  |
| (ii) Lease-leaseback system                                    | * Legal fund to challenge cases<br>* Moratorium in SABL<br>* Leave the process to FCAs<br>* Assessing viability of agricultural proposals  |
| (iii) Improper ILF formation/illegal ILG process               | * Improvement of civil registry<br>* ILG process needs to be strengthened  |
| (iv) Insufficient data on natural resources                    | * Emphasis on improved database of natural resources and information gaps  |
| (v) There is no mandated DAL policy/<br>no legislative mandate | * No major influence on FCAs or lease-leaseback<br>* There should be a tribunal where land-owners can raise their complaints on lease-leaseback or illegal land grabbing<br>* There should be a maximum limit to FMAs/TAs/FCA land sizes<br>* Give mandate to administrative process away from legislative powers. |

**Group 2: The State and Resource Owners**

1. Suspend/impose moratorium on granting SPABs
2. Ensure all consenting parties including LLG/WC agree to application
3. Judicial Reviews on:
  - a. SPABs
  - b. FCAs
  - c. Export permits
  - d. Revisit ban on round log exports
4. “Conditions for Norway” deals
5. Establish independent multi-stakeholders’ administered fund for REDD
6. Resource Inventory & Management Plans at Provincial Level for REDD Readiness
  - a. Workshop
7. Substantial funding towards institutional support from US\$6.4million UN REDD support.
8. Sack KC
9. Explicit reference under Forestry Act that landowners have ownership rights over carbon

**Group 3: International Experiences**

1. Clan-based participatory land use plan – a pre-requisite
2. Participatory organizing towards micro-savings and economic enhancement
3. Develop REDD as just one of several income sources for communities
  - a. Mama Graun Trust Fund
  - b. National Microbank
  - c. National HIV/AIDS Council

**Group 4: Way Forward: Inclusion, Transparency and Coordination***1. Laws*

- a. Review relevant regulation – revoke regulation on discretionary powers
- b. Sort out rights to carbon- Under FMA
- c. Clarify whether lease-leaseback void with customary act
  - i. Interim step to ILGs to make flexible
- d. Develop legal mandate to make ministers and public servants do their job
- e. Whistle-blower regulation

*2. Build on PNG Home Grown*

- Initiative
- New Pilot Areas should be based on previous experience
- All new Forest Areas should be required to get FSC

*3. Lack of Co-ordination by Government Departments*

- a. Name and Shame

*4. Implementation*

- a. Allocation enough resources to do the job
- b. Reinforcement of Ombudsman
- c. Enforce legal mandate (as per 1)
- d. Timely dissemination of Information

*5. Conflict Resolution*

- a. Establish tribunal to resolve tensions without recourse to courts