The current legal and institutional framework of the forest sector in Papua New Guinea

Papua New Guinea Forest Studies 2

Overseas Development Institute

January 2007

About ODI and FPEP

The **Overseas Development Institute** (ODI) is a leading independent think tank on international development and humanitarian policy issues. Its mission is to inspire and inform policy and practice which lead to the reduction of poverty, the alleviation of suffering and the achievement of sustainable livelihoods in developing countries. It does this by bringing together high-quality applied research, practical policy advice, and policy-focused dissemination and debate. ODI's work centres on four research and policy areas, each of which has a dedicated group: the Poverty and Public Policy Group, the International Economic Development Group, the Humanitarian Policy Group and the Rural Policy and Governance Group.

ODI has a strong international reputation for rigorous policy-orientated development research and has made major research contributions internationally to the understanding of the principles of environmental management, poverty alleviation and sustainable development. It has an international and multidisciplinary body of core staff and research associates and works with partners in the public and private sectors in both developing and developed countries. ODI also operates an extensive programme of publication and dissemination linking researchers, policy-makers and practitioners in the North and South. Publications include topical briefing papers, working papers, research reports, books, two journals and three international networks. Communicating research into the public arena and influencing development policy-makers through a variety of meetings, talks and conferences bringing together different development players is central to ODI's mission. ODI also provides research support and advice to the UK's Parliamentary Select Committees, MPs and Peers, and to the All Party Parliamentary Group on Overseas Development.

Within ODI, the **Forest Policy and Environment Programme** (FPEP) specialises in policy research on sustainable natural resource management in the context of poverty reduction. It promotes a broader, livelihood-oriented approach to the importance of forests and natural resources, focusing especially on institutional, policy and socio-economic aspects of sustainable forest management and conservation as well as on the interface between forests and other land-uses.

Overseas Development Institute, 111 Westminster Bridge Road, London SE1 7JD, UK.
Website: www.odi.org.uk

Disclaimer
This paper has been commissioned by the Government of Papua New Guinea and funded by the European Commission. The views expressed are not necessarily those of the Government of Papua New Guinea or the European Commission.

Team members
Neil Bird, Adrian Wells, Flip van Helden, Ruth Turia.

Summary of Findings

This paper examines the current legal and institutional framework governing the administration of the forest sector in Papua New Guinea. From the evidence examined, the review concludes that the main requirements for reform at this stage concern fulfilment by the state of its responsibilities. This constitutes a more pressing issue than operator compliance, important as this also is.

The paper is divided into two parts:

i) An analysis, summarized below;

ii) An annex providing an overview of current legal conflict, active Timber Permits, institutional roles and responsibilities, as well as processes for resource acquisition, allocation, planning and control.

The analysis starts with an examination of cases currently before the courts. These challenge the legality of timber licensing on grounds of sustainability and due process. This includes issuances of permits and related extensions in the absence of a valid National Forest Plan, and a certified forest resource inventory; and in alleged contravention of established procedures for (amongst others) securing the consent of landowners and Provincial Forest Management Committees (PFMCs). Claims have also been brought for trespass (and related nuisance) on grounds that permits do not provide a valid basis for logging.

Of greatest significant is a reference to the Supreme Court by the Ombudsman Commission. Where forests are ultimately private property, the Ombudsman's questions address a subject hitherto untested in the courts. They ask whether the process by which the State acquires timber rights from landowners, and the State's monopoly on forest development once rights are acquired, comply with the Constitution as well as statutory rights and obligations under the Forestry Act itself. The determination of the Supreme Court will be pertinent to the charge that resource acquisition under Forest Management Agreements (FMAs), and their subsequent allocation to licensees, is tantamount to "equitable fraud" in respect of landowners' rights.

Resolution of these cases is essential to any meaningful discussion of legality in the PNG forestry sector. But, vital as these cases may be, it is not effective that the integrity of the sector should be so contingent on litigation. It places a disproportionate burden on landowners and other groups acting in the public interest. Rules of procedure and the time taken to secure judgement mean that litigation can be extremely costly. Alternative mechanisms for public oversight and dispute resolution are desperately needed, as are reforms to the justice sector.

Section 1.2 of the analysis highlights lack of procedural clarity as an important source of legal conflict. While there is detailed guidance on monitoring and control, there remains significant ambiguity over processes for resource acquisition and allocation. Key concerns include:

i) The lack of standards governing landowner awareness-raising by officers of the National Forest Service (NFS) prior to resource acquisition.

ii) The fact that under Timber Authorities (for road alignments, agricultural clearance etc..), responsibility for awareness raising and land group incorporation is left to licence applicants.

iii) The lack of guidance on structures for distribution of benefits and royalty payments to landowners in line with the policy intent of the Land Groups Incorporation Act (1974).

Other procedural gaps include:

iv) Decisions to prosecute or compounding offences. The NFS currently enjoys substantial discretion to either overlook cases or to set fines that do not constitute sufficient deterrence.

v) An active system of cash bonds as a guarantee on operator performance, despite being provided for in the Forestry Act 1991.

vi) Monitoring of domestic timber flows, mill throughput and recovery rates, where the timber administration system is geared largely to export of round logs. This is of concern as the proportion of processed exports rises exponentially.

Procedural gaps are compounded by structural weaknesses, including the allocation of functions for forest-sector administration (see Section 1.3). Section 1.3.1 highlights the broad and potentially open-ended mandate of the NFS and whether it has sufficient resources to fulfil this, especially in relation to:

i) Resource planning, with substantial delays in completing a certified resource inventory as the basis for resource acquisition and allocation.

ii) Monitoring and enforcement, with indications that current field operations are severely under-resourced.

iii) Duty of care owed to landowners, in particular the requirement not just to incorporate landowner groups (ILGs) for resource acquisition but also to provide ongoing support and extension in managing ILG membership and funds.

These issues call into question the core mandate of the NFS and how this might be better managed.

One option is that some functions of the NFS (e.g. landowner incorporation) should be decentralised to lower tiers of government, in line with the new constitutional arrangement established under the 1997 Organic Law on Provincial and Local-Level Government. Centralised forest administration under the 1991 Forestry Act arguably conflicts with the distribution of functions under the Organic Law, and is another issue that perhaps requires determination by the Supreme Court. Decentralisation is, however, contingent on the development on effective local accountability mechanisms.

Another option is to outsource certain core functions of the NFS. The SGS log export monitoring system establishes a useful precedent. It has since been suggested that SGS's remit be extended to include monitoring of upstream harvesting and timber administration. However, any policy on further outsourcing functions of the NFS will need to lay down clear tests of independence and impartiality in selecting contractors. There is also a strong feeling amongst foresters that instead of 'hollowing out' the NFS, the emphasis needs to be on capacity building and institutional strengthening both centrally and at local government levels.

Section 1.3.2 examines the checks and balances within the structure of the PNG Forest Authority, as incorporated into the Forestry Act (1991) with the intention of curtailing the Minister's power. These are embodied in the distribution of functions between the Board, the Provincial Forest Management Committees (PFMCs) and the NFS; as well as through multi-stakeholder representation. Checks and balances have, however, been compromised by (amongst others) changes to the membership of the Board; and the inability of both the Board and PFMCs to verify information independently of the NFS.

Proposals to shield the decisions of the Board from political interference include an independent Board Secretariat. This would have the power to sign off on NFS advice and on the legality of Board Decisions, where necessary, using third-party verifiers. A Board Secretariat was proposed for inclusion in the 2005 Forestry (Amendment) Act but was not ultimately adopted.

Steps could also be taken to properly resource and empower the PFMCs, e.g. in verifying the authenticity of tenure and landowner consent prior to resource acquisition and the extension of timber licenses. The Kiunga-Aimbak road alignment case highlighted the vulnerability of PFMCs to poor advice when vetting applications for licenses. The internal workings of PFMCs deserve attention too, including the need to ensure proper landowner representation at meetings.

Measures to strengthen forest-sector administration should also take stock of arrangements for land-group incorporation and participation (see Section 1.4). Incorporated Land Groups (ILGs) face major difficulties in managing their membership and the accountability of ILG chairs. Where the oil and gas sector is considering dropping the ILG system as a mechanism for benefit-sharing, the forestry sector must also take stock of its merits – not least because the NFS is using ILG incorporation as a form of de facto land registration. If forestry is to continue using ILGs, it will either need to better resource NFS field officers in incorporating and assisting ILGs and/or decentralise the function to lower tiers of government in line with 1997 Organic Law on Provincial-Level and Local-Level Government. Of particular concern is the need to strengthen the fiduciary duties of ILG chairs which the ILG Act 1974 currently makes no provision for.

In Section 1.5, the analysis examines the blend of instruments necessary for external oversight of forest-sector administration, as a guarantor on internal reform processes. Section 1.5.1 discusses the role of the Ombudsman Commission. This has been active in the forestry sector and enjoys broad public support. But while a source of moral persuasion, the Ombudsman is prevented from enforcing the results of investigations through litigation and cannot provide routine oversight of the forest sector. It will need to work alongside other external oversight functions.

Foremost amongst proposals to strengthen external oversight are an Independent Commission Against Corruption (ICAC) as well as a Human Rights Commission (see Section 1.5.2), constituted as constitutional bodies under their own Organic Laws. Crucially, they would have the power to both investigate and seek prosecution of cases - complementing the role of the Ombudsman:

- An ICAC has been mooted under a 2006 National Anti Corruption Strategy, which is indicative of political recognition of the problem. However, there is also a view that it would be more effective to consolidate inter-agency action on corruption before an ICAC is put in place; in particular the role of the Inter-Agency Public Sector Anti-Corruption Committee.
- Calls for a Human Rights Commission arise out of widespread allegations of policy brutality including within the forestry sector. A proposal for a Human Rights Commission has recently been tabled by the Department of Community Development and the Attorney General.

Gaining public oversight of forestry is needed but difficult

In addition to standing commissions on Anti-Corruption and Human Rights, it has been proposed by the PNG Eco Forestry Forum that another standalone Commission of Inquiry into the forestry sector be instituted. This would present an opportunity to comprehensively review and overhaul the functioning of the forestry administration.

However, perhaps the most pressing issue for effective public oversight of forestry is the need for more effective dispute resolution (Section 1.5.4). The judiciary have strong credibility, but the courts are also severely overloaded. It may take years for a case to come to trial. Current rules of procedure are ill-suited to multiple-party claims and allow parties to run up substantial costs in lawyers' fees.

Where a major part of the existing forest-sector litigation relates to alleged abuse of administrative processes, an alternative might be a Tribunal for Review of Administrative Decisions along the lines of the Administrative Appeals Tribunal (AAT) in Australia. The AAT has proved cheap to run, easy to access and its proceedings can be conducted with little formality and technicality. As such, the AAT may expedite decisions that would otherwise take months or even years in the normal courts of law, and reduces the need for judicial review.

One further option might be a consolidated, dedicated land and natural resource court, akin to the Land and Environment Court of New South Wales. This would address concerns that: (i) forest-sector disputes are not currently integrated into mechanisms established for mediation of customary land disputes; (ii) the existing (especially lower) courts may not have the necessary expertise or capacity to handle the body of cases generated by the land and forestry sectors; and, (iii) local land mediation is not properly resourced.

Notwithstanding the fact that the PNGFA is an independent statutory body, cross-departmental scrutiny plays an important role in overseeing the forest sector (see Section 1.5.5). Amongst others, there may be justification in broadening involvement in the approval of log export prices beyond the NFS Marketing Branch to include the Treasury and Internal Revenue Commission (IRC). As a measure against transfer pricing, transparency is essential.

Finally, there may be scope to enhance the role of the Auditor-General in vetting disbursements, receipts and final disposal of landowner payments; as well as to introduce routine third-party auditing of the NFS' core functions under voluntary ISO and timber certification schemes (see Sections 1.5.6 and 1.5.7). However, it is not within the scope of this study to assess the feasibility and efficacy of these options.

Under section 1.6 the analysis highlights the importance of access to information as a guarantee on public oversight of the forest sector. Although an enforceable right under S.51 of the Constitution, transparency protocols are not yet in place. Landowners and other stakeholders often cannot access FMAs and other basic documents when seeking redress. The SGS outsourced log export system is a step forward, e.g. by enabling landowners to reconcile documented exports with royalty receipts.

Access to information is further hampered by important gaps in information systems, e.g. for timber administration (see Section 1.7). NFS continues to rely on paper-based log tally sheets to record the volume of logs harvested and to assess timber royalties. While SGS has introduced computerised systems for log export monitoring, this does not cover the entire chain of custody. Nor is it currently possible to reconcile data on timber production, mill throughput and exports.

In Section 2, the analysis concludes with the need to phase and prioritise reforms in line with available public finances and the institutional capacity to see them through. Some important trade-offs need to be considered, e.g. passing the costs of enhanced administrative capacity onto industry versus efforts to reduce the tax burden on companies. The challenge lies in identifying realistic and strategic entry points, including those that are likely to have traction in sectors beyond forestry.

Contents

I Analysis

II ANNEX

Analysis

Enhancing the legal and institutional framework for forest-sector administration

1

A credible system of forest sector administration requires a clear legal basis, with broad stakeholder buy-in, unambiguous procedures and standards of performance, effective allocation of functions, as well as an appropriate blend of instruments for external oversight and dispute settlement.

This paper assesses the extent to which the legal and institutional framework governing the PNG forest sector currently delivers this. The key issues at stake relate to:

- conflicts over the interpretation of law;
- the legality of administrative decision-making;
- the exercise of discretionary powers;
- the need to safeguard checks and balances between levels of government and between different stakeholders;
- rethinking institutional arrangements for landowner incorporation and support;
- reconciling the 1991 Forestry Act with the provisions of the 1998 Organic Law on Provincial- and Local-Level Government;
- public oversight that has the power to both investigate and seek prosecution and
- instruments to expedite conflict resolution.

Many of these concerns reflect the need to reconcile a highly ambitious 1991 Forestry Act with limited administrative and enforcement capacity. Indeed an over-ambitious legal and policy framework is more likely to create distortions than improved performance.[1]

But equally so must any process of reform account for limited institutional capacity. While this paper lays out possible options for improvement, reforms are contingent on a credible multi-stakeholder process to identify and prioritise actions within the resources available.

Reforms are also contingent on political will. Many of the issues identified in this report are also highlighted in the findings of the Independent Forest Review Teams (2001 – 2005). These were commissioned following a moratorium on issuances of new timber concessions, as required in the conditions of new Structural Adjustment Programme and in the terms of a proposed World Bank loan for the Forest and Conservation Programme (FCP) (see Paper 1). Although the conclusions of the Review Team were adopted by the National Executive Committee (NEC), most remain unimplemented to this day. In May 2005, government requested the cancellation of the FCP loan.

[1] Fingleton, J. (2002) Regional Study on Pacific Islands Forestry Legislation, FAO Legal Papers Online #30

1.1 Resolving legal challenges

In a number of cases currently before the courts, landowners and their representative organisations including the PNG Eco-Forestry Forum Incorporated Association, are seeking to challenge the legality of timber licensing decisions on grounds of ***sustainability*** and ***due process***, and to file ***claims in tort*** for trespass, nuisance and breach of duty of care by logging operations. These are but the latest in a series of similar actions, and point to increasing resort to litigation in the absence of effective public oversight and alternative dispute resolution in the forestry sector.

...landowners and their representative organisations are seeking to challenge the legality of timber licensing decisions...

Ongoing litigation and a Supreme Court Reference by the Ombudsman's Commission also challenge the ***constitutionality*** of the 1991 Forestry Act and subsequent amendments. This is the first time that the Act has been the tested against concepts established in the National Goals and Directive Principles of the PNG Constitution, and could have profound implications for administration of the forest sector in future.

Much of the current litigation focuses on three current (and disputed) Timber Permits relating to the East Awin, Wawoi Guavi and Kamula Doso Forest Management Agreements (FMAs) but have implications for many more. A list of current Permits is presented in Annex 2. The licensing processes they relate are described in Annex 3.

Resolution of these cases is imperative to any meaningful discussion of legality in the PNG forestry sector. The following summarises the substantive issues at stake, pending final determination by the courts. Annex 1 summarises the legal contentions by case.

1.1.1 Challenges to licensing decisions on grounds of *sustainability*

Landowners and the PNG Eco Forestry Forum have both challenged the validity of licensing decisions on grounds that they are not sustainable.

Under Originating Summons (OS) NO. 126 OF 2004, the PNG Eco Forestry Forum has filed an application for interlocutory injunctions, to restrain G. L. Niugini Limited from utilising a Timber Permit granted in respect of the East Awin Forest Management Agreement (FMA). The application also seeks to restrain the Minister and PNGFA from issuing any alternative logging rights pending a Judicial Review of the decision to grant the Timber Permit. Amongst others, OS No. 126 of 2004 questions whether the allowable cut under the East Awin Timber Permit was based on accurate resource inventories.

Under OS No. 612 of 2004, landowners have contested a decision by PNGFA to extend the term of the Wawoi Guavi Timber Permit in Western Province. Amongst others, they have argued the extension does not conform to sustained yield management practices as required under S.78 and S.137 of the Forestry Act.

In addition, both cases challenge the issue and extension of permits in the absence of a valid National Forest Plan, as required under S.46 of the 1991 Forestry Act. This stipulates that '*Forest resources shall only be developed in accordance with the National Forest Plan*'. Three sets of issues relating to validity of the National Forest Plan are highlighted:

- While the 1996 National Forest Plan contained (as required under Act) a National Forest Development Program for the period 1996 - 2001, it provided no information on how forest resources were to be managed after this time. It is therefore argued that it must, to all intents and purposes, have now expired.[2]
- Although S.47(b) of the Act requires a National Forest Plan to be based on a certified National Forest Inventory, this had yet to be done. [3]
- S.47(c)(i) also requires that the National Forest Plan contain the National Forestry Development Guidelines. While these undertook to be reviewed every 3 years, the 1993 Guidelines have not been updated. [4]

Compliance with sustained yield management practices is also highlighted in Section 19 Constitutional Reference No 5 to the Supreme Court by the PNG Ombudsman Commission which questions the validity of certain amendments to the Forestry Act in 2005 (see Section 1.1.3).

The rainforests are biologically diverse

1.1.2 Challenges to licensing decisions on grounds of *due process*

Challenges to licensing decisions on grounds that they have violated mandatory procedures have been the particular subject of litigation. Cases to date include:

- *Ben Ifoki & ors v the State, the Registrar of Titles, Keroro Development Ltd, Deegold (PNG) Ltd, and the PNGFA* [1999] OS 313, & OS 556. This concerned an area in Collingwood Bay over which a Timber Authority had been granted on the basis of a fraudulent lease-lease-back scheme and in spite of the objections of landowners on the Oro Province PFMC. The National Court ruled the Timber Authority void and ordered that the State, the PNGFA and their agents be restrained from dealing with land, or issuing any statutory authority, permit or license to harvest forests and forest produce in respect of that area.

[2] The Board subsequently extended the validity of the National Forest Plan for a further 12 months from November 2002.

[3] The PNGFA has, however, since adopted the forest resource assessments undertaken by the Forest Inventory Mapping (FIM) system.

[4] Page 1, National Forestry Development Guidelines, prepared by Tim Neville, MP, Minister for Forests, Port Moresby, September 1993.

- *Sep Galeva and others v Paiso Company Limited and others* [2003] OS 427, the National Court ruled the grant of Timber Authority 08 for a road alignment project null and void due to violations of mandatory procedures prescribed in SS.87, 88 and 89 of the Forestry Act. Amongst others: there was no written consent of landowners accompanying the application; the application was not referred to the Provincial Forest Management Committee (PFMC) by PNGFA nor did the PFMC approve or recommend the application; and the PNGFA Managing Director's decision to approve the license was not supported by a decision of the PNGFA Board.

Of the ongoing litigation, OS No. 126 of 2004 concerning the grant of a Timber Permit in respect of East Awin contends *inter alia* failure to:

- implement recommendations contained in the (2001) Independent Forest Review Team Report and Compliance Audit (2005) regarding the East Awin FMA – notwithstanding the recommendations of the National Executive Council that the findings of the Review Team be implemented;
- comply with the Environmental Plan Approval Conditions, as highlighted in the Compliance Report; and,
- lodge a performance bond required of all Timber Permits within the mandatory 21 day period.

However, a crucial focus of the current litigation concerns the validity of decisions to:

- extend the term of Timber Permits granted before the 1991 Act came into force, and permitted under S.137 to continue to operate under pre-1991 laws until such time as they expire;[5] as well as,
- decisions to grant geographical extensions to existing Permits.

(i) A legal challenge to the extension of permits granted prior to the 1991 Forestry Act

OS No. 612 of 2004 contends that a 10-year extension to the Wawoi Guavi Timber Permit 1-7 on 4 Feb 2002 does not comply with the relevant and applicable provisions of the Forest Act 1991 and cannot be relied upon. Specifically, it disputes the validity of the extension in the absence of: (i) a S.78(3) report from the Provincial Forest Management Committee (PFMC) regarding (amongst others) the social acceptability of the developer; (ii) a Board recommendation for an extension; (iii) due care and consideration to objections raised by landowners. [6, 7]

[5] S. 137(1) of the 1991 Forestry Act (as amended in 1993, 1996 and 2005), provides that 'permits, licences, timber rights purchase agreements and other authorities granted under [the previous Forestry Act] (repealed), …valid and in force immediately before [the 1991 Act], shall continue… to have full force and effect for the term for which they were granted …or until they sooner expire or are revoked according to law.' It also provides that 'all agreements entered into under the Forestry (Private Dealings) Act …(repealed) valid and in force immediately before the coming into operation of [the 1991 Act] are …deemed to be timber permits granted under [the 1991] Act…'.

[6] S.123(2) of the Forest Regulations Act 1998 provides that an application for an extension will not be considered by the Board until the information and particulars set out in S.78(3) have been obtained.

[7] These contentions reflect the findings of the January 2003 Review of Disputed Forest Allocations which highlighted concerns over the social acceptability of the extension, and whether the extension conformed to sustained yield management practices, as required under s.78(3) of the 1991 Forestry Act.

In addition OS No. 612 contends that: S.137 of the Forest Act (as applicable in 2002 when the original permit expired) in no way provides for an extension on permits saved from before the Act came into force. Also, under S.143, saved permits can only be extended for a year until a National Forest Plan is established or 31 December 1993 (whichever the sooner) with the intention that such permits are brought into line with the conditions of the 1991 Act as quickly as possible.

It is partly in response to legal challenges that the PNGFA subsequently attempted to change the rules governing extensions to saved permits, with retrospective effect (see Box 1).

Box 1: Changing the rules on extensions to permits granted before the 1991 Act

Under amendments to the Forestry Act in 2005, S.137 (1B) now allows for the extension of Timber Permits originally granted before the Act came into force. S.137 (1E) states that all such timber permits previously saved under s.137 subsections (1) and (1A), and extended under S.78 (as with Wawoi Guavi), are deemed (retrospectively) to be extended under this section as amended.

The Board of the Forest Authority view that these and other amendments to the Act as a necessary and pragmatic measure, in the face of a complex and rigid regulatory framework. However, by allowing existing projects to be extended and operated under the pre-1991 laws, the PNG Eco Forestry Forum believes that: (i) the amendments defeat the purpose of the 1991 Act – including the proper identification of landowners through ILGs; and (ii) they conflict with a commitment in the National Forestry Development Guidelines (NFDGs) to review all existing forestry projects (not including Timber Authorities), and to amend the terms and conditions of saved permits to ensure compliance with the 1991 Act as required under s.137(2). [1,2]

The 2005 Amendments to the Forestry Act were brought into effect in April 2006 in a gazette note issued by the Minister for Forests. The gazette notice purports to back-date the effectiveness of the amendment to the time when Parliament passed the Act. Gazettement nevertheless pends a reference to the Supreme Court by the Ombudsman Commission challenging the constitutionality of S.137(1E) of the Act as amended (see Section 1.1.3).

[1] S. 137(2) of the 1991 Act provides that, 'where the Board is of the opinion that any term or condition of any.. permit, license, timber rights purchase agreement or other authority granted under the [the previous Forestry Act] (repealed); ...or agreement entered into under the Forestry (Private Dealings) Act ...(repealed) ...is at variance with the provisions of [the 1991 Act] to an extent which makes it unacceptable, ...it shall by written notice advise the [license holder or parties to the agreement] of the term or condition that is unacceptable; ...and specify the variation in the term or condition required to ensure compliance with this Act'.

[2] The NFDGs provide for performance audits, including a review of project documentation, field inspections and (where appropriate) notification of remedial action and/or withdrawal of the permit. Where the operator has complied or taken satisfactory remedial action, the Board will then assess the implications of the new legal and policy framework on the project, and will notify the license holder of aspects unacceptably at variance with the Act. The Board may under S.137(2) unilaterally vary terms where agreement cannot be reached. NFDGs, prepared by Tim Neville MP, Minster for Forests, Port Moresby, September 1993, page 28 - 29.

(ii) A legal challenge to the geographical extension of existing permits

A decision granting the Kamula Doso FMA as a geographical extension to the Wawoi Guavi Timber Permit is currently the subject of an application in the Supreme Court (SCM No. 3 of 2006) by the PNG Eco Forestry Forum. [8]

[8] The Ombudsman Commission had applied to be a party to the action but this was ruled out by the National Court in Ken Norae Mondiai and others v. Wawoi Guavi Timber Company Limited and others [2006] PGNC 4; N3061 (see Section 1.4.1 below). The issue of whether landowners from Wawoi Guavi could join was heard by the Supreme Court in May 2006, but judgement had yet to be handed down in December 2006.

The application seeks, amongst others, to restrain the National Forest Board from making any decision over the award of timber rights in respect of Kamula Doso pending determination of an Appeal against a decision of the National Court in 2006. This had given effect to a decision of the Board in February 1999 granting Kamula Doso as an extension to Wawoi Guavi Timber Company's existing Timber Permit No 1-7.

Geographical extensions are permitted under S.64 of the 1991 Forestry Act (as amended in 2000) where the forest resources within the forest development project shall be used primarily to sustain an existing processing facility though subject to certain rules.[9] But the issues before the court include:

- Whether there had been valid acquisition of resource rights under the original Kamula Doso FMA.
- Whether the rules concerning geographic extensions as contained in the Forestry Amendment Act 2000 were applied, including the requirement that the area added should be so small on its own that it is unable to operate as a stand-alone project.
- Whether litigation between the logging company and the PNGFA, seeking to give effect to a decision of Board in 1999 granting Kamula Doso as an extension of the Wawoi Guavi Timber Permit, was settled in accordance with the wishes of the National Forest Board.
- Whether, in granting orders to give effect to a decision of Board in 1999, the Kamula Doso FMA be an extension of the Wawoi Guavi Timber Permit, the National Court was not informed of numerous important matters that should by law have been drawn to its attention.

Cleared log road

The contentions set out in SCM No. 3 of 2006 reflect the findings of the Ombudsman Commission (2002)[10] and the Independent Review of Proposed New Forestry Projects,[11] that the Kamula Doso FMA, as signed by the landowners, was invalidly executed and certified and that these failures needed to be rectified. Amongst others, the Ombudsman concluded that any future allocation of Kamula Doso "*must comply with the provisions of the Forestry Act as amended in 2000*" – including the requirement that it be allocated by competitive selection.

[9] Under S.64(3), a forest development project may qualify as an extension to an approved timber permit operation where it is contiguous to an existing timber permit, the holders of which have a satisfactory record and are acceptable to landowners. It is also necessary that the project is the subject of a development options study, final project guidelines are consistent with the National Forest Development Programme, and 'is, in the opinion of the Board, so small on its own that it is unable to operate as a commercially sustainable forest development project'. S.64 (4) provides that all eligible timber permit holders with operations contiguous to the project in question shall be invited by the Board to make project proposals.

[10] Ombudsman Commission of Papua New Guinea

[11] PNG Forest Review Team, Individual Project Review Report Number 16, Kamula Doso (Western Province)

1.1.3 Do resource acquisition and allocation under the Forestry Act comply with the Constitution as well as statutory rights and duties?

The National Goals and Directive Principles and other provisions of the PNG Constitution establish clear concepts for the natural resource development, including: (i) national sovereignty; (ii) equality and fairness; (iii) development through means that preserve resources for future generations; and (iv) the predominance of Papua New Guinean cultural values and custom. The 1991 Forestry Act and related administrative decisions have never been comprehensively tested in terms of their adherence to these concepts.

Supreme Court Reference questions both the process of timber rights purchase from landowners and the monopoly adopted by the State

The decision of the Ombudsman Commission to file a Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court is therefore highly significant. It challenges provisions of the Forestry Act (as amended in 2005) on timber rights acquisition and allocation in terms of their constitutionality, and whether they comply with statutory rights and duties established under the Act itself. As such, the Supreme Court Reference is an important opportunity to both refine principles established in the Constitution, as well as to take stock of how the forestry sector is currently administered.

The Supreme Court Reference questions both the process of timber rights purchase from landowners as well as the monopoly adopted by the State over forest development once rights have been acquired (see also Box 2 below). It does so from three perspectives:

i) *The National Goals and Directive Principles on the equal participation by resource owners in the development of their resources, as well as the right to consultation and participation under s.6 and s.46 of the Forestry Act itself.* The Ombudsman has submitted questions as to whether these principles are fulfilled by:

- The purchase of timber rights under Forest Management Areas (FMAs). Alternatively, do FMAs merely equate to the rights and interests of resource owners as based on the consideration given in an agreement for sale and purchase of their resources?
- S.17 of the Forestry (Amendment) Act 2005. This cancels s.59 of the 1991 Forestry Act, which required PNGFA to consult with resource owners in relation to the intentions of the Board in recommending the allocation of a timber permit over that area.
- S.62 and 63 of the principal 1991 Forestry Act requiring PFMCs to investigate participation by landowners in Forest Development Projects and/or prepare guidelines for such projects in consultation with landowners.

ii) *Equality of Citizens under s.55 of the Constitution*. The Ombudsan has asked whether the cancellation of s.59 of the 1991 Forestry Act under s.17 of the Forestry (Amendment) Act 2005 amounts to discrimination against forest resource owners, as compared with provision for consultation and participation under the Part III, Div 6 of Oil & Gas Act 1998:

- S. 48 of the Oil & Gas Act provides for a development forum to be convened 'prior to the first grant of a licence or licences in respect of a petroleum project [which] fair[ly] represent[s] all persons or organisations which the Minister believes will be affected by that petroleum project.'

- S.50 of the Oil & Gas Act provides that the State, resource owners and affected Local-Level and Provincial-Level Governments shall enter into a Development Agreement.[12]

iii) *Protection from Unjust Deprivation of Property under s.53 of the Constitution, as well as s.38 on valid qualifications of rights and freedoms guaranteed under Part III.3.C of the Constitution (Special Rights of Citizens)*.

Where forests are essentially private property, the Constitution implies that commercial scale harvesting should clearly demonstrate that it is done in the National interest. The Ombudsman has asked whether s.1 of the 1991 Forestry Act provides an adequate enough basis to ensure this by:

- Not only declaring a particular public purpose but also describing, defining, stating the necessity of and affording reasonable justification for it.
- Specifying the rights or freedoms that it regulates or restricts, etc.

In addition, the Supreme Court Reference addresses *Provisions of the Constitution and the Forestry Act itself on the sustainable management of natural resources*. In this respect, the Ombudsman has asked whether s.137(1E) of the 1991 Forestry Act (as amended), providing for the extension of saved timber permits originally entered into under the pre-1991 *Forestry (Private Dealings) Act (repealed)*, is contrary to conservation principles, sustained yield management, and logging practice required by the Constitution as well as s.6, 58(d), 78 and 137 of the Act.[13]

Box 2: Equitable fraud?

The questions raised by the Ombudsman Commission in the Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court are pertinent to the allegations of some commentators that the process of resource rights acquisition amounts to "equitable fraud", on grounds that:

(a) landowners have no access to independent legal advice when entering into an FMA, unlike any normal process of land conveyancing;

(b) the royalty payment received by landowners is neither commensurate with the value captured by license holders and processors, nor with damage and wastage during the harvest process;

(c) landowners have minimal role in forest management once an area has been licensed;

(d) neither the TRP nor the FMA between the PNGFA and landowners include enforceable promises for infrastructure, services, or spin-off businesses. Unlike a Development Agreement under the Oil and Gas Act 1998, these are only included in the project agreement between the PNGFA & the logger, to which landowners are not privy.

None of these issues have yet been tried in court, which only highlights the importance of the Supreme Court Reference.

[12] Under the 1999 Forestry Act, there is no equivalent instrument other than the FMA between the State and resource owners (S.58) and the project agreement between the licensee and the State (S.72(b)(i)).

[13] S.137(1E) of 1991 Forestry Act (as amended) provides that a saved timber permit originally entered into under the Forestry (Private Dealings) Act (Chapter 217) (repealed), 'may be extended ...by the Minister upon recommendation of the Board where the Board considers that the remaining forest resource in the project area is not sufficient to meet the requirements of section 78', but contains no reference to social acceptability and other conditions as required for the extension of timber permits under S.78 or S.137(1B)

1.1.4 Claims in tort

Alongside legal challenges on grounds of sustainability, due process and/or adherence to principles established in the Constitution, landowners have also filed claims in tort for: (i) trespass due to illegal logging (e.g. in the absence of a valid Timber Authority or extension to a Timber Permit); (ii) related private and public nuisance caused by logging practices in breach of the PNG Logging Code of Practice (1996); as well as (iii) breach of duty of care owed to landowners and related losses and damages suffered by them.

Ongoing litigation includes a writ of Summons (WS) No. 1465 of 2004 filed by landowners affected by the activities of the Wawoi Guavi Timber Company. Based on the argument (set out in OS612 of 2004) that the permit was improperly obtained and in breach of the Forestry Act, the writ contends that the Timber Company does not possess adequate/valid timber rights to enter and fell trees on the customary land of the plaintiffs. A similar action is being brought by landowners in the Kiunga Aimbak road alignment case.

Successful claims to date include *Warongoi Blockholders* [1997] SCA 78, 80, 81, in which the Supreme Court upheld orders for damages payable to leaseholders of customary land for trespass and nuisance as a result of logging activities. K2.3 million in damages were awarded.

1.2 Clarifying administrative procedures and standards of performance

The current weight of litigation stems in part from a continuing lack of procedural clarity

The current weight of litigation over the validity of FMAs and decisions to award and extend licenses stems in part from a continuing lack of procedural clarity, including auditable standards of performance.

Timely amendments to the 1991 Forestry Act have been made to address potential loopholes, including changes to S.64(3) – (7) in 2000 governing the geographic extension of existing permits over contiguous areas, as well as S.89 in 2005 governing the procedure for approval of timber authorities. Both sets of changes responded to specific instances of abuse and subsequent investigation by the Ombudsman Commission and Independent Forest Review Team, and/or litigation.

PNGFA has also gazetted nearly 300 forms under the 1st Schedule of the 1998 Forestry Regulations (as amended), and developed detailed manuals and procedures for incorporation of landowner groups, issuances of Timber Authorities, planning monitoring and control of log harvesting, identification, scaling and reporting on logs, as well as log exports.

Nevertheless, while procedures for monitoring and control are relatively detailed, it remains difficult to verify the authenticity of documentation submitted by forest officers and licensees. There also remains significant procedural ambiguity. Key areas of concern include:

- landowner awareness raising prior to the acquisition of timber rights under Forest Management Agreements, and participation in the evaluation of project proposals;
- means of verifying authenticity of tenure and landowner consent, especially in relation to applications for Timber Authorities;
- structures for distribution of landowner benefits;
- ambiguities over the prosecution of offences;
- lack of clear procedures for administration of domestic log movements, and for monitoring mill throughput and recovery rates as a guarantee on chain of custody.

The development of clear performance standards would ensure greater consistency in the implementation of these processes. It might even limit the chances of legal conflict further down the road.

1.2.1 Landowner awareness raising

The full process of resource acquisition and allocation under Forest Management Agreements is set out in Annex 4.2.

While the PNGFA conducts some level of landowner awareness-raising prior to the incorporation of ILGs and the acquisition of timber rights, the 1991 Forestry Act makes no specific provision for this. Nor have procedures for awareness-raising been developed to assist NFS officers. This makes it difficult to verify whether all affected landowners have given their Free and Prior Informed Consent (FPIC), based on a proper understanding of the potential implications of ILG incorporation and logging. Under circumstances where NFS officers may be required to complete awareness-raising in as little as 3 weeks, over an area as large as 100,000ha[14] and with remote communities, establishing clear standards of performance for (and means of verifying) FPIC remains a significant gap.

Raising landowner awareness can lead to better management of forest resources

[14] PNGFA, 2 November 2006

It is not surprising, therefore, that the Forest Authority has been criticised for not explaining clearly to land groups what they are signing up to. There are no examples of a FMA where the NFS has actually entered into detailed discussions with the landowners as to how best to develop their areas, prior to obtaining consent. The time frame for acquisition is simply too short (Power, 2000). Applying a longer time frame might, however, allow the Forest Authority to determine more appropriate forms of forest management for any given area (Turia, 2005).

1.2.2 Resource acquisition under Timber Authorities

There are no specific guidelines for resource acquisition under Timber Authorities. Whereas under a FMA, the NFS takes responsibility for awareness raising, land group incorporation and acquisition, under the Timber Authorities it is left to applicants. For Timber Authorities, including selective harvesting of 5000 m^3, and forest conversion for road-line development or agriculture, applicants need only secure the approval of a clan agent, signed in front of a village magistrate or land mediator (using Form 165 in Schedule 1 of the 1998 Forestry Regulation). ILG incorporation is an option, but is not necessary. No landowner awareness need be undertaken, nor does a Timber Authority require a development options study or project guidelines.[15] This has previously opened the way for abuse of resource acquisition processes, as highlighted by the Kiunga – Aimbak case (see Box 3).

The 2005 amendments to the Forestry Act have strengthened scrutiny of applications for Timber Authorities by both the PFMCs and the Board. Landowner consent nevertheless remains a concern given growing interest in Timber Authorities as a source of raw material for downstream processing and as a means for landowner companies to partner with external investors.[16, 17] That said, additional safeguards on resource acquisition will need to account for the already high transaction costs of obtaining a Timber Authority relative to the volumes of timber involved (less than 5000 m^3 per year).

Box 3: The Kiunga – Aimbak road alignment case

This case concerns the award of a Timber Authority to Concord Pacific Limited for forest conversion in respect of stages 2 and 3 of the Trans Island Highway in the Kiunga-Aiambak area of Westem Province. Based on information received from the Ecoforestry Forum in November 2002, the Independent Forest Review Team (Review of Disputed Timber Permits) judged the application for a Timber Authority deficient in respect of S.90C(3) which requires (amongst others) verification of ownership and the consent of each resource owning clan agent within the project area. Specifically, landowners allege ILG incorporation processes were left incomplete; the company did not even submit completed application forms to the Registrar of Land Groups. The fact that the license had been expedited with neither the prior recommendation of the PFMC nor the approval of the Board meant that these deficiencies were not addressed.

Sources: Forestry and Conservation Project Review Team (Kiunga - Aiambak, Simbali And Bonua Magarida) Final Report; Sep Galeva and others v Paiso Company Limited and others [2003] OS 427.

[15] Clement Victor (2006) A case study of the Situm Timber Authority, Morobe Province, for the PNG Forest Sector Studies, European Commission.

[16] Ecoforesty Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October, 2006.

[17] The Situm Timber Authority, Morobe Province, is a case in point. This is a small-scale logging operation with maximum harvestable volume of 5,000 m3 per year for domestic processing only. In this case, landowners approached PI Logging Company of Lae directly. PI is a registered Forest Industry Participant is using the timber harvested for its own downstream processing operations, targeting the local market. Clement Victor (2006) A case study of the Situm Timber Authority, Morobe Province, for the PNG Forest Sector Studies, European Commission.

1.2.3 Certification of authenticity of tenure and landowner consent

S.58(f) requires a FMA to contain a certificate[18] from the Provincial Forest Management Committee '*to the effect that it is satisfied as to: (i) the authenticity of the tenure of the customary land alleged by the persons or land group or groups claiming to be the customary owners; and (ii) the willingness of those customary owners to enter into the agreement*'. At present, no specific guidance has been issued to PFMCs on means of verifying this beyond the documentation generated by land group incorporation and registration.[19]

The capacity of a PFMC to make its own, independent determination of authenticity is essential if it is to protect itself over negligent mis-statements

The same problem applies to s.64, s.78 and s.137(1B) (as amended) of the Forestry Act (1991). These require the PFMC to ascertain the '*acceptability*' of proposed extensions and renewals to affected landowners in the project area. In circumstances where the membership of ILGs may have changed since a FMA was first agreed, a methodology for verifying consent seems essential.

In both instances, the PFMC relies on the briefing information that is provided by the same PNGFA staff who have conducted landowner awareness raising, assisted in the incorporation of land groups and collected the signatures for the FMA. The capacity of a PFMC to make its own, independent determination of authenticity is, however, essential if it is to protect itself over negligent mis-statements and related fraudulent acts.

1.2.4 Landowner participation in resource allocation

The controversy generated by the cancellation of s.59 of the Forestry Act (1991), including the 2005 Supreme Court Reference, highlights a lack of confidence in the ability of resource allocation processes to guarantee landowner participation (beyond their basic consent at the acquisition stage). Key steps in the allocation process include Development Options Studies (s.62(4)), project guidelines (s.63(2)), PFMC evaluation of project proposals (s.68) and project negotiation (s.70 and 71). Section 28(3) of the Act entitles affected landowners to attend PFMC meetings. However, neither the Forestry 1991 Act nor the Forestry Regulations 1998 provide any further guidance on landowner involvement at each of these stages. This is compounded by the fact that landowners may themselves be unaware of the allocation procedure.

S.59 of the Forestry Act (1991) has now been replaced by an amendment to s.57. This requires the Board to consult with the Provincial and Local-Level Government, as well as members of Parliament and the electorate, as to its intentions in entering into an FMA. Here too, no clear procedures have yet been defined. The only additional guidance lies in:

- s.83 of the Forestry Regulations Act (1998) (as originally applied to s.59) under which local stakeholders have 14 days to submit their views having been notified by the Board.
- Step 24 of the PNGFA's *Checklist of steps required to be taken before a Timber Permit can be granted*. This refers to s.115 of the Organic Law on Provincial and Local Level Government 1998 ('Control of Natural Resources'). This requires National, Provincial and Local-Level Government '*in the province or provinces where the natural resource is situated* [to] *liaise fully with the landowners in relation to the development of the natural resources.*"

[18] Form 79 Sch 1, Forestry Regulations 1998.

[19] This includes census lists of members, genealogies, group property lists, constitutions, as well as applications and certificates of registration, as specified in the Land Groups Incorporation Act (1974) and the PNGFA Manual on Land Group Incorporation (February 2005).

...standards for landowner participation should have been determined for all other steps in the resource acquisition and allocation process...

It is arguable that standards for landowner participation should have been determined for all other steps in the resource acquisition and allocation process, before S.59 was repealed. Effective implementation of s.57 (as amended) now depends on the development of clearly drafted regulations and forms that reflect the original intent of s.59.

1.2.5 Structures for the distribution of benefits

As stated in section 2.1 of this report, s.235 of the Forestry Regulations (1989), requires landowners to '*appoint or establish, and nominate for recognition by the Managing Director, a corporate body or Local-Level Government to represent them*' for purposes of apportioning payments. The Regulation is, however, silent on how these should relate to land groups incorporated under s.57 of the Forestry Act (1991) in line with the PNGFA *Manual on Land Group Incorporation*.

Whereas the policy intent behind land group incorporation had envisaged ILGs as bodies represented within the structure of local government (e.g. through Ward Development Committees), and/or corporate structures (either as shareholders under the Companies Act 1997 or as business groups under the Business Groups Incorporation Act 1974 for the purposes of 'working' group titles), the provisions of S.235 provide no guidance on verifying that nominated bodies reflect these aspirations.

S. 235 (2) merely provides that "*where the Managing Director is of the opinion that a body nominated under Subsection (1) satisfactorily represents in accordance with this section the customary owners in the project area, he shall recognise the body for such purpose, and notify the body accordingly.*"

Logged forest

1.2.6 Prosecution of offences

In practice, it would appear that few cases have been prosecuted – in part given weak legal resourcing within PNGFA and also (according to some commentators) alleged interference in the actions of Project Supervisors in controlling logging operations.

In *PNGFA v Concorde Pacific & ors* N2465 of 2003, concerning the Kiunga – Aimbak road alignment project, it has been suggested that the Forest Authority was forced into court given a complaint by NGOs to the World Bank Inspection Panel and the implications this might have had for the proposed FCP loan. Kandasi J. was also scathing of the performance of the PNGFA the State and its lawyers, including its failure to perform its policing role. [20]

...it would appear that few cases have been prosecuted...

It has also been suggested that, whenever PNGFA does chose to take disciplinary action against operators referred to it by its field officers, it prefers to compound offences (i.e. issue a fine). [21] In doing so, PNGFA may accord itself substantial discretion. With the exception of a 'default penalty' under s. 122(1),[22] the Act merely states penalties up to a certain limit and/or a maximum jail sentence with the possible intent that this be determined in a court of law. The Forestry Act 1991 does not also specify that the PNGFA may compound offences. Rather, it would appear that all offences must be prosecuted by a Forest Inspector. [23]

At issue is the need to limit the exercise of discretion and to maintain an effective deterrent where compounds might currently be so low as to be written off as a routine operating cost by offending companies. There is hence an urgent need for further legal and administrative guidance on when offences may be compounded or prosecuted in court, and the minimum penalty that may apply in different cases.

This could be further enhanced by a vigorous system of cash bonds. Although a Performance Bond mechanism exists under the Forestry Act, it has not been actively used as an enforcement tool. S.92 authorizes the Authority to draw directly on a bond in the event of non-performance by the holder of the timber permit, timber authority or license.

1.2.7 Procedures for control of domestic timber flows, mill throughput and recovery rates

With a focus on collection of export revenues, PNGFA has established a log export monitoring scheme operated by SGS (for further details of SGS's functions, see Annexes 1.7 and 2.5). This includes issuance of log tags printed by SGS as a means of tallying logs for export. Tags enable traceability back to individual harvest blocks. SGS will also verify log shipments against prices endorsed by PNGFA, a Log Export License from the Department of Trade and Industry, as well as a Log Export Permit from PNGFA. This system does not yet apply to domestic processing and exports of processed timber – both of which are tax exempt as an incentive for enhancing local value-added. But as processed exports rise exponentially, procedures to endorse provenance, mill throughput and recovery rates as well as processed export consignments seems essential in guaranteeing chain of custody. There is at present no mechanism to prevent a mill from under-declaring consumption or timber from unregistered sources from slipping into the supply chain for processed products.

[20] PNGFA v Concorde Pacific & ors N2465, of 2003, p38

[21] PNGFA, 23 October 2006.

[22] S.122(1) 'A forest industry participant, and any person acting in the capacity of an employee, servant or agent of a forest industry participant, who engages in forest industry activities except under and in accordance with a timber permit, timber authority or license, held by the forest industry participant...'

[23] S.129. A forest inspector is an officer of the NFS who is appointed by the Minister on the recommendations of the Board under S.41.

1.3 Reforming the allocation of functions for forest-sector administration

A description of the institutional architecture governing the forestry sector can be found in Annex 3. This section assesses how the different components of the PNGFA - the National Forest Service (NFS), the Board and the Provincial Forest Management Committees (PFMC) - might be better positioned to deliver on their objectives and functions under the 1991 Forestry Act. Options for outsourcing as well as revitalizing internal checks and balances are discussed. Complementary reforms to the role of Provincial- and Local-Level Government, as well as to institutions for landowner incorporation and support, are also addressed.

1.3.1 The functions of the National Forest Service (NFS); decentralise and outsource?

(a) Risk of overstretch

S. 9 of the 1991 Forestry Act tasks the Board with carrying out the core functions of PNGFA as set out in S. 7, including:

i) planning (including a certified forest resource inventory, and up-to-date National Forest Development Guidelines and National Forest Plans);

ii) resource acquisition under FMAs;

iii) selection of operators and negotiation of license conditions;

iv) control and regulation of exports;

v) administration and enforcement;

vi) registration of forestry industry participants;

vii) negotiation of international obligations.

The NFS bears responsibility for all these functions, but the 1991 Forestry Act provides little guidance in terms of what aspects. The NFS may also be delegated functions by the Board and the PFMCs under Ss.19 and 30(2). Where many PFMCs lack technical capacity, most in fact depend on the NFS to fulfil their functions under the Act. In addition, the NFS must take responsibility for landowner incorporation under S.57, given limited resources within the Department of Lands and Physical Planning.

The NFS is therefore left with a broad and potentially open-ended mandate spanning both administrative and forest management functions. At the same time, out of a requested K50 million, the NFS receives an annual budget of K23 million. It is not within the scope of this report to judge whether this is sufficient to meet the NFS' mandate. This issue is nevertheless pertinent to whether the NFS is able to fulfil its mandate in respect of three crucial aspects of its mandate: (i) resource planning; (ii) monitoring and enforcement; and (iii) a duty of care owed to landowners. This is turn raises the need to examine how funding is currently prioritised and whether, if resources are not sufficient, the PNGFA should continue to grant resource rights beyond areas currently licensed.

Resource planning

The forest resource assessments undertaken by the Forest Inventory Mapping (FIM) system have only just been adopted as a certified forest inventory, some 15 years after the Forestry Act came into force. This may finally provide the basis for bringing existing projects into compliance with the requirements for sustained yield management practices under the 1991 Forestry Act. The lack of resources has been cited as the reason for such a lengthy delay. The National Forest Plan had itself not been updated since it expired in 2001, nor has the National Forest Development Guidelines (1993) despite a commitment to renewal every three years.

Monitoring and enforcement

The Field Services Division of NFS operates on a budget of K5 million a year. This supports 126 technical staff, including 90 field offers with responsibility for 42 Timber Permits, plus other Timber Authorities and Licenses (see Annex 2). This, however, is insufficient. [24] For a large project like the Makapa, for example, at least two officers are needed yet only one may be active at any one time, e.g. for set-up inspections and closures. From the company's perspective, the lack of NFS presence also hinders work, e.g. when the responsible officer is in Port Moresby. A permanent presence by the PNGFA at base camp is an important issue for the company. Field officers also lack many of the basic resources needed to operate independently of concession companies – including housing, as well as vehicles and radio links. [25]

With the challenge of having to monitor up to 30 'set ups' (harvest blocks) at a time, field officers are having to rely on spot checks as opposed to detailed inspections in order to meet target response times and other obligations under the Planning, Monitoring and Control Procedures. This places greater onus on self-regulation by companies depending on corporate policies on SFM or supply chain management, as well as professional accreditation of company log scalers by the Timber and Forestry Training College in Lae, as means of maintaining integrity. [26]

Adequate control of installed capacity is essential to any prospect of sustainability

The NFS has not yet implemented a system to monitor mill recovery rates, as the basis for regulating installed capacity – despite the growing proportion of processed wood exports. Adequate control of installed capacity is essential to any prospect of sustainability. [27]

Duty of care to landowners

Given the severe shortage of capacity in land administration, the PNGFA has taken responsibility for the incorporation of land-groups within project areas. This includes physically assisting their registration with the Registrar of Incorporated Land Groups in the Department of Lands and Physical Planning (DLPP). But the NFS' own resource limitations means that its Resource Acquisition and Landowner Liaison functions are unable to provide ongoing extension and support for ILGs once incorporated. This includes the management of ILG membership and funds.

[24] PNGFA, 23 October 2006.

[25] Vatabu M. (2006) Makapa Timber Project Case Study Report – Western Province, Papua New Guinea Forest Sector Studies.

[26] PNGFA, 23 October 2006.

[27] PNGFA, 23 October 2006.

The ruling of the Supreme Court in Duman Dibiaso Incorporated Land Group No. 1664 and others v Kola Kuma and others (2004) SC805 is significant in this respect. It found that the PNGFA, as a trustee of royalties held on behalf of landowner groups, has an interest not only in ensuring those monies are paid into designated accounts, but also in their final disposition for legitimate purposes. In a situation where large royalty payments are encouraging ILGs to splinter into smaller family-based units, and with upwards of 500 ILGs in some FMAs, this presents a serious challenge which the NFS is not equipped to address. This reflects s.235(7) of the Forestry Regulations Act 1998 which provides that the Board may suspend the operation of bank accounts where it has reasonable grounds to believe that the moneys have been expended or invested in breach of any rules and procedures governing or establishing the representative body.

(b) Divest powers in Provincial and Local-Level Government?

Some provincial and local-level administrations are working proactively to put in place policies and need as much support as they can get

There is currently no functional link between the Provincial and Local Government and the obligations of the PFMC to (amongst other things) verify authenticity of tenure, and the social acceptability of proposed permits and extensions. This is exacerbated by the fact that Provincial and Local-Level Government sees no share of royalty payments other than what it receives in negotiated levies from specific projects. There is hence very little incentive for these lower tiers of government to see that the requirements of the Forestry Act are adequately complied with.

Yet the fact that PFMCs do not have the capability to independently verify the work of the NFS (see Section 1.3.2) and that the NFS is itself over-stretched, presents a strong case for vesting greater powers in local government structures, commensurate with the Organic Law on Provincial Level and Local Level Government (1997). This includes resourcing and empowering Ward Councils and Ward Development Committees in facilitating and overseeing landowner awareness-raising and land group incorporation processes.

SGS tagged logs

While there is a lot of disappointment and scepticism in the decentralisation process to date, it constitutes a political settlement that cannot be retracted and can only be made to work. There are also Provincial and Local-Level administrations such as Milne Bay that are working proactively to put in place policies on sustainable harvesting and down-stream processing, and who need as much support as they can get.

The challenge lies in ensuring that decentralisation does not lead to the replication of problems already experienced by centralised management. This in turn depends on functioning local accountability mechanisms.

(c) Outsource?

Outsourcing may be a further option in assisting the NFS to better manage its core mandate, in addition to decentralising functions. The value of outsourcing may be demonstrated by the log export monitoring scheme operated by SGS (for further details of SGS's functions, see Annexes 1.7 and 2.5).

SGS was originally contracted in 1995, responding to the 1989 Independent Commission of Inquiry under Judge Barnett. This identified major losses in export revenues as a result of extensive transfer pricing. Since SGS began work, an additional K265 million in export revenues, as well as K27 million in landowner payments, has been collected. The role of an outsourced log export monitor has consequently gained strong support within Treasury. The SGS tag-based log tallying system can also be used to secure chain of custody back to landing points within individual set-ups (harvest blocks).

...policy on further outsourcing functions of the NFS will need to lay down operating principles to assist in the selection and oversight of contractors...

While presently mandated to monitor only log exports, it has been suggested that SGS's remit be extended to include outsourced monitoring of upstream harvesting and timber administration. Under circumstances where NFS field staff lack resources for more intensive monitoring, this would provide greater assurance of compliance with the Logging Code of Practice, as set out in Planning, Monitoring and Control Procedures. The idea could be taken a step further to outsource all aspects of field monitoring and timber administration (including royalty payments). This could potentially free up the NFS to focus on core aspects of forest management, including resource inventories, SFM standards as well as landowner awareness-raising and support.

However, any policy on further outsourcing functions of the NFS will need to lay down operating principles to assist in the selection and oversight of contractors, including clear tests of independence and impartiality. This is essential if such functions are to enjoy both public and market credibility.

There is also a strong feeling amongst foresters that, instead of 'hollowing out' the NFS, the emphasis needs to be on capacity building and institutional strengthening both centrally and at local government levels. Indeed, it had originally been intended that SGS would transfer new skills, technology and management procedures, to a point where its functions could eventually be re-absorbed by NFS. ISO9000 certification of the export monitoring procedure theoretically enables a complete hand-over of the documentation process. Although NFS staff have been seconded into SGS for training, no such decision has yet been taken. [28]

An alternative to further outsourcing might be routine 3rd-party audits of NFS' field operations. This would also provide greater assurance of legal compliance, but it does not address the fact that NFS' field operations are potentially over-stretched. Any discussion of further outsourcing and/or third party auditing would need to take place as part of a broader review of the NFS' core functions and the allocation of resources to fulfil these.

[28] SGS, 17 October 2006.

1.3.2 The Functions of the National Forest Board and the Provincial Forest Management Committees (PFMCs)

(a) A deteriorating set of checks and balances

The intent behind the Forestry Act (1991) was to institute a system of checks and balances that also secured greater stakeholder participation. This is embodied in:

i) The Board and the Provincial Forest Management Committees (PFMCs) as evaluatory mechanisms, versus the planning, administration and control functions of the NFS.

ii) The PFMCs as a consultative instrument versus the Board as the body responsible for carrying out the functions and objectives of the PNGFA.

iii) The inclusion of stakeholder representatives within the membership of the PFMCs and the Board, including Local and Provincial Government, NGOs, landowners and industry.

The roles of the Board and the PFMCs are described in Annex 1.1 and 1.3 respectively. Those of Local and Provincial Governments and landowner groups are described in Annex 1.4 and 1.6

This arrangement does not detract from the role of the Minister as the representative of the National Executive Council in approving policies, licensing decisions and appointments. However, it does severely curtail the Minister's discretionary powers.

Lack of functioning checks and balances has compromised the ability of the PNGFA to ensure consistent application of rules and procedures

However, judging by current case law, the findings of the Independent Forest Review Team and other commentators, the operation of these checks and balances appear to have been hampered by (amongst others):

- The relative vulnerability of the NFS to political interference, given the lack of consistent leadership. The NFS has operated on the basis of Acting Managing Directors for the past few years.
- The inability of the Board and the PFMCs to secure independent verification of information submitted to them by the NFS, and of the legality of their own decisions.
- The fact that landowners have no access to independent legal advice when entering into agreements with the State and with licensees.

NGOs have also criticized the 2005 Amendment to the Forestry Act as increasing political control by: (a) including a Ministerial nominee on the Board; (b) removing the PNG Eco Forestry Forum as a statutory member of the board (under circumstances where it was widely perceived as an honest broker); and (c) enhancing the power of the Board to suspend PFMCs. [29, 30] With continuous changes to its membership through

[29] S.10(1)(i) and S.25(7) – (9) Forestry Act (1999) as amended.

[30] Eco-Forestry Forum, The Forestry Amendment Bill 2005. Unwinding 10 years of reform.

amendments to the Act, it is questionable how effectively the Board can perform its duties. Civil society groups also highlight the fact that Board must be in a position to hire and fire its CEO in line with their statutory and fiduciary responsibilities. The CEO is currently a political appointee.

The lack of functioning checks and balances has on occasion compromised the ability of the PNGFA to ensure consistent application of rules and procedures. The judge in *Sep Galeva and others v Paiso Company Limited and others* [2003] OS 427, ruling on the grant of Timber Authorities for the Kiunga – Aimbak road alignment highlighted how "[t]*he lack of …a clear and correct line of formal communication between the key players in compliance with the procedural requirements prescribed by the laws* [was] *clearly evidenced from the documents including the* [PNGFA] *files*."

The award of the Vailala Blocks 2 & 3 project area to Frontier Holdings Limited is a similar example. Turia (2005) described how political circumstances came to dictate the resource acquisition and allocation process (see Box 4).

Box 4: The Vailala Blocks 2 and 3 Timber Project

Timber Permit 2-16 was issued by the Minister for Forests to Frontier Holdings Limited on 24 June 1992, for a period of 10 years. This covered Vailala Blocks 2 & 3 - two separate but adjacent timber areas in Ihu District, Gulf Province. The permit was issued on the assumption that Vailala Blocks 2 & 3 had been acquired as TRPs prior to the 1991 Forestry Act. However, the PNGFA had no record of this purchase in their listings of Forest Resource Acquisitions. PNGFA was then placed under intense political pressure to re-acquire the timber rights as FMAs, despite the fact that a National Forest Plan was not yet in place and was a pre-requisite for forest resource development under S. 54 of the Act. In the event, it took the PNGFA the shortest time (just two weeks) to complete the landowner awareness phase for the re-acquisition of the Vailala Blocks.

Source: Turia (2005)

(b) Enhancing the capacity of the Board in overseeing the functions of the PNGFA

These and other cases have inspired some discussion of mechanisms to safeguard the system of checks and balances within the PNGFA, as originally intended under the Act. Building on the suggestion of a Forestry Tribunal, originally put forward by Judge Barnett, it was proposed by individuals within the PNG government that a Probate Commissioner be established. [31] This would have power to vet and sign off on administrative decisions, and to seek prosecution in instances of illegality.

This idea was subsequently adopted by members of the Board as a means to shield its decision-making processes from external interference – but in the form of a Board Secretariat with the power to sign off on both NFS advice as well as Board Decisions, and to contract in third parties to assist it in its work (see Box 5). Currently, the Board has little basis on which to inform its decisions beyond the information that is provided to it by the Managing Director of the NFS.

[31] INA, 30 October 2006.

Box 5: Proposed Functions of the National Forest Board Secretariat

As proposed for inclusion in the 2005 Forestry (Amendment) Act, the Board Secretariat would have the power to (amongst others):

- certify Board submissions for their compliance with the Act and other relevant laws and Government policies, including the acquisition and allocation process of forest development projects, operational audit of projects, audits of the accounts of the Authority, and implementation of performance bonds;
- monitor and report on the compliance of Provincial Forest Management Committees in the performance of their powers and functions,
- liaise with the Board and the National Forest Service on Board matters relating to the powers and functions of the Authority.

The propose amendment would have also empowered the Board Secretariat to brief out or outsource to an independent third party matters including submissions or papers prepared for the Board for compliance with the Act and other relevant laws, standard technical forestry, environmental, financial, accounting, and commercial practices and Government policies

Source: proposed text for Forestry (Amendment No.2) Bill 2005

A Board Secretariat was proposed for inclusion in the 2005 Forestry (Amendment) Act. It was not ultimately adopted. Though by no means a complete solution, it deserves further attention as a means to revitalise the checks and balances originally envisaged in the Forestry Act 1991. It may also provide the basis for routine 3rd-party auditing of NFS' core functions.

Improved capacity of PFMCs may help to reduce poor tree felling

(c) Resourcing and empowering PFMCs to act independently of the NFS

Annual meetings of PFMC NGO and landowner representatives facilitated by the PNG Eco-Forestry Forum Inc. have raised a number of common constraints. Amongst others, PFMC members highlight the lack of resources that would otherwise enable them to independently verify key requirements under the Act. These include: (i) the authenticity of tenure and the willingness of customary owners to enter into an FMA under s.58(f) of the Forestry Act; as well as, (ii) social acceptability, performance of licensees and remaining forest resources in respect of applications to extend or renew a Timber Permit under s.78 and s.137. At present PFMC members are largely reliant on the NFS Regional Offices for information and access to project sites.

The capacity of PFMCs to act independently of the NFS in undertaking such assessments is arguably essential to the system of checks and balances intended in the 1991 Act. The cases of PNGFA v Concorde Pacific & ors [2003] N2465 and Sep Galeva and others v Paiso Company Limited and others [2003] OS 427 highlighted the vulnerability of PFMCs to poor advice when vetting applications for licenses and the fact that they may get no advice at all. Greater resourcing would enable the PFMCs to play a more active role in awareness-raising prior to the conclusion of an FMA and in liaising with local-level governments. Some PFMCs (notably Western Province and Simbu) have successfully secured Provincial budget allocations in addition to funding by the Forest Authority, but remain the exception. [32]

Other constraints highlighted by PFMC members include: failure to ensure proper landowner representation at meetings; irregularities over frequency, prior notification, attendance and minute-taking of PFMC meetings; as well as legal awareness and other training in fulfilling PFMC roles and responsibilities under the Act. [33] Thought also needs to be given to means for shielding PFMCs from external interference, including an equivalent to an independent Board Secretariat.

1.4 Overhauling institutional arrangements for landowner participation

Steps to reform the allocation of functions for forest-sector administration should also take account of the need to overhaul institutional arrangements for land-group incorporation and participation. The latter provides the basis for just and secure timber rights acquisition and benefit-sharing.

The main purpose of the Land Groups Incorporation Act (1974) was to provide the legal vehicle for the holding of registered group titles, and not a means of identifying and adjudicating who the true owners of the land are. The 1973 Commission of Enquiry into Land Matters envisaged that the registration of customary land would be addressed under separate legislation. It also enabled landowners to cash crop their own land (Whimp, 1998).

Many ILGs occur within major forestry projects

[32] Eco-Forestry Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October, 2006

[33] Eco-Forestry Forum, Minutes of Workshops for PFMC NGO and Landowner Representatives, 26 – 28 October 2004, 25 – 27 October 2005, 24 – 26 October 2006.

The 1974 Act has worked out very differently in practice. There are now around 10,000 registered ILGs (Antonio, 2006), most of which have been established as a mechanism to manage and distribute benefits from natural-resource investments (an approach pioneered by Chevron). They have consequently also become a means to identify 'authentic' customary land owners. In the forestry sector, this has gone as far as requiring detailed maps of customary land boundaries. In the absence of customary land registration, the ILG incorporation process has hence become a form of de facto land demarcation giving rise to claims of ownership – a practice that is arguably outside the purview and ambit of the Land Groups Incorporation Act (Kalinoe, 2001) and that has potentially serious consequences given the inherent weakness of ILGs as corporate bodies.

While the incorporation process undertaken by the NFS includes safeguards against membership of more that one group, most ILGs face major difficulties in managing their membership and the accountability of ILG chairs once incorporated. This is compounded by the inability of PNGFA to offer continuing support; and, in some cases, the formation of landowner companies as a means of channelling benefits. With none of the same safeguards, the use of landowner companies appears to defeat the whole purpose of ILGs under the Forestry Act (Turia, 2005).

Most ILGs face major difficulties in managing their membership and the accountability of ILG chairs once incorporated

This begs the question of whether the NFS should be taking virtually sole responsibility for the incorporation of ILGs. The fact that NFS is doing so is essentially due to the lack of other options given chronic under-capacity within the Department of Lands and Physical Planning (DLPP). Up to 2001, the NFS had overseen the incorporation of 1,870 ILGs across 32 FMAs, many of which have since sub-divided. Even more concerning are landowner consent and incorporation processes under Timber Authorities, in which the NFS may not be involved (resulting in the abuses highlighted in the Kiunga – Aimbak case).

If indeed land group incorporation under the Forestry Act amounts to de facto land registration, this raises three sets of challenges:

1) Either the NFS needs to be properly equipped (including dedicated staff and adequate operational funding); and/or DLPP, district lands officers as well as Ward Development Committees (on which ILGs are represented) need to have the capacity to oversee (if not take responsibility for) the incorporation process and to provide long-term extension to ILG management. Land issues are in fact devolved to the Provinces under the Organic Law on Provincial and Local-Level Government, implying that institutional arrangements for incorporation should properly be addressed at that level.

Greater focus needs to be placed on the fiduciary duties of ILG chairs

2) A proper legal framework needs to be put in place, as current practice by the forestry sector is not accommodated within the ILG Act. This will need to take note of the ongoing work of the Task Force on Land Development. The Task Force is currently looking into alternatives to earlier (and ultimately controversial) proposals for customary land registration including options for partial titling to enable business transactions.

3) Greater focus needs to be placed on the fiduciary duties of ILG chairs. At present the Land Groups Incorporation Act makes no provision imposing legal duties of accountability on leaders (Whimp, 1998).

It is essential to address these challenges if the social fabric of rural communities is not to be further undermined.[34] There are even suggestions that an alternative to ILGs now needs to be found to ensure the distribution of benefits to genuine resource owners. The petroleum and gas sector, which initially pioneered the use of ILGs as a benefit-sharing mechanism, is in fact leading this move. The Oil and Gas Act 1998 may be amended to delete all reference to them.

1.5 Options for external oversight of forest-sector administration

The previous section highlighted the resource constraints faced by the NFS in compliance monitoring, and the case this presented for further outsourcing. It also highlighted the break-down of checks and balances between the components of the PNGFA, and the need to enhance the capacity of both the Board and the PFMC to act independently of the NFS. But while solutions such as a Board Secretariat might enhance internal oversight, other instruments providing external oversight are an important guarantee on the integrity of forest-sector administration. This spans a number of functions including: (i) investigation; (ii) routine auditing; (iii) oversight by other executive agencies; (iv) the power to seek prosecution; and (v) dispute resolution.

1.5.1 The Ombudsman Commission

Under s.219 of the Constitution, the primary functions of the Ombudsman Commission are (1) Investigation of alleged wrong conduct and defective administration by governmental bodies;[35] (2) investigation of alleged discriminatory practices, by any person or body;[36] and (3) Investigation of alleged misconduct in office under the Leadership Code.[37] As a constitutional body in its own right, the Ombudsman Commission operates independently of both the legislature and the executive. Under S219(1)(a)(ii) of the Constitution, it can also initiate investigations of its own initiative (as opposed to acting only in response to a public complaint).

As such, the Ombudsman Commission has proved one of the most active forms of public oversight in the forestry sector – including investigations into the grant of an extension to the Wawoi Guavi Timber Permit in respect of Kamula Doso FMA, and the Supreme Court reference challenging the constitutionality of the Forestry Act 1991 (see section 1.1.4). The power vested in the Ombudsman Commission to investigate the conduct of public officer holders, and to seek their referral to the Public Prosecutor or an appropriate tribunal under s.27 of *Organic Law on the Duties and Responsibilities of Leadership*,[38] is especially significant.

[34] Kalinoe, L (2001) Incorporated Land Groups in Papua New Guinea, A paper prepared for the Australasian Law Teachers Association Conference (ALTA) 2001 July 1 – 4, 2001, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu. Whimp, K (1998) Some issues of law and policy relating to landowner organization and representation mechanisms, paper given at the 'Conference on Incorporated Land Groups', organised by the Department of Petroleum and Energy and Chevron, Granville Motel, Port Moresby, 8 – 9 September, 1998. Wycliffe Antonio, Department of Lands and Surveying, PNG University of Technology, presentation on Incorporated Land Groups (1974): Lessons from its Application given at National Research Institute workshop on 'Understanding Transactions on Customary Land' 2 – 3 November 2006, Port Moresby.

[35] Constitution, Sections 219(1)(a) & (b) Organic Law on the Ombudsman Commission

[36] Constitution, Section 219(1)(c) Organic Law on the Ombudsman Commission

[37] Constitution, Section 219(1)(d) Organic Law on the Ombudsman Commission

[38] S. 27

Capacity of the Ombudsman Commission to cover such a large forest sector is limited

However S.219(6) of the Constitution prevents the Ombudsman Commission from enforcing the reports of its investigation by litigation. This was affirmed by the National Court in *Ken Norae Mondiai and others v. Wawoi Guavi Timber Company Limited and others* [2006] PGNC 4; N3061. The Ombudsman Commission is also constrained from providing routine oversight of the forest sector given its heavy case load and limited capacity. While a sector-specific Ombudsman is an attractive option, there is currently no legal basis to establish one.[39]

While the Ombudsman Commission has strong moral suasion its power to influence governance is ultimately limited. As such, it will need to work alongside other external oversight functions, including supervision by other executive agencies, routine audits, and specialised dispute resolution mechanisms.

1.5.2 Anti-Corruption and Human Rights Commissions

Foremost amongst proposals to strengthen external oversight of the forest sector are an ***Independent Commission Against Corruption*** (ICAC) as well as a ***Human Rights Commission***. Like the Ombudsman Commission, it is proposed that these are established by constitutional amendment and pursuant to separate Organic Laws, enabling them to act independently of both the legislature and the executive.

[39] Ombudsman Commission, 24 October, 2006.

Transparency International (TI) highlights corruption as endemic to the public sector in PNG. In a 2003 report, TI states that, although there are applicable anti-corruption laws including provisions on fraud, bribery and undue influence in the Criminal Code, organisations such as the Ombudsman Commission lack the teeth to deter corrupt practices.[40] The national chapter of TI strongly advocates the establishment of an ICAC with the power to both investigate and seek prosecution, so working to complement the role of the Ombudsman.

The establishment of an ICAC was first mooted in the late 1980s, by a team who looked to equivalent bodies in Hong Kong and Australia to model a Papua New Guinean Commission. The concept subsequently sat in limbo until it recently gained renewed support, with acknowledgement by some in government that corruption in PNG is a problem that requires serious attention. A draft National Anti Corruption Strategy was adopted in April 2006 (NEC Decision 93/2006) and recently circulated to the Law and Order Committee. The draft highlights an ICAC as one of a series of short- to medium-term deterrence measures aimed at "*improving detection, investigation and prosecution of corruption allegations.*" Longer-term measures include legislative and administrative reforms.[41] A proposed Organic Law on the ICAC was also Gazetted on 1st Sept 2006 No G170.

There is, however, concern that it may be better to reinforce existing institutions and make them work more effectively, rather than spreading responsibilities; at least until there is a real political commitment to stamping out corruption. Steps to this end include the Inter-Agency Public Sector Anti-Corruption Committee established in 2000. This includes the Police, Ombudsman Commission, Auditor Generals Office, the Prime Minister and NEC, Provincial Affairs, Personnel Management, Justice and Attorney General's Office, Finance and Treasury Departments. The Committee has subsequently worked to establish a National Anti-Corruption Agency (NACA), giving legal status to existing inter-agency co-operation.

... it may be better to reinforce existing institutions and make them work more effectively, rather than spreading responsibilities

Proposals for a Human Rights Commission arise out of widespread allegations of policy brutality. Alleged cases of human rights abuse by security personnel in the forestry sector have also been highlighted by the Centre for Environmental Law and Community Rights (CELCOR)[42] as well as a confidential report by the Independent Forest Review Team. To date the Ombudsman has acted as a *de facto* human rights commission in assisting victims of alleged abuse, but lacks the power to pursue prosecution. A proposal for a Human Rights Commission has recently been tabled by the Department of Community Development and the Attorney General.

1.5.3 Another Commission of Inquiry

In addition to standing commissions on Anti-Corruption and Human Rights, it has been proposed by the PNG Eco Forestry Forum that another stand-alone Commission of Inquiry into the forestry sector be instituted. This comes 16 years after the Barnett Inquiry and (notwithstanding reforms pursuant to that first Inquiry) in response to a perceived further deterioration in the governance of the sector. This may be a necessary step towards a comprehensive review of the

[40] Mellam, A., and D. Aloi (2003)

[41] National Anti-Corruption Strategy 2007-2012

[42] CELCOR (2006)

PNGFA (including the core and outsourced functions of the NFS), and the blend of instruments necessary for both internal and external oversight. However, this can only be mandated at the behest of the Executive and depends on political will.

1.5.4 Specialised dispute resolution mechanisms

The relatively large number of cases that have been brought before the courts relating to administrative decision-making is testimony to high public expectation in the courts and the ability of aggrieved parties to secure access to justice. However, the courts are severely overloaded. Nor is a growing pile of litigation a necessarily efficient way for government to conduct its business. Securing improved governance of the sector through public interest litigation also places a disproportionate burden on landowners and other civil society actors. New South Wales rules of civil procedure, on which PNG's as based, allow for lawyers to run attrition over long periods of time, with no control on fees. Proceedings may be started by writ, summons, or judicial review and may take years to settle. For example, litigation over Wawoi Guavi started in 2004 and there has still been no trial. Nor do current procedures adequately allow for the joining of multiple parties in public interest cases. The judge-made rules on multiple plaintiffs are onerous, especially where entire clans may be seeking restitution. Delays are further compounded by weak management in the court registries, including the loss of files. Judges may take 12 months or longer in issuing judgments post-trial and, even then, may not be written down – as in the case of Ben Ifoki & ors v the State, Registrar of Titles, Keroro Development Ltd, Deegold (PNG) Ltd, PNGFA [1999] OS 313 of 1999, & OS 556 of 1999.

The main advantage with the AAT model is that it cheap to run, and that its proceedings can be conducted with as little formality and technicality

A case needs to be made for more effective dispute resolution through specialised institutions. Given that a major part of the existing forest-sector litigation relates to alleged abuse of administrative processes, a strong case can be made for establishing a dedicated Tribunal for Review of Administrative Decisions, akin to the Administrative Appeals Tribunal (AAT) in Australia. The latter was established by Act of Parliament in 1976. The main advantage with the AAT model is that it cheap to run, and that its proceedings can be conducted with as little formality and technicality as the requirements of the Act and a proper consideration of the matters before the Tribunal permits. Nor is the Tribunal bound by the rules of evidence and can inform itself in any manner it considers appropriate. It can establish its own procedures, has the power to compel evidence and may access the top experts in relevant fields. As such, the AAT has the potential to expedite decisions that would otherwise take months or even years in the normal courts of law.[43] And, unlike judicial review which is restricted to consideration of points of law, the AAT has the power to replace a faulty administrative decision with a better one. The AAT was established precisely to reduce the need for judicial review and has arguably acted more effectively in countering the concentration of powers.

There is also a strong case for establishing combined, dedicated ***land and natural resource courts***, where there are no specialised courts or tribunals in the forestry sector. Given the indivisibility of land and natural resources, and the complex nature of land tenure in PNG, a specialised court would seem essential. Amongst others, it would also help to integrate forest-sector disputes (e.g. over distribution of benefits) into mechanisms established for mediation of customary land disputes. Again, a suitable model is provided for by the Land and Environment Court of New

[43] See also: http://www.aat.gov.au/

South Wales. This is a specialist superior court established in 1979 with exclusive jurisdiction in environmental matters and deals with both civil and criminal cases. Its jurisdiction includes appeals under the Local Government Act 1993, the Environmental Planning and Assessment Act 1979 and the Crimes (Local Courts Appeal and review) Act 2001, as well as claims under the Aboriginal Land Rights Act 1983. It may make declarations and injunctions and impose criminal sanctions. [44]

A consolidated court would also help to address the disarray facing mechanisms for resolving land disputes. Under the Land Dispute Settlements Act 1975, land disputes between customary owners are in the first instance resolved through the appointment of a second-level magistrate as a mediator to settle the dispute on the basis of custom, and to walk agreed boundaries. If that fails a dispute may be referred for hearing by a lower-level court magistrate and, above that, by a Provincial Land Court (in practice the District Court). Appeals may also be made to the National Court. Other categories of dispute, including those involving State land, are resolved through a separate process under the National Land Titles Commission and the National Lands Commission. The system is, however, relatively complex to administer. Lower-level level magistrates often lack the resources (and indeed the will) to fulfil their basic mediation function. District and National Courts are over-stretched and difficult to access for all the reasons highlighted above, and also lack a specialist jurisdiction in land.

Log export monitoring has been assisted by SGS log tracking

1.5.5 Oversight by other executive agencies (price approvals for log exports)

The PNGFA is an independent statutory body. But while it is not responsible to other executive agencies, there is a role for cross-departmental scrutiny.

The negotiation of sales by log exports is currently subject to price approval by the NFS Marketing Branch. SGS will scrutinise remittance invoices to ensure prices are not negotiated at above approved rates. Whether, however, the system works to address transfer pricing turns on the integrity of the price approval mechanism itself. The complexity of the timber market, and apparently wide variation in export prices as highlighted in recent SGS data,[45] makes a case for broadening involvement in price approval processes beyond the NFS, to include the Treasury and the Internal Revenue Commission (IRC) – notwithstanding the fact that the latter cannot disclose taxpayers' affairs. Both have a direct interest in ensuring revenues are captured. This option is also taken up in Paper Three of this series of forest-sector studies.

[44] See also: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_index. Significantly, a Court Users Group was established in 1996 as a consultative committee comprising representatives from interested organisations. The Group meets three times a year and assists with improving Court services by making recommendations to the Chief Judge about improving the functions and services provided by the Court and ensuring services and facilities of the Court are adapted to the needs of litigants and their representatives.

[45] SGS (2006) Log Export Monitoring Monthly Report for August 2006 to the Papua New Guinea Forest Authority. October 2006 unpublished.

Many tree species are found within the rainforest

1.5.6 Supreme Audit Institutions

S. 213 of the Constitution of Papua New Guinea establishes the Office of the Auditor-General. Under S.214 (and also S.3 of the Audit Act 1989), the functions of the Auditor General are to "*inspect and audit, and to report at least once in every fiscal year ….to the Parliament on the public accounts of Papua New Guinea, and on the control of and on transactions with or concerning the public moneys and property of Papua New Guinea, and such other functions as are prescribed by or under Constitutional Law.*" Under the Organic Law on Provincial-Level and District-Level Government and Audit Act 1989, the Auditor General may also establish a Provincial Audit Service with responsibility for auditing the account of the Provincial and District government annually and with the power to inspect accounts at any other time.

While the Auditor-General already audits PNGFA finances, there is a potential role of the Supreme Audit Institutions in auditing disbursements, receipts and final disposal of landowner payments. This is especially pertinent to the duty of public trust borne by government in respect of royalties held on behalf of, and disbursed to, ILGs (see s.1.3.1a). However, while the Auditor-General has been highly effective e.g. in inspecting local government accounts, it is thought to be too under-resourced to act proactively in a sector such as forestry.

1.5.7 Auditing under voluntary certification schemes

As argued in section 1.3.1, there may be an important role for routine 3rd party audits of the NFS' core monitoring functions where these have not been outsourced. This could potentially be introduced:

i) On request by a Board secretariat (as a form of internal oversight) – see section 1.3.2; or

ii) Under voluntary schemes, such as ISO 19000 certification for environmental management and systems monitoring (as a form of external oversight). [46]

[46] 3rd party auditing of SFM is also taking place under operator-based schemes, including FOCERT (group certification of community producers) as well as Innovision (PNG) Ltd which is working towards FSC certification in the Makapa FMA.

1.6 Guarantees on access to information

An important guarantor on external oversight is S. 51 of the Constitution. This grants "*Every citizen …the right of reasonable access to official documents, subject only to the need for such secrecy as is reasonably justifiable in a democratic society…*". Access to information is an enforceable right under S.57 of the Constitution but protocols are not yet in place to see it operationalised with due respect to both public transparency and contractual confidentiality. FMAs and other basic documentation have allegedly not been made available where landowners have requested them, requiring legal action to force disclosure. Access to such information is of vital importance in enabling landowners, PFMC members and other stakeholders to monitor resource acquisition, allocation and exploitation. Some progress has, nevertheless, been made. Landowners can and do access data gathered by SGS under the log export monitoring system to verify royalty receipts.

Access to information is an enforceable right under S.57 of the Constitution but protocols are not yet in place to see it operationalised

1.7 Resolving gaps in information systems

Gaps in current information systems constitute a further significant constraint on effective administration and oversight of the forestry sector.

Of particular concern are systems for timber administration. Provincial forest offices may send monthly declarations on a diskette to Port Moresby, but the idea of a computerized system linking the provinces, regions and NFS headquarters never took off. This is despite investments by AusAid in the mid 1990s. The reasons include constraints with the existing telecommunications network. As such, the NFS continues to rely on paper-based log tally sheets (FR 100 or what was previously known as FD 66) to record the volume of logs harvested and to assess timber royalties.

SGS has since installed its own computerized database on log export consignments. As the only information source of its type, landowners are currently using this to cross check royalty payments. It also only captures part of the timber administration system and there is a need to extend it upstream to cover set-up inventories, log scaling and assessments of royalties paid to landowners. Amongst others, this may provide an incentive to reduce wastage, the costs of which landowners have to bear.

Nor is it currently possible to reconcile data on timber production, mill throughput and recovery rates (currently not monitored) and exports of processed material (exempt from export taxes and so not subject to SGS verification). This is of real concern as the proportion of sawn timber exports expands exponentially. [47]

[47] SGS, 17 October 2004.

Finally, information systems are not yet in place enabling easy reconciliation of declared exports with declared imports into recipient countries. Relevant measures have been discussed within the framework of (amongst others) the East Asia Forest Law Enforcement and Governance initiative, including harmonisation of customs codes and procedures for prior notification of exports as a check against log smuggling.

2 Phasing and prioritising reform

Fingleton, in a regional study on Pacific Islands forestry legislation, reminds us that legislation must take account for a country's administrative realities. An over-ambitious legal and policy framework is more likely to create distortions than improved performance – as already witnessed with the 1991 Forestry Act.

The options set out above are intended to address those distortions. However, the further development of administrative procedures, reforms to the structure of the PNGFA, enhanced external oversight and investments in information systems must themselves account for limited resources.

Amongst others, a decision to outsource certain functions of the NFS must come with a commitment to investing in the functions that remain - if it is not to 'hollow out' and demobilize the Service. Equally, the costs of enhanced administrative capacity cannot simply be passed on to industry independently of reforms to the tax burden on companies (see Paper 3).

Changes to the legal and institutional framework governing the forest sector will need to be prioritised and phased, in line with available public finances and the institutional capacity to see them through. The challenge is to identify realistic but strategic entry points - a Board Secretariat might be one such option, a forest-sector Warden another.

Governing the forest sector needs realism

Certain reforms may also have benefits that go much beyond forestry – an obvious candidate being an administrative appeals tribunal. The courts are playing a crucial role in holding administrative decision-making to account. But litigation is also extremely costly and measures that might expedite access to justice and dispute resolution are desperately needed.

Finally, as Fingleton argues, there may be a need to scale back on forestry operations in line with the funds and personnel available to supervise them. It is unlikely that administrative structures will otherwise ever be given the chance to catch up.

II

Annex

1 Legal Challenges

1.1 Ongoing litigation relating to issuances and implementation of logging permits

	Cases	Contentions
Sustainability	OS NO. 126 OF 2004	• Whether a Timber Permit granted in respect of the East Awin FMA is void for want of a valid National Forest Plan (under S.46 of the Act): i) 1996 – 2001 National Forest Plan provided no information on how forest resources were to be managed after this time. ii) S.47(b) of the Act requires a National Forest Plan to be based on a certified National Forest Inventory, which was not yet in place.[1] iii) S.47(c)(i) requires that the National Forest Plan contain the National Forestry Development Guidelines. While these undertook to be reviewed every 3 years, the 1993 Guidelines have not been updated.[2] • Whether the allowable cut under the Timber Permit allows for sustained yield based on accurate resource inventory in line with the recommendations of the Inter-Agency Forest Review Committee. • Whether there was failure to comply with a Forest Board stipulation that the resource data be rechecked before the Timber Permit was issued.
	OS 612 of 2004 & WS No.1465 OF 2004	• Whether the extension to the Wawoi Guavi Timber Permit 1-7 issued on 4 Feb 2002 conformed to sustained yield management practices. • Whether the extension was valid in the absence of a valid National Forest Plan or update National Forestry Development Guidelines. • That despite the operation of S.137(1F) of the Forest Act (as amended in 2005), providing that permits saved under S.137(1A) and extended under S.78, would be considered extended for the purposes of S.137(1B) as amended, the requirements of S.78 and S.137(1B) on sustainability have not in any case been met.
Due Process	OS NO. 126 OF 2004	• Failure to implement recommendations contained in the (2001) Review Team Report and Compliance Audit report (2005) regarding the East Awin FMA – notwithstanding the recommendations of the National Executive Council that the findings of the Review Team be implemented. • Failure to comply with the Environmental Plan Approval Conditions, as highlighted in the compliance report. • Failure to lodge a performance bond required in relation to the timber permits within 21 days.
	OS 612 of 2004	• Whether the extension to the Wawoi Guavi Timber Permit 1-7 issued on 4 Feb 2002 complies with the relevant and applicable provisions of the Forest Act 1991 and can be relied upon. • Specifically, whether the extension was valid in the absence of: (i) a S.78(3) report from the Provincial Forest Management Committee (PFMC) regarding (amongst others) the social acceptability of the developer; (ii) a Board recommendation for an extension; (iii) due care and consideration to objections raised by landowners. • That S.137 of the Forest Act (as applicable in 2002 when the current permit expired) in no way provides for an extension on saved permits; and that under S.143, saved permits could only be extended for a year until a National Forest Plan is established or the 31 December 1993, whichever the sooner. • Whether there has been avoidance of competitive tendering in the allocation of concessions.

Constitutionality of the Act, statuory rights and duties	SCM NO. 3 OF 2006	• Whether there had been valid acquisition of resource rights. • Whether the rules concerning geographic extensions as contained in the Forestry Amendment Act 2000 were applied; including the requirement that the area added should be so small on its own that it is unable to operate as a stand-alone project. • Whether litigation between the logging company and the PNGFA seeking to give effect to a decision of Board in 1999 grating Kamula Doso FMA as an extension of the Wawoi Guavi Timber Permit, was settled in accordance with the wishes of the Board. • Whether in *Wawoi Guavi Timber Company Limited v. Papua New Guinea Forest Authority* [2004] OS 557 the National Court, in granting orders to give effect to a decision of Board in 1999 that the Kamula Doso FMA be an extension of the Wawoi Guavi Timber Permit, was not informed of numerous important matters that should by law have been drawn to its attention.
	Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court, the Ombudsman Commission	*National Goals and Directive Principles* on ***equal participation by resource owners*** and the ***Right to consultation and participation*** *under s.6 and s.46 of the Forestry Act itself*. Are these fulfilled by: i) FMAs or do they merely amount to landowners' rights as reflect in the consideration given for the sale and purchase of their resources? ii) Provisions on landowner participation in resource allocation processes (S.62 and S.63 of the 1991 Forestry Act)? iii) Removal of s.59 of the 1991 Forestry Act, requiring PNGFA to consult with resource owners in recommending the allocation of a timber permit, therefore unconstitutional?
		Equality of Citizens under s.55 of the Constitution. Does removal of S.59 of the Act discriminate against forest resource owners as compared with provisions for consultation and participation under the Part III, Div 6 of Oil & Gas Act 1998 (S.48 and S.50 on Development Fora and Development Agreements)?
		Protection from Unjust Deprivation of Property and ***valid qualification of rights and freedoms*** under S.53 and S.38 of the Constitution. For the purposes of the Constitution, does S.1 of the 1991 Forest Act define and afford reasonable justification for a public interest in forestry and the purchase of logs? Are its provisions sufficient to exercise a valid qualification of rights or freedoms, including privacy?
		Principles of conservation and sustained yield management, under the Constitution as well as s.6, 58(d), 78 and 137 of the Forestry Act. Are these fulfilled by S.137(1E) of the 1991 Forestry (as amended), providing for the extension of saved timber permits originally entered into under the *Forestry (Private Dealings) Act (repealed)*?
	OS 612 of 2004	That S.137(1F) of the Forest Act (as amended in 2005), providing that permits previously saved under S.137(1A) and extended under S.78, would be considered extended for the purposes of S.137 (as amended) does not give effect to the intentions of the Act and the National Goals and Directive Principles of the Constitution.
Claims in tort	WS No.1465 OF 2004	• Whether the Wawoi Guavi Timber Company, the PNGFA, the Minister of Forests and the State of PNG are liable for: (i) private and public nuisance caused by logging activities in breach of the PNG Logging Code of Practice (1996); (ii) trespass due to illegal logging, in the absence of a valid permit extension; (iii) breach of duty of care owed to landowners and related losses and damages suffered by them. Specific complaints include lack of compliance with buffer zone requirements, damage to food crops, failure to pay royalties on wasted logs and pollution.
	Kiunga Aimbak	• Private and public nuisance • Trespass due to illegal logging • Breach of duty of care owed to landowners

[1] The PNGFA has, however, since adopted the forest resource assessments undertaken by the Forest Inventory Mapping (FIM) system.

[2] Page 1, National Forestry Development Guidelines, prepared by Tim Neville, MP, Minister for Forests, Port Moresby, September 1993.

1.2 Some previous court rulings relating to issuances and implementation of logging permits

	Cases	Contentions
Due Process	Ben Ifoki & ors v the State, Registrar of Titles, Keroro Development Ltd, Deegold (PNG) Ltd, PNGFA [1999] OS 313, & OS 556, consolidated.	• The National Court ordered that the State, the PNGFA and their agents be restrained from dealing with land, or issuing any statutory authority, permit or license to harvest forests and forest produce, in respect of an area in Collingwood Bay over which a Timber Authority had been granted on the basis of a fraudulent lease-lease-back scheme and despite the objections of landowners on the Oro Province PFMC.
	Sep Galeva and others v Paiso Company Limited and others [2003] OS 427	• The National Court ruled the grant of Timber Authority 08 for a road alignment project null and void due to violations of mandatory procedures prescribed in SS.87, 88 and 89 of the Forestry Act 1991. • Amongst others: there was no written consent of landowners accompanying the application; the application was not referred to the PFMC by PNGFA nor did the PFMC approve or recommend the application; and the PNGFA Managing Director's decision to approve the license was not supported by a decision of the PNGFA Board.
Claims in Tort	Warongoi Blockholders [1997] SCA 78, 80, 81.	• The Supreme Court upheld orders that damages (K2.3 million) be awarded to the respondents (leaseholders of customary land) for trespass and nuisance as a result of logging activities. The appeal by the applicants was dismissed for want of prosecution.

Current timber permits for all provinces as of November 2006

Permit No.	Permit Holder	Contractor (where applicable)	Project Location	Gross Area (Ha)	Gross Vol. (m3)	TRP/FMA		TP		
						Start	*Expiry*	*Start*	*Expiry*	
Province:	**Western**									
TP1-8	Wawoi Guavi Timber Co.	na	Wawoi Guavi	422,078	3,228,912			10/4/1992	9/4/2012	
			Blk 1	35,000	500,000	14/08/1981	14/08/2021			
			Blk 2	180,000	1,296,169	10/12/1985	9/12/2025			
			Blk 3	206,301	2,323,860	17/08/1989	16/08/2029			
TP1-9	Innovision (PNG)	na	Makapa	301,494	7,900,000	3/12/1991	2/12/2031	24/06/1992	24/06/2012	
TP1-?	Wawoi Guavi Timber Co.	na	Kamula Doso	791,200	11,274,244	19/02/1998	18/02/2048			
Province:	**Gulf**									
TP2-12	Long Term Trading	Turama For.Ind.	Turama	187,733	2,716,077	4/3/1988	3/3/2028	30/03/1988	28/03/2008	
TP2-14	China Long Kong (PNG)	na	Vailala Blk 1	88,630	1,431,508	11/4/1989	10/4/2029	28/02/1991	27/02/2003	
TP2-12A	Turama Forest Indust.	na	Turama Ext.	1,721,800	no records			1/6/1995	31/05/2030	
			Turama Blk1 FMA	539,400	no records	29/05/1995	28/05/2045			
			Kikori Blk2 FMA	744,100	no records	29/05/1995	28/02/2045			
			Baimuru Blk3 FMA	438,300	no records	29/05/1995	28/05/2045			
TP2-16	Frontier Holdings	na	Vailala Blks	267,820	7,295,818			24/06/1992	24/06/2002	Extended?
			Blk2 FMA	105,400	2,951,00	18/12/1995	17/12/2045			
			Blk3 FMA	200,100	5,617,360	18/12/1995	17/12/2045			
TP2-15	Gopera Investments	Rimbunan Hijau	East Kikori	83,800	1,509,312	12/9/1990	11/9/2030	11/5/1992	11/5/2002	Extended?
Province:	**Central**									
TP3-34	Koneri Dev.	Rimbunan Hijau	Edevu	26,850	326,652	3/8/1989	2/8/2009	5/5/1992	5/5/2002	Extended?
TP3-37	Brown River Dev. Corp.	na	Varagadi FMA	6,500	92,800	14/02/1996	13/02/2046			
TP3-?	Cloudy Bay Timber	North.Dist.Saw.	Cloudy Bay FMA	94,013	2,490,986	6/10/1997	5/10/2047			
?	Brown River For. Part'ship		Brown River/Kuriva							

Permit No.	Permit Holder	Contractor (where applicable)	Project Location	Gross Area (Ha)	Gross Volume (m3)	TRP/FMA		TP		
						Start	*Expiry*	*Start*	*Expiry*	
Province:	**Milne Bay**									
TP4-3	Tandragee	Saban Enterp.	Sagarai-Gadaisu	118,951	540,378			28/08/1987	31/12/2002	Extended
Province:	**Oro**									
LFA5-1	Yema Gaiapa	Ambogo S'mill	Yema	38,930	1,170,00	8/12/1989	not set	6/8/1991	5/11/2006	LFA
TP5-11	Ambogo Sawmill	na	Kumusi & Saiho Ext.	48,506	2,490,000			17/12/1996	16/12/2001	Extended?
			Kumusi	44,780	2,290,000	13/06/1969	12/6/2009			
			Saiho Ext.	17,167	20,000	18/03/1976	17/03/1996*			
Province:	**Southern Highlands**									
Nil										
Province:	**Eastern Highlands**									
Nil										
Province:	**Western Highlands**									
Nil										
Province:	**Simbu**									
Nil										
Province:	**Enga**									
Nil										
Province:	**Sandaun**									
TP10-8	Vanimo Forest Prod.	na	Vanimo Blks1-6	287,428	na			31/101991	30/10/2011	
			Block 6	53,743	na	8/2/1967	7/2/2007			
			Blocks 1-5	233,685	na	26/03/1968	25/03/2008			
Province:	**East Sepik**									
Nil										
Province:	**Madang**									
TP12-6	Madang Timbers	na	Far North Coast	4,950	344,799	12/10/1979	11/10/2009	17/10/1988	16/10/1998	Extended?
TP12-20	Sogeram Dev.	Madang Timb.	Sogeram	56,410	276,073	30/07/1987	29/07/2017	4/10/1990	3/10/2000	Extended?
TP12-21	Jant	na	Gogol/Naru	52,455	836,969					Plantation?

Province:	Morobe									
TP13-27	Umboi Dev. Corp.	Putput Logging?	Umboi Island	42,261	56,946			31/01/1991	31/01/2001	Extended?
			Bunsil	8,936	331,292	30/12/1976	29/12/2016			
			Kowai	16,924	897,311	31/12/1977	30/12/2017			
			Kaimanga	22,925	897,311	2/1/1978	1/1/2018			
TP13-31	Low Impact Logging?	na	Buhem-Mongi-							Not listed
			Busiga							
			Mongi Busiga	32,800	1,069,200	27/09/1996	26/09/2046			
			Buhem Mongi	38,100	1,027,075	25/04/1997	24/04/2047			
TP13-34	PNG Forest Prod.	na	Bulolo Plantations	na	45,000,000			12/1/1996	1/1/2031	Plantation
TP13-33	PNG Forest Prod.	na	Watut West	31,950	436,840	22/06/1992	21/06/2007	24/06/1992	24/06/2002	Extended
Province:	**West New Britain**									
TP14-50	Nam Yang Timbers	Meda Assets	Kapuluk & Kap. Ext	169,740	3,500,000			29/03/1989	28/03/2009	
			Kapuluk	54,250	na	20/11/1971	19/11/2011			
			Kapuluk Ext.	115,692	600,000	21/05/1975	20/11/2015			
TP14-53	Milupol Dev. Corp.	Cakara Alam	West Arawe	68,181	1,617,000	18/07/1990	17/07/2015	25/10/?	24/10/2000	Extended?
TP14-54	Central Arowe Res.	Cakara Alam	Central Arawe	63,500	1,397,760	20/05/1991	19/05/2015	20/02/1991	19/02/2006	Extended?
TP14-55	East Arowe Res.	Cakara Alam	East Arawe	61,600	1,397,760	20/05/1991	19/05/2015	31/05/1991	30/05/2006	Extended?
TP14-41	Unevugl Dev. Corp.	Open Bay Timb.	Bakada, ...	57,100	680,000			31/12/1996	31/12/1997	Extended?
			Bakada	?						
			Madedua	13,560		16/11/1968	15/11/2008			
			Ext. Mengen	33,180		20/11/1968	19/11/2008			
LFA14-8	Kandrian Timb. Invest.	Island For. Res.	Alimbit Andru	39,930	1,200,000	10/4/1990		5/10/1990	4/10/2000	Extended?
TP14-58	Kumo Dev. Corp.	Sinochem (PNG)	Maututu Blks 1 & 2	15,780	?	12/8/1969	11/8/2009	24/05/1995	23/05/2002	Extended?
			(Hargy Consol.)							
LFA14-13	Aria Vanu Timb.	Rimbunan Hijau	Aria Vanu Blk 3	39,650	1,035,000	?	?	24/06/1992	23/06/2002	Extended?
TP14-43	Roman Cath. Arch. Rab.	Ulamona S'mill	Ulamona Consol.	21,565	760,000	?	?	31/12/1996	31/12/2001	Extended?

Permit No.	Permit Holder	Contractor (where applicable)	Project Location	Gross Area (Ha)	Gross Volume (m3)	TRP/FMA		TP		
						Start	*Expiry*	*Start*	*Expiry*	
Province:	**East New Britain**									
TP15-58	Nangal	Deegold Ent.	Seraji & Seraji Ext.	18,700	607,750			27/11/1995	26/11/2005	Extended?
			Seraji	1,700		?	?			
			Seraji Ext.	?	?	?	?			
?	?	Hugo S'milling	Pondo	12,140	?	?	?	?	?	
TP15-45	Elmere Legru	Niugini Lumber	Tokai Matong	22,170	420,000	10/2/1989	9/2/2029	14/04/1989	13/04/1999	Extended?
TP15-53	Open Bay Timbers	na	Open Consol.	210,650	3,500,000	?	?	28/10/1992	27/10/1994	Extended?
TP15-57	Uriskuat Timbers	Bismark Indust.	Ramandu	23,592	812,800	21/04/1988	20/04/2008	27/11/1995	26/11/2005	Extended?
Province:	**New Ireland**									
TP16-42	Basoma Holdings	Lombda	Central New Ireland	98,100	840,000	14/06/1977	14/06/2017	29/01/1991	28/01/2001	Extended
TP16-48	Dominance Res.	na	Umbukul	22,700	520,000	24/06/1992	23/06/2012	24/06/1992	24/06/2002	Extended?
Province:	**Manus**									
TP18-2	Kei Beseu	Seal (Manus)	Manus West Coast	32,667	1,614,437	4/2/1988	3/2/2028	2/5/1988	1/5/2003	Extended?
LFA18-1	Jaha Dev. Corp.	Monarch Invest.	Jaha	9,000	31,500	?	?	15/08/1989	14/08/2001	Extended?
LFA18-2	Kali Bay Dev. Corp.	Rivergoi No. 6	Kali Bay	10,067	84,000	?	?	14/03/1991	13/03/2001	Extended?
Province:	**Bougainville Auto.**									
Nil										

This information is based on the following sources but requires verification:

1. PNGFA (1998). *Forest Resource Acquisition General Information.*
2. PNGFA (1997). *Timber Permits, Local Forest Areas and Timber Licences Status as of February 1997.*
3. PNGFA (2005). *Timber Digest, May 2005.*

3 Institutional Roles and Responsibilities

This section describes the roles and responsibilities of:

- the different elements of the National Forest Authority (PNGFA) – as embodied in the National Forest Board, the National Forest (NFS) and the Provincial Forest Management Committees (PFMCs).
- Provincial and Local-Level Governments.
- Other executive agencies.
- Land-owner companies and incorporated land groups.
- Outsourced functions of SGS.
- Enforcement agencies and other forms of external oversight.

3.1 National Forest Board

Section 9 of the Forestry Act specifies that there shall be a National Forest Board which shall carry out the functions and objectives, manage the affairs and exercise the powers of the National Forest Authority (PNGFA).

Section 10 then goes on to outline the membership of the Board which shall consist of –

a) the Department Head of the Department responsible for environmental protection matters, or his nominee;

b) the Departmental Head of the Department responsible for trade and industrial development matters, or his nominee;

c) the Departmental Head of the Department responsible for finance and planning matters, or his nominee;

d) the Director-General [Managing Director of the National Forest Services];

e) one member with appropriate experience in commerce and finance, preferably with respect to forestry, nominated by the Minister;

f) the President of the Forest Industries Association or his nominee;

g) one member to represent non-governmental organizations concerned with environmental, social or developmental issues;

h) four members, one from each region of the country, to represent the provincial governments of that region.

The composition of the Board has changed at least three times over the short period that the Act has been in operation. The membership was initially reduced under the 1993 amendment to the Forestry Act to just 6 members, leaving out three representatives from provincial governments, one other government representative and a representative that was to be nominated by the Minister. Under the 1996 amendment, membership was increased to 7 with the inclusion of a member to represent forest resource owners. The Minister's nominee was also replaced by the President of the Association of Foresters of Papua New Guinea. Under the most recent

2005 amendments to the Forestry Act, membership was further augmented by the inclusion of the Forest Industries Association and the reinstatement of a Ministerial nominee. The PNG Eco Forestry Forum was also dropped as the NGO representative in favour of "one member from the community involved in Forestry Activities". This has been heavily criticised under circumstance where the Forum was widely perceived as an honest broker.

3.2 National Forest Service

The functions of the National Forest Service are not spelt out under the Forestry Act, 1991. Rather, its role is subsumed within the functions of the Papua New Guinea Forest Authority (PNGFA) which, under S. 7 of the Act are defined as follows:

1) to provide advice to the Minister on forest policies and legislation pertaining to forestry matters;
2) to prepare and review the National Forest Plan and recommend it to the National Executive Council for approval;
3) through the Managing Director, to direct and supervise the National Forest Service; [This section now reads – to direct and supervise the National Forest Service – 2005 amendment];
4) to negotiate Forest Management Agreements;
5) to select operators and negotiate conditions on which timber permits, timber authorities, *large scale agricultural or other land use and road forest clearing authorities* [addition as part of the 2005 amendment] and licenses may be granted in accordance with the provisions of this Act;
6) subject to the *Customs Act, Customs Tariff Act and Exports (Control and Valuation Act)*, to control and regulate the export of forest produce;
7) to oversee the administration and enforcement of this Act and any other legislation pertaining to forestry matters, and of such forestry policy as is approved by the National Executive Council;
8) to undertake the evaluation and registration of persons desiring to participate in any aspect of the forestry industry;
9) to act as agent for the State, as required, in relation to any international agreement relating to forestry matters;
10) to carry out such other functions as are necessary to achieve its objectives or as are given to it under this Act or any other law.

Prior to the 2005 amendment, many of the above functions were delegated to the Managing Director of the National Forest Service to administer and implement. But with the removal of the term 'Managing Director' from S.7(1)(c) of the Forestry Act under the 2005 amendments, the mechanism by which the PNGFA (as embodied by the Board) can direct and supervise the NFS is left ambiguous.

3.3 Provincial Forest Management Committees

Sections 22-30 of the *Forestry Act, 1991* stipulate the functions and composition of the Provincial Forest Management Committee (PFMC). The Act clearly intends for the PFMC to play an important role in enabling consultation with provincial governments and customary owners.

Section 22 of the Act specifies that the PFMC members will consist of:

a) a senior officer in the administration of the province – chairman;

b) an officer of the NFS;

c) a representative of the local or community governments – nominated by the provincial executive;

d) two persons to represent landowning groups; and

e) a representative of non-governmental organizations

Unlike the National Forest Board the composition of the PFMCs has not changed.

Section 30 of the Act defines the functions of the PFMC as:

a) providing a forum for consultation and co-ordination on forest management between national and provincial governments, forest resource owners and special interest groups;

b) undertaking continuous consultation with the provincial Minister responsible for forestry matters on matters relating to acquisition and allocation of forest resources;

c) assisting the provincial government in preparing forest plans and forest development programmes consistent with national and provincial programmes;

d) making recommendations to the Board on –

- preparation and terms of Forest Management Agreements;
- selection of operators and the preparation of timber permits;
- enforcement of timber permit conditions and of the Act;

e) making recommendations to the provincial Minister on

- the issue of timber authorities;
- the extension, renewal, transfer, amendment or surrender of timber authorities;
- supervise extension services with respect to business management, agroforestry, silviculture, reforestation, environmental protection, processing and marketing;
- overseeing the receipt and distribution of government levies and charges and other benefits due to landowners;
- assisting in the early identification and resolution of land-owning disputes affecting forest resources;
- carrying out such other functions as it is required to carry out by the Act or any other law.

Consequently, the PFMCs have a very important role to play, yet experience show that they often lack the capacity to perform their role independently.[3] Interestingly, S.30(2) stipulates that a PFMC may, by notice in writing, delegate to the National Forest Service any of its functions under s.39(1).

3.4 Provincial and Local-Level Governments

The allocation of roles and responsibilities under the Forestry Act (1991) seeks to bring forestry under the control of a single Authority, with PFMCs providing the basis for consultation with local-level stakeholders.

Forestry Act 1991 consequently vests little power in Provincial Governments themselves (defined under the Act as *Provincial Forestry Committees* as opposed to PFMCs). Their duties are subject to Board approval and only relate to:

i) Development of Provincial Forestry Plans under S.49 – 51 of the Forestry Act (1999), which must be consistent with the National Forest Policy and the National Forestry Development Guidelines; as well as

ii) Issuances of Timber Authorities under S. 87 – 90.

While provincial administrations may chair PFMCs there is no other functional link between these institutions. Unlike other natural resource sectors, the Provinces and LLGs also see no direct share in timber royalties, though they may receive negotiated levies.

This, however, appears to conflict with the intent of the Organic Law on Provincial Government and Local Level Government (1998). On the premise of enhancing local accountability, the Organic Law worked to redistribute authority across the three levels of government, including a substantial increase in the role of Local-Level Government in planning, regulation, taxation and service delivery. The Organic Law also vests substantial law-making powers in Provincial and Local-level administrations, including a number of areas relevant to forestry.

Under s.42(1) of the Organic Law, the Provinces may make laws on (amongst others):

- (r) Land and land development including provincial titles and leases;
- (s) Forestry and agro-forestry;
- (t) Renewable and non-renewable natural resources; and,
- (y) Parks, reserves, gardens, scenic and scientific centres.

S.44(1) grants LLGs power to make laws on (amongst others):

- (i) Dispute settlement;
- (p) Local environment;
- (s) Domestic animals, flora and fauna;
- (z) Protection of traditional sacred sites; and,
- (ab) The imposition of fines for breaches of any of its laws.

[3] Eco-Forestry Forum, Workshop for PFMC NGO and Landowner Representatives, Lae, 24 – 26 October, 2006

Given the conflicts between the Organic Law and the Forestry Act, certain changes were made before the Law was passed by Parliament. S.42(2) of the Organic Law provides that powers to make laws on natural resource sectors do not apply to large-scale ventures declared by the Head of State. S.41(7) also provides that an Act of the Parliament on matters specified in Section 42 or 44 will prevail over any equivalent provincial or local-level law to the extent that there is any inconsistency with the Act. The issue of whether or not matters have been exhausted by an Act of Parliament, or remain for Provinces and Local-Level Governments to regulate, has consequently been the source of some tension within the forestry and fisheries sectors – given that they are both now governed by single-spine Authorities. [4]

Provinces and Local-Level Governments do, however, enjoy an implicit veto under the Forestry Act when it comes to the acquisition and allocation of resource – under both S.57 which requires the Board to consult with provinces as to its intentions to enter into an FMA, as well as S.67 on the evaluation of proposals by the PFMC; presuming, of course, that the basis of such is itself consistent with national law and policy. However, recent cases such as Kamula Doso and Kiunga-Aimbak demonstrate that this system of consultation has not worked in practice.

3.5 Other executive agencies

3.5.1 Environment & conservation

The approval of the Department of Environment and Conservation (DEC) is required for all major development projects. The DEC is tasked to implement the *Environment Act 2000*, an Act to provide for and give effect to the National Goals and Directive Principles (Natural Resources and Environment), and in particular –

a) to regulate the environmental impacts of development activities in order to promote sustainable development of the environment and the economic, social and physical well-being of people by safeguarding the life-supporting capacity of air, water, soil and ecosystems for present and future generations and avoiding, remedying and mitigating any adverse effects of activities on the environment;

b) to provide for the protection of the environment from environmental harm;

c) to provide for the management of national water resources and the responsibility for their management.

Because of its mandate (listed above), the Head of the Department of Environment and Conservation has been a member of the National Forest Board since its inception. This also includes him being appointed as the Chairman of the National Forest Board on many occasions.

[4] Van Helden, F. (2001) PNG/99/G41 Marine Conservation in Milne Bay Province, Papua New Guinea, A Policy and Planning Needs Assessment for the Milne Bay Marine Conservation Project. UNOPS Contract for Services Ref.: C00-1076

With references to timber, no actual development will take place – even after the Minister for Forest has issued a timber permit - until the Minister for Environment and Conservation has approved an environment plan. Unfortunately, while the DEC has an important role, it reportedly does not have the capacity (both personnel and financing) to perform its function.

3.5.2 Department of Labour and Employment

The timber industry in PNG employs a large number of foreign nationals. The Department of Labour and Employment is responsible for issuing Work Permits but leaves NFS to supervise day to day operations. There is in fact little dialogue between the Department of Labour and Employment and the NFS, despite concerns over the high number of foreign nationals in jobs that could be easily undertaken by Papua New Guineans. [5]

3.5.3 Departments of Health, Education, Transport and Works

The Departments of Health and Education are required to be involved in the provision of community health centres and schools. Unfortunately, there is little communication between these agencies and the National Forest Service, with the result that not all the required infrastructure to be provided by the timber company is necessarily constructed to standard. Lack of manpower and resources also means that these agencies are not able to meet the recurrent costs of maintaining such infrastructure. Similar problems beset the Department of Transport with respect to wharves and airstrips and the Department of Works with respect to roads and bridges.

3.6 Landowner companies and incorporated land groups

The 1979 Forest Policy envisaged public involvement in decision-making through the institution of landowner companies, but this quickly proved to be an inadequate basis for equitable participation. More often than not, the landowner companies provided a means for individual clan agents to enter into business transactions without the consent of other members of their communities.

The new 1991 Forest Policy looked, rather, to Incorporated Land Groups (ILGs) which had been pioneered by the oil and gas sector as mechanisms for the distribution of benefits. This is reflected in s.57(1)(a) of the Forestry Act 1991, which identified ILGs as one basis for resource acquisition under Forest Management Agreements (FMAs). ILGs were first introduced under the Incorporated Land Groups Act (1974) as a 'holding' mechanism for the registration of group titles (to be regulated under a separate act). As such, they provide a structure for collective decision-making governed by a constitution.

Although the 1991 Forestry Act excludes landowner companies for purposes of entering into FMAs, landowner companies still play a part. This is because permits in operation before the Act came in force, and saved under S.137, have not been brought into line with the provisions of the Act itself.

[5] Independent Forest Review Team 2002, 2004

Landowner companies also continue to play a part as structures for the distribution of royalty payments held on trust by PNGFA and/or as clan agents in the acquisition of resources for smaller-scale Timber Authorities.

With respect to royalty payments, s.235 of the Forestry Regulation Act (1989), requires landowners to '*appoint or establish, and nominate for recognition by the Managing Director, a corporate body or Local-Level Government to represent them*'. The relationship between this and ILGs incorporated under s.57 of the Forestry Act (1991) is not self-evident. However, for the purposes of the Regulation, an ILG could in theory be represented:

i) by a Local-Level Government where the ILG is a member of a Village Development Council;

ii) as shareholder to a Landowner Company incorporated under the Companies Act (1997); or

iii) by a business group incorporated under the Business Groups Incorporation Act (1974), passed for the purposes of 'working' group titles held by ILGs.

In any case, the Regulation requires the nominated body to operate a bank account through which royalties held on trust by the NFA are distributed to the body's membership. The body's managers are required to expend and invest moneys received subject to its articles and rules, for the collective benefit of resource owners. S.235(7) provides that the Forest Board may suspend operation of the bank account if, in its opinion, there are ground to believe funds have been expended or invested in breach.

3.7 SGS

SGS was contracted in 1995 to operate an outsourced log export monitoring system in 1995. This responded to evidence of heavy transfer pricing and losses in export revenues. Under its contract, SGS monitors all log exports from the country (approximately 2 million m^3 annually) through 30 export points. Further detail on the administration of log exports is contained in Annex 2.6.

3.8 Ombudsman Commission

The Constitutional Mandate of the Ombudsman Commission is to the improve work of government bodies, and to eliminate unfairness and discrimination. The sole functions of the Ombudsman Commission are to investigate and report, as well as its duties under the *Leadership Code*. It does not have a judicial function.

Under S.219(1) of the Constitution, the Ombudsman is mandated to (among others):

a) investigate, on its own initiative[6] or on complaint by a person affected, any conduct on the part of:
   i) any State Service or provincial service, or a member of any such service; or
   ii) any other governmental body, or an officer or employee of a governmental body; or
   iii) any local government body or an officer or employee of any such body; or
   iv) any other body set up by statute—
   v) any member of the personal staff of the Governor-General, a Minister or the Leader or Deputy Leader of the Opposition; or
   vi) any other body or person prescribed for the purpose by an Act of the Parliament,
   … where the conduct is or may be wrong, taking into account, amongst other things, the National Goals and Directive Principles, the Basic Rights and the Basic Social Obligations…
b) investigate any defects in any law or administrative practice…;
c) to investigate, either on its own initiative or on complaint by a person affected, any case of an alleged or suspected discriminatory practice…; and
d) any functions conferred on it under Division III.2 (leadership code).

Under 219(2) wrong conduct is defined here as:

a) contrary to law; or
b) unreasonable, unjust, oppressive or improperly discriminatory, whether or not it is in accordance with law or practice; or
c) based wholly or partly on improper motives, irrelevant grounds or irrelevant considerations; or
d) based wholly or partly on a mistake of law or of fact; or
e) conduct for which reasons should be given but were not.

In line with enabling legislation, the Commission works to ensure integrity and fairness in the course of its investigations. Persons and authorities or institutions subject of the Commission's investigation are accorded fairness and natural justice at every step.[7]

3.9 Enforcement agencies

3.9.1 National Forest Service – Forest Inspectors

The Forestry Act clearly states that any forest industry participant who engages in forest industry activities except under and in accordance with a timber permit, timber authority or licence, held by the forest industry participant, is guilty of an offence (S.122 (2)). The forest inspector (who in

[6] The Commission will act of its own initiative where, for example, a pattern of maladministration has been identified. Presentation by Ila Geno to 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand 9 – 11 February 2005.

[7] Presentation by Ila Geno to 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand 9 – 11 February 2005.

most cases is the project supervisor) will establish what the offence is and advise the company and the head office of the NFS accordingly. Many project supervisors and even provincial forest officers have nevertheless commented that this never results in prosecution. The reasons may include the cost of seeking prosecution, the lack of adequate legal advice as well as external interference in the operations of the NFS.

3.9.2 The Royal Papua New Guinea Constabulary (RPNGC)

The involvement of the RPNGC in timber development is a new phenomenon. RPNGC presence has been reported at Vailala Blocks 2 & 3 and Wawoi-Guavi timber areas. Their involvement or presence is not directly related to the enforcement of the Forestry Act, but allegedly to quell increasing law and order concerns due to the presence of a timber project.[8] This in turn has given rise to allegations of human rights abuses highlighted by, amongst others, the Centre for Environmental Law and Community Rights (CELCOR).[9]

[8] *A Catalogue of abuse. Officially documented abuses in Rimbunan Hijau's logging operations in Papua New Guinea*, April 2006. Anonymous.

[9] CELCOR (2006)

4 Forest management and control

The PNGFA's Planning, Monitoring and Control Procedures for Natural Forest Logging Operations Under Timber Permits (PMC) sets out in detail what is expected of the timber operators as well as the approval procedures to be administered by the NFS. However, based on interviews with field foresters for this study, understaffing and other resource constraints make it difficult to follow all that is contained within the PMC.[10]

4.1 Resource planning

Section 54 of the Forestry Act 1991 states that forest resources shall only be developed in accordance with the National Forest Plan. This was developed and approved by Parliament in 1996, and directs the Papua New Guinea Forest Authority (PNGFA) in its work programmes.

The provisions for the development of the National Forest Plan are specified under section 47 of the Act as follows. They should:

a) be consistent with the national forest policy and relevant government policies;

b) be based on a certified National Forest Inventory which shall include particulars as prescribed;

c) consist of –

   i) National Forestry Development Guidelines prepared by the Minister in consultation with the Board and endorsed by the National Executive Council;

   ii) The National Forest Development Programme;

   iii) A statement, prepared annually by the Board, of allowable cut for each province for the succeeding year which will ensure that the areas of forest resource set out in the Provincial Forest Plan, for present or future production, are harvested on a sustained yield basis.

NGOs have raised concerns about the 1996 National Forest Plan, arguing that it was not developed in strict compliance with the Act as set out above. The matter is presently before the Courts (see also Section 1.1.1 of the Analysis).

4.2 Resource acquisition and allocation

Requirements for the acquisition and allocation of forest areas under The Forestry Act 1991 are set out in Figure 1.

[10] Vatabu M. (2006) M*akapa Timber Project Case Study Report – Western Province*, Papua New Guinea Forest Sector Studies.

Figure 1: Forest Resource Acquisition and Allocation Process

Step 1: Forest Inventory (Forest Resources shall be developed only in accordance with the National Forest Plan)	**Acquisition Phase**
Step 2: Landowner Awareness Programme	
Step 3: Formation of Land Group	
Step 4: Forest Management Agreement	
Step 5: Development Options Study	**Allocation Phase**
Step 6: Advertisement: Call for Project Proposals	
Step 7: Corporate Formation	
Step 8: Selection of Preferred Developer(s), Negotiations	
Step 9: Developer Feasibility Study	
Step 10: Project Agreement	
Step 11: Approval of Environmental Plan Under the Environment Planning Act	**Operations Phase**
Step 12: Timber Permit	
Step 13: Harvest Authorization	

Source: Adapted from Turia (2005) Figure 4:97

The two initial steps in Resource Acquisition involve: (1) a forest resource inventory; and (2) landowner awareness raising.

The forest area to be inventoried has to be in accordance with the National Forest Plan, meaning that it has been identified as a potential forest production area and listed in the National Forest Plan.

The landowner awareness program is intended to:

a) provide landowners with an information base to assist them in making decisions concerning the options for the use of their land and forest resources; and

b) present landowners with a general but realistic picture of the likely costs and benefits, impacts and responsibilities associated with a forest development project and possible alternatives; and

c) establish channels of communication which will enable landowners to truly participate in a project formulation process and ensure that it is sensitive to their needs and concerns.

If the landowners agree to their forest resource area being developed involving timber production, the PNGFA will proceed with the incorporation of all land groups within the forest resource area based on the *Land Group Incorporation Act, 1974*. This process is legally under the ambit of the Department of Lands and Physical Planning (DLPP), but is been performed by PNGFA for forestry projects.

The third step involves the formation of land groups (Section 57 of the *Forestry Act, 1991*). It is the land groups rather than individual landowners who will become the parties to the FMA. Landowners or any person or any organisation may assist landowners incorporate their land groups, however the PNGFA has insisted that all documents are lodged with them for inspection and further verification before such documents are lodged with the DLPP for processing and certification.

The fourth step is the execution of the FMA itself (Section 58 of the *Forestry Act, 1991*). In accordance with Section 58 of the Act, a Forest Management Agreement shall:

a) be in writing; and

b) specify the monetary and other benefits, if any, to be received by the customary owners in consideration for the rights granted; and

c) specify the estimated volume or other measure of quantity of merchantable timber in the area covered by the Agreement; and

d) specify a term of sufficient duration in order to allow for proper forest management measures to be carried out to completion; and

e) be accompanied by a map showing clearly the boundaries of the area covered by the Agreement; and

f) contain a certificate from the Provincial Forest Management Committee to the effect that it is satisfied as to –

   i) the authenticity of the tenure of the customary land alleged by the persons or land group or groups claiming to be the customary owners; and

   ii) the willingness of those customary owners to enter into the agreement; and

g) provide that a portion of the area covered by the Agreement –

   i) has been identified and dedicated; or

   ii) shall, after the Agreement has been entered into, as logging progresses in working plan areas, be identified, by the customary owners as areas for forest management purposes.

While these provisions are similar to the pre-1991 Forestry Act, they incorporate two new aspects:

- the explicit assumption on the part of the Government that it can 'manage' the land area over the entire life of the FMA - 35 years; and,
- the involvement of the Provincial Government, through the PFMC, in verifying the ownership of land.

These are big demands on any of the Provincial Governments which do not have the capacity (manpower and financial) to perform such tasks.

As regards the PNGFA, this step involves its officers going out to the land groups and collecting signatures of the appointed chairmen of each land group. A certificate from the Provincial Forest Management Committee (PFMC) will be required to validate authenticity of tenure by those claiming to be the owners and their willingness to dispose of their rights is true in all respects.

The other steps that are important as regards landowners consent or consultation are in the Allocation Process, steps 5 and 6. Step 5 involves the carrying out of a Development Options Study (DOS) under Section 62 of the Act. This is normally done by the PNGFA and is separate from the feasibility studies that interested investors conduct when they are interested in an advertised timber area. The aim of the DOS is to investigate:

1) the possible environmental and social impacts of the project; and
2) the feasibility of the project including the feasibility of processing locally all or part of the timber harvested in the project; and
3) the level of investment required in the project; and
4) the prospects for marketing and the expected timber prices; and
5) options available for development and forest management; and
6) options for landowner participation in the project.

According to the Forestry Act and the Guidelines as developed by the Minister of Forests, it would appear that the DOS should take place straight after the landowner awareness program. However, in practice, the PNGFA conducts it after the FMA process.

The next step in the allocation process is Step 6, Advertisement of Project. This step involves the Provincial Forest Management Committee (PFMC) and the Provincial Government. As required by S.67 of the Act, the PFMC in consultation with the forest resource owners and the provincial government concerned prepare draft guidelines for how the project is to be developed. The draft guidelines are then forwarded to the National Forest Board for its consideration and if satisfactory, the Board will issue the final guidelines for the project. The guidelines will provide interested parties with general information about the project development area. It will also serve as the basis for assessing project proposals for compliance with the guidelines. This step (Advertisement of Project) is an improvement on the previous situation, in that all timber projects must now have a negotiated Project Agreement (PA). The Act does not define what a PA is, though Division 5 of Part III of the Act outlines the requirements for entering into a PA.

The Board in conjunction with the PFMC will define the parameters within which project negotiation shall be conducted and the composition of a negotiation committee. The Board will consider the draft project agreement and if it is satisfied with its contents, it can then execute the project agreement on behalf of the Authority. If the Board is not satisfied with the final draft project agreement, it will return it to the PFMC with the details of any matters that will

require further negotiations. The important aspects contained in the project agreement are the 'schedules' relating to log harvest, log export and other necessary infrastructure.

Section 73 (1) of the Forestry Act enables the person with whom the PNGFA has entered into a project agreement to make an application for a timber permit under Section 77, whereupon the Minister grants a permit within 30 days. The process can, however, be delayed if an Environmental Plan has not been improved or payment of a Performance Bond has not taken place.

4.3 Registration and tendering by forest industry participants

The Forestry Act clearly stipulates that no person can apply for a timber permit, timber authority or timber license (section 114) unless registered as a forest industry participant. However, it is difficult for the NFS to implement this provision under timber authorities where customary landowners are involved in the operation themselves with assistance from non-governmental organizations. This is because they own the land and the forest resources.

The tendering and negotiation of timber development projects come under the allocation process (part of the so-called 34 steps that the PNGFA follows) to approve a project. The tendering process follows immediately after the FMA has been executed by the Minister for Forests and a development options study (DOS) has been conducted by the NFS.[11] The advertisement (tender document) includes the name of the proposed timber area, estimated timber volume, the kind of industry that the PNGFA is contemplating and a feasibility study. This is determined based on the DOS.

4.4 Harvesting

Harvest planning procedures are set out in the Procedures for the Planning, Monitoring and Control of Natural Forest Logging (PMC). The PMC aims to assist Project Supervisors in monitoring and control of logging operations in the field, so as to achieve the goals of sustainable forestry and the observance of appropriate environmental standards. The process for planning and approval of timber harvesting is set out in figure 2.

4.4.1 5-year plans

These plans are prepared by the timber operator and forwarded to the PNGFA. Once approved, they are sent back to the Project Supervisor for monitoring. Basically, a 5-year plan outlines the timber company's proposed activities for the five (5) year period, and includes such things as:

[11] This feasibility study (DOS) is different to the feasibility study that the timber developer is required to conduct once it is selected as the preferred developer.

- A project statement
- Forest inventory data
- Permanent roads (if any) to be constructed
- Where log ponds and base camps are to be constructed.

Figure 2: Process for planning and approval of timber harvesting

Step 1: A 5 Year Plan is prepared and submitted by the operator to the PNGFA for the Managing Directors' approval.	**Evaluated by the Resource Development Division**
Step 2: Once approved, the operator is required to prepare and submit an Annual Plan to the PNGFA for the Managing Directors' approval.	**Evaluated by the appropriate Regional Office within the Operations Division**
Step 3: If Annual Plan is approved, the operator then prepares and submits its Set-up Plan to the Project Supervisor for his/her approval.	**Evaluated by the Project Supervisors under the appropriate Regional Offices**
Step 4: Timber harvesting, including road and base camp construction commences.	**Supervised by the Project Supervisors under the appropriate Regional Offices**

Source: PNGFA (1995). *Planning, Monitoring and Control Procedures for Natural Forest Logging Operations under Timber Permits.*

4.4.2 Annual logging plans

These are the plans that lay out the annual activities of the timber company, building on the 5-Year Plans. According to the PMC, annual logging plans are submitted to the Regional Office for evaluation and a recommendation may be made to the Managing Director for approval or rejection. This is relatively straight forward when a timber company is just commencing its operations. But delays in securing approvals for new annual logging plan can be problematic once an operation is under way, and do occur when non-compliances have been identified, e.g. in the development of roads.

4.4.3 *Set-up (harvest block) planning and monitoring*

The PMC requires that logging companies submit their 'set-up plans' directly to the project supervisors who are supposed to evaluate and approve them. The set-up plans are more detailed than the 'annual logging plan' in that they must specify:

- the boundaries for harvesting of timber;
- the proposed forest roads, skid tracks, log landings;
- areas to be excluded from logging – as marked out on a 1:5000 or 1:10000 map;
- a pre-logging 10 % inventory;
- a schedule of the number of trees tagged for felling;
- a schedule of planned water crossings; and
- a completed landowner cultural site identification form.

While the timber companies are able to comply with these requirements, some officers of the National Forest Service have indicated they do not have the capacity (in terms of manpower and finance) to monitor and evaluate all these planning stages, let alone the actual harvesting operations. Timber companies also have more than one set-up being harvested at any one time, which adds to the NFS workload. This includes assessing and giving approval (or otherwise) for the decommissioning and clearance of previously harvested 'set-ups'.

4.5 Timber administration, payments and community development

4.5.1 *Timber administration at log ponds*

Tagging and scaling takes place at the log pond. Tags are printed by SGS and provide a means to tally logs for export. Given that the tag number contains a site code, they enable traceability back to individual harvest blocks but not to individual stumps. PNGFA monitors tag numbers to ensure that they are roughly sequential. Tags may, however, be issued for logs from Timber Authorities, and there is a concern that they can therefore enter the export stream when they are supposed to be for domestic processing only. Scaling is undertaken at log ponds by accredited log scalers, subject to spot checks by NFS officers. Scaling data is also monitored by the chief scaler at NFS headquarters.

4.5.2 *Payment of royalties and levies*

The logs are listed by clans as well as tag numbers. This assists in determining who owns how much timber from a particular set-up, and provides the basis for distributing royalties. Levies are generally paid to the community or the provincial administration for a specified purpose (e.g. a community hall) as negotiated between landowner representatives and the timber company. The experience of Makapa, however, shows how payments can lead to rapid fragmentation of ILGs.

4.5.3 Community development

In most cases, the community development work is undertaken by the operating timber company in the area. Some projects are now insisting that any community development (to be paid from the levies) should be publicly tendered and that landowner companies be given preferences to construct them.

4.6 Processing

To date, the National Forest Service has not shown much interest in the monitoring of throughput and recovery rates from processing plants. Much of its attention has been focused on log export monitoring as this is where the government generates most of its revenue. This area needs to be revisited and monitored closely given the growing importance of sawn timber exports.

4.7 Log exports

Under the PNGFA's Procedures for Exporting Logs, all impending log shipments are required to be notified to SGS. SGS's export monitoring process involves independent physical checks for species identification and log measurement before loading, as well as a tally of logs in each shipment. Vessel cargo details are also reported. Inspections are undertaken jointly with PNGA. For SGS to perform this service, an exporter must have PNGFA endorsement of the price at which the timber will be sold at, a Log Export License from the Department of Trade and Industry, as well as a Log Export Permit from PNGFA. SGS will then issue an Inspection Report. This is used to calculate the export tax and enables Customs to clear the shipment.

As originally intended in the PNGFA Procedures for Exporting Logs, an exporter would also be required to obtain SGS endorsement of commercial invoices against Letters of Credit issued by PNG Banks. But, this was rendered obsolete as a result of changes in foreign exchange controls. SGS has, however, taken the initiative in requesting exporters to submit copies of remittance invoices. SGS then recalculates the export tax by comparing volumes exported against approved prices on the export permit. Discrepancies are reported to the Inland Revenue Commission (IRC) for purposes of log export duty and company tax monitoring.[12]

The log export procedure is summarised in Figure 3, consisting of at least 22 steps overleaf.

[12] SGS, 17 October 2006

Figure 3: Log Export Procedure

Step 1: Exporter to ensure all logs are identified with Tags

Step 2: Exporter to seek export price endorsement from the PNGFA – Marketing Branch.

Step 3: Exporter to finalise sale contract

Step 4: Exporter to apply for a Log Export License

Step 5: PNGFA processes Log Export License application and forwards this to the Department of Trade and Industry for issuance

Step 6: Issuance of Log Export Permit by Minister for Forests

Step 7: Exporter to ensure appropriate clause in the Letter of Credit – requiring a SGS Security Label

Step 8: Exporter to inform SGS of impending shipment

Step 9: Log preparation by Exporter

Step 10: SGS to arrange for Pre-shipment Inspection

Step 11: Exporter to prepare a 'Statement of Logs to be Exported' plus a Summary

Step 12: Pre-shipment Inspection by SGS

Step 13: PNGFA to give permission to commence ship loading

Step 14: Inspection liaison between Exported and SGS

Step 15: Tallying of logs actually loaded by SGS

Step 16: Production of the SGS 'Inspection Report'

Step 17: Exporter to prepare shipping documents for vessel clearance

Step 18: PNGFA Boarding Officer to check consistency of volumes actually loaded with Log Export Licence

Step 19: Exporter sends documents to SGS Port Moresby Office

Step 20: SGS to affix an SGS Security Label to the Commercial Invoice

Step 21: Exporter to collect Commercial Invoice from SGS

Step 22: SGS to produce a full post-shipment Report to PNGFA

Note: Steps 20 and 21 have not been implemented. SGS instead requests a copy of the commercial invoice to verify prices paid versus prices approved by PNGFA

Source: PNGFA (1996). *Procedures for Exporting Logs*.

References

Administrative Appeals Tribunal, Australia, http://www.aat.gov.au/

Anon. 2006. *A Catalogue of abuse. Officially documented abuses in Rimbunan Hijau's logging operations in Papua New Guinea*, April 2006.

Antonio, W. 2006. Department of Lands and Surveying, PNG University of Technology, presentation on Incorporated Land Groups (1974): Lessons from its Application given at National Research Institute workshop on *Understanding Transactions on Customary Land*, 2nd – 3rd November 2006, Port Moresby.

CELCOR (2006) *Bulldozing Progress: Human Rights Abuses and Large Scale Corruption in Papau New Guinea's Large Scale Logging Industry.* http://www.acfonline.org.au/uploads/res_ACF-CELCOR_full.pdf

Duman Dibiaso Incorporated Land Group No. 1664 and others v Kola Kuma and others (2004) SC805

Eco-Forestry Forum, *The Forestry Amendment Bill 2005. Unwinding 10 years of reform.*

Eco-Forestry Forum, Workshop for NGO and Landowner PFMC Representatives, Lae, 24 – 26 October, 2006

Eco-Forestry Forum, Minutes of Workshops for NGO and PFMC Landowner Representatives, 26 – 28 October 2004, 25 – 27 October 2005, 24 – 26 October 2006.

Fingleton, J. (2002) *Regional Study on Pacific Islands Forestry Legislation*, FAO Legal Papers Online No.30.

Forestry and Conservation Project Review Team (Kiunga - Aiambak, Simbali And Bonua Magarida) Final Report.

Geno, I. (2005) *Developing Investigative Methods that Work. The Papua New Guinea experience*, presentation to 22nd Australasian and Pacific Ombudsman Regional Conference, Wellington, New Zealand 9 – 11 February 2005.

Kalinoe, L (2001) Incorporated Land Groups in Papua New Guinea, A paper prepared for the Australasian Law Teachers Association Conference (ALTA) 2001 July 1 – 4, 2001, University of the South Pacific, Emalus Campus, Port Vila, Vanuatu.

Mellam, A., and D. Aloi (2003) *Papua New Guinea TI Country Study* - National Integrity Systems 2003. http://ww1.transparency.org/activities/nat_integ_systems/dnld/png.pdf

National Anti-Corruption Strategy 2007-2012, Combating corruption and improving governance.

Power, A.P. (2000). Broad Discussion on Landowner Issues Including Suggested Improvements in Dealings with Landowners and their Organisations [Appendix 6 to the IFRT Report, 2001], Unpublished Report.

PNG Forest Review Team, Individual Project Review Report Number 16, Kamula Doso (Western Province)

PNG the Ombudsman Commission, Section 19 Constitutional Reference No 5 of 2005 to the Supreme Court.

PNGFA Manual on Land Group Incorporation edited by Harmut Holzknecht, Forest Management and Planning Project (FMPP), World Bank.

PNGFA, National Forest Development Guidelines, prepared by Tim Neville MP, Minster for Forests, Port Moresby, September 1993, page 28 - 29.

PNGFA, Procedures for the Planning, Monitoring and Control of Natural Forest Logging (PMC)

PNGFA, Procedures for Exporting Logs, Holahola, April 1996.

PNGFA v Concorde Pacific & ors N2465, of 2003

Sep Galeva and others v Paiso Company Limited and others [2003] OS 427

SGS (2006) Log Export Monitoring Monthly Report for August 2006 to the Papua New Guinea Forest Authority. October 2006 unpublished.

Turia, R.C.H. (2005). *Cannot See the Land for the Trees: the forest management dilemma in Papua New Guinea*. Department of Human Geography, Research School of Pacific and Asian Studies, Canberra, Australian National University: 242. Doctoral Thesis.

Wawoi Guavi Timber Company Limited v. Papua New Guinea Forest Authority [2004] OS 557.

Whimp, K (1998) Some issues of law and policy relating to landowner organization and representation mechanisms, paper given at the 'Conference on Incorporated Land Groups', organised by the Department of Petroleum and Energy and Chevron, Granville Motel, Port Moresby, 8 – 9 September, 1998.

Van Helden, F. (2001) PNG/99/G41 Marine Conservation in Milne Bay Province, Papua New Guinea, A Policy and Planning Needs Assessment for the Milne Bay Marine Conservation Project. UNOPS Contract for Services Ref.: Coo-1076

Vatabu, M. (2006) *Makapa Timber Project Case Study Report – Western Province*, Papua New Guinea Forest Sector Studies.

Victor, C. (2006) *A case study of the Situm Timber Authority, Morobe Province*, for the PNG Forest Sector Studies, European Commission.