Pacific Community
Communauté du Pacifique

RESCCUE

Exploring opportunities for land and land-rights transactions for conservation and climate change resilience in Pacific Island Countries and Territories:

ANALYSIS OF FEASIBILITY CONSIDERATIONS

AFD

FFEM FONDS FRANÇAIS POUR L'ENVIRONNEMENT MONDIAL

EcoAdvisors

MAIN REDACTOR(S)/CONTRIBUTOR(S):

Eduard Niesten
Hari Balasubramanian
Julisa Edwards
Philippe Taïeb
Jakob Timmer

PUBLICATION DATE:

17/06/2018

FRONT COVER PHOTO:

Fiji landscape, Eugene Kaspersky, 2018.

© Pacific Community (SPC) 2018

TABLE OF CONTENTS

TABLE OF CONTENTS

EXECUTIVE SUMMARY

The analysis presented in this report follows a global review of land and land-rights transaction tools that may be applicable in Pacific Island Countries and Territories (PICTs) as a means to pursue conservation and climate change resilience objectives. The global review focused on purchases, conservation easements, and leases, referred to collectively as transactions or transaction tools:

i. Outright purchase for conservation, in which a landowner irrevocably relinquishes all property rights to a buyer against payment. The buyer can be another private entity, a government entity, or an organization such as a land trust specifically established for the purpose of acquiring lands for conservation.

ii. Conservation easements or other voluntarily accepted encumbrances on rights to dispose of land and resources in particular ways. Landowners relinquish partial rights over property (e.g. development rights) or accept restrictions on certain activities on the property, but not ownership of the property itself. Incentives to landowners to accept such encumbrances on their property can include direct payments (using private or public funds), tax relief, and technical support for conservation management. A key consideration is to what degree the easement attaches to subsequent land transactions (sale or bequest) involving the parcel in question.

iii. Conservation leases, in which landowners relinquish use-rights for a defined period of time without fully ceding ownership of a property. Leases typically include payments based on economic value of the land, though all terms including payment amounts are subject to negotiation. Lease payments can involve private or public funds. Concessions can be considered as a special case of leases relating to public land.

The global review concluded that there is potential for expanded use of these mechanisms in PICTs that merits further exploration. That said, there are challenges facing such efforts, and this analysis of feasibility considerations explores favorable factors and opportunities as well as these challenges in the four focal PICTs of the RESCCUE project (Fiji, Vanuatu, New Caledonia and French Polynesia). The analysis considers conservation priorities, policy context, legal context, social and cultural context, implementation capacity, financing options and management sustainability.

Fiji

A survey of feasibility considerations for expanded use of land and land-rights transactions to achieve conservation and climate resilience goals suggests a highly conducive context in Fiji. A Protected Area Committee that includes government, NGO and academic partners has identified priority sites, and the need for placing additional areas under conservation management is clearly recognized in government policy. Experience with conservation leases and land purchase initiatives in Fiji demonstrates legal feasibility, and there are also as-yet unused legal provisions for conservation covenants (equivalent to easements). The constellation of conservation actors including government agencies, the National Trust of Fiji, the University of the South Pacific and environmental NGOs collectively embody ample

technical capacity, mandates and appetite for increased use of transaction tools.

Although funding is a significant constraint (for transaction costs themselves as well as to support the capacity of actors to absorb long-term management responsibility for additional sites), conservation and climate interventions in Fiji enjoy a broad base of donor and private sector support that lends confidence in financing potential given a clear, robust strategy. Such a strategy would benefit from further refinement of spatial priorities as well as articulation of a national conservation financing mechanism (potentially through expansion of the Sovi Basin endowed trust fund to accommodate additional sites). However, in addition to replication of the Sovi and Kilaka conservation lease models, further purchases beyond the Macuata or Nakanacagi initiatives, and demonstration of conservation covenants or easements, Fiji would benefit from improved protected area legislation that includes provisions for permanent protected areas.

Vanuatu

Perhaps the most significant factor with respect to the feasibility of expanding use of transaction tools for conservation and climate resilience in Vanuatu is the strong emphasis on community resource management, in national policies as well as locally motivated action. This emphasis is reflected in strong policy commitments to including Community Conservation Areas (CCAs) in the formal national protected area system. Purchases are not possible as all land is under inalienable customary tenure, and there is no strong legal basis for conservation easements. Leases are possible, but historical experience has led to widespread suspicion or antipathy towards leases among rural communities.

Hence, pursuing a lease requires clarity as to what a lease can accomplish above and beyond a CCA at a particular site, including a strong case for introducing payments into a context where conservation management is largely voluntary. There are at least two cases where leases were considered as a possible tool but the notion was ultimately discarded, despite substantial technical and financial support for the projects. Protected area category definition, spatial prioritization and policy formulation and planning are currently fluid processes in Vanuatu, with key legislative, regulatory and execution mechanisms under development. An effort to apply conservation leases before these processes are more mature may complicate the government's task by impacting community perceptions, precedents, messaging, and conservation finance flows.

New Caledonia

Transaction tools could complement the current set of available mechanisms in New Caledonia, particularly in the design of win-win agreements that would reduce the incidence of infractions by increasing the financial rewards of compliance. The financial compensation component of most transaction tools would be a new element in the Caledonian context. So far, leases and more or less formal conservation agreements have been the most frequently used transaction or transaction-like tools. The major entities using these tools are the CEN New Caledonia and the Southern and Northern Provincial administrations. With the required political will, conservation easements could be used within the next few years.

On customary land, leases with Kanak communities have been fairly widely used for housing and agricultural purposes in particular. The main potential for expanded use, including conservation applications, lies with communities already residing on customary land. Legal bodies to serve as collective management entities for development activities on customary land (GDPLs) may also choose to expand their activities to include transaction-based conservation as an alternative means of economic empowerment. With respect to social and cultural considerations, the feasibility of using leases is furthered on customary land by traditional linkages between people and the land. Engagement and relationship management will benefit from mutually trusted intermediaries and emphasis on the fact

that a correctly structured transaction will reinforce ownership, cultural links, and local management capacity

French Polynesia

The supply of land for transactions historically has been limited in French Polynesia because of geography and complex multi-generational joint ownership situations. To date, land purchases, leases, and more or less formalized conservation agreements have been used in the territory, but several constraints complicate efforts to apply such tools at scale. Despite the introduction of new provisions and resources to resolve multi-generational joint ownership situations, it is unlikely that the amount of land available for transactions will grow significantly in the near future.

Right of way agreements have been used in the territory but suffer from poor enforcement, seen in multiple instances of landowners changing their minds with no recourse for the other parties. Small embankment-type walls are popular on properties along the coast, but have caused severe erosion. In these two cases, the introduction of conservation easements could formalize agreements, make rights of way more permanent, and freeze further proliferation of coastal walls. However, a broad cross-section of the territory's environmental stakeholders views easements with skepticism due to their permanence.

The most feasible avenue for expanding use of transaction tools may be to extend applications of leases through longer durations and more contracts on private lands. Longer durations will suit those willing to make long-term commitments without imposing the irreversible binding nature of easements. Contracts with farmers on private lands will offer more economic opportunities to property holders and farmers in the form of incentives for conservation. The provision of payments has not been the norm in the majority of available examples in French Polynesia. Indeed, as in New Caledonia, the absence of payments has often characterized transactions such as right of way and conservation agreements, and government agency representatives emphasize enforcement of appropriate regulations as a higher priority than application of new tools. Although payments or compensation might be attractive to landholders, the feasibility of an effort to expand use of transaction tools could be hampered by this perspective on the part of key government stakeholders.

Conclusion

For use of a particular transaction tool at a specific site, a thorough feasibility assessment will be required before proceeding; this report does not serve as a substitute for site-specific due diligence. Rather, it is intended to inform deliberation on whether investment in a wider strategy to expand use of transaction tools may be warranted and worthwhile in each focal PICT, and what form such strategy might take. In addition, the analysis may help efforts in other PICTs to structure thinking around the potential for increased application of land and land-rights transaction tools. The analysis indicates that circumstances in each PICT with respect to transaction tools vary considerably, such that strategies to expand their use (if warranted to begin with) would take quite different forms. That said, there are several common points shared between Fiji, Vanuatu, New Caledonia, and French Polynesia:

- The definition of conservation priorities, though at different stages of advancement in the four PICTs, requires further refinement in all of them. In particular, climate resilience is not factored into existing priorities. Furthermore, to inform strategies for transaction tools, priority mapping must include thorough mapping of tenure and ownership details for potential sites.

- In each PICT, there are no legal obstacles to conservation purchases per se, but the amount of land that is available for purchase in priority areas for conservation or climate resilience is known to be limited in Fiji and Vanuatu and likely to be limited in New Caledonia and French Polynesia. Therefore a major investment to catalyze purchases is not warranted, though opportunistic responses to parcels that become available may be justified.

- In each PICT, legal frameworks accommodate the use of leases to achieve conservation and climate resilience objectives. This is attributable to the fact that leases are feasible in each country and territory to facilitate various types of investment in economic development (agriculture, forestry, tourism, mining, residential construction, etc.), and that the provisions for such leases can be adapted for conservation. However, even if legally practicable, the actual scope for using leases varies widely, primarily as a function of complexities surrounding tenure.

- Conservation easements are unknown in all four of the focal PICTs. Generally, provisions for easements in the various legal regimes envision affirmative rights such as rights of access, rather than restrictions on rights more typically relevant to conservation easements, such as giving up development rights. Moreover, on native or customary lands the notion of ceding rights in perpetuity is likely to encounter significant obstacles. Therefore conservation easements remain at an experimental stage, warranting a search for promising sites for pilot/demonstration initiatives. In New Caledonia and French Polynesia, conservation easements would require passage of territorial legislation.

1. INTRODUCTION

The analysis presented in this report follows a global review of land and land-rights transaction tools that may be applicable in Pacific Island Countries and Territories (PICTs) as a means to pursue conservation and climate change resilience objectives. This review focused on three principal tools – purchases, conservation easements, and leases, which we will refer to collectively as transactions or transaction tools:

i. Outright purchase for conservation, in which a landowner irrevocably relinquishes all property rights to a buyer against payment. The buyer can be another private entity, a government entity, or an organization such as a land trust specifically established for the purpose of acquiring lands for conservation.

ii. Conservation easements or other voluntarily accepted encumbrances on rights to dispose of land and resources in particular ways. Landowners relinquish partial rights over property (e.g. development rights) or accept restrictions on certain activities on the property, but not ownership of the property itself. Incentives to landowners to accept such encumbrances on their property can include direct payments (using private or public funds), tax relief, and technical support for conservation management. A key consideration is to what degree the easement attaches to subsequent land transactions (sale or bequest) involving the parcel in question.

iii. Conservation leases, in which landowners relinquish use-rights for a defined period of time without fully ceding ownership of a property. Leases typically include payments based on economic value of the land, though all terms including payment amounts are subject to negotiation. Lease payments can involve private or public funds. Concessions can be considered as a special case of leases relating to public land.

The global review provided further detail on the mechanisms, identified some actors associated with their use, and presented examples including cases from within the PICT region. The review concluded that there is potential for expanded use of these mechanisms in PICTs that merits further exploration. That said, there are challenges facing such efforts, and the following analysis of feasibility considerations will explore favorable factors and opportunities as well as these challenges in the four focal PICTs of the RESCCUE project (Fiji, Vanuatu, New Caledonia and French Polynesia).

The remainder of this report will be divided into sections examining each of four focal PICTs, followed by a concluding synthesis section. The sections that examine individual PICTs will devote attention to the following main areas of relevance to the feasibility of expanding use of land and land-rights transaction tools:

i. Conservation priorities: if use of land and land-rights transactions is to be scaled up, there must be a clear geographical sense of where investment of funds for conservation and climate resilience will achieve the greatest positive impacts. Therefore, a clear prioritization of sites that explicitly takes into consideration factors relevant for biodiversity conservation and climate resilience is essential.

ii. Policy context: execution of a transaction strategy at significant scale will require government support; to facilitate relevant approval processes and also ensure enforcement of transactions and property or use rights. Government as a supportive partner as reflected in commitments to international agreements, national policy documents, agency mandates, and the like is therefore essential.

iii. Legal context: a land and land-rights strategy must be grounded in the legislative and regulatory frameworks governing transactions, and transactions must be enforceable under the law. The nature of legal tenure and property rights is a central determinant of the parameters of such a strategy.

iv. Social and cultural context: As much as a legal issue, the nature of land rights and governance is a matter of social and cultural context. The relationships of people individually and collectively to land influence their roles as conservation counterparts, can be a key factor in stakeholder conflicts, and also shape the political context for land transaction programmes.

v. Implementation capacity: application of transaction tools requires a range of technical capacities including those related to specific financing and legal arrangements to underpin transactions, as well as conservation capacities such as site management, ecological monitoring, and stakeholder engagement.

vi. Financing options: transactions such as purchases, easements and leases involve paying landowners for transfers of property or partial property rights. Moreover, after a transaction is executed most sites will involve long-term management costs to ensure that conservation or climate resilience objectives are met.

vii. Management sustainability: to ensure integrity of sites after a transaction, there will need to be an actor that accepts responsibility for long-term management, and there must be funding to ensure adequate capacity to do so.

2. FIJI

2.1 Conservation priorities

In Fiji ongoing collaboration between government and environmental organizations has resulted in a clear prioritization of terrestrial sites for inclusion in the national protected area network. This collaboration is structured as the Protected Areas Committee (PAC). The PAC was established in 2008 under section 8(2) of Fiji's Environment Management Act 2005, for the explicit purpose of facilitating work to meet Fiji's commitments under the Programme of Work on Protected Areas (PoWPA) of the Convention on Biological Diversity (CBD). Notable activities of the PAC include setting national targets for conservation and management; compiling data on species and habitats; formally documenting protected area boundaries; and conducting gap analyses of national biodiversity coverage of current terrestrial and marine protected areas.[1]

The PAC has defined a set of proposed terrestrial protected areas to advance toward a national target of placing 17% of the nation's land area under protection.[2] In general, the principal threats to be addressed are logging, pressure for conversion to agriculture, and uncontrolled fire. Land or land-rights transactions can be an effective means to respond to these threats, but will need to be accompanied by ongoing engagement of communities living in and around the sites to be protected. The sites are listed in Table 1 below:

TABLE 2.1: PRIORITY SITES FOR ADDITIONAL TERRESTRIAL PROTECTED AREAS IN FIJI

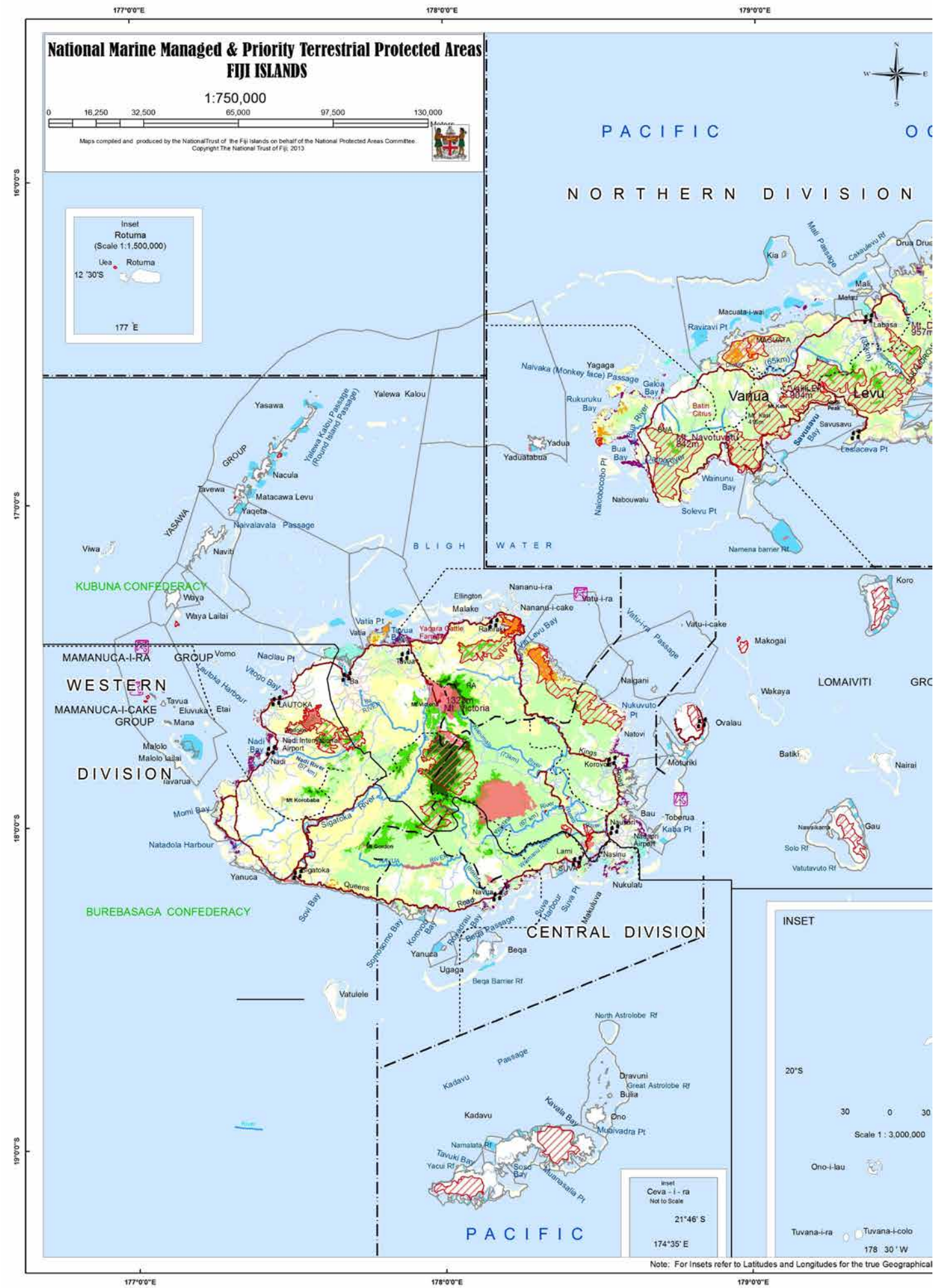
Delaikoro	Monu	Ovalau Highlands
Devuilau	Monuriki	Rokosalase
Dogotuki	Mt. Evans/Koroyanitu/Abaca	Sawa i lau
Dry Forest Area	Mt. Kasi/Drawa Block	Taveuni Forest Reserve
Emalu	Mt. Sorolevu	Tunuloa/Natewa
Gau Highlands	Mt. Washington	Uea
Koronibanuve Kadavu	Nadrau Plateau	Vatuvara
Kuata	Naicobocobo	Viria
Kubulau	Nakauvadra	Vuaqava
Kuitarua Koro	Nakorotubu	Vuna
Makodroga	Navotuvotu	Vunimoli/Dikeva
Makogai	Ogea Driki	Waidina
Moala	Ogea Levu	

These proposed protected areas have been mapped, and work is currently ongoing to model establishment and management costs and to explore financing options (see Map on following page). Thus, a concerted push to expand the use of land and land-rights transaction tools in Fiji benefits from a clear spatial prioritization of sites.

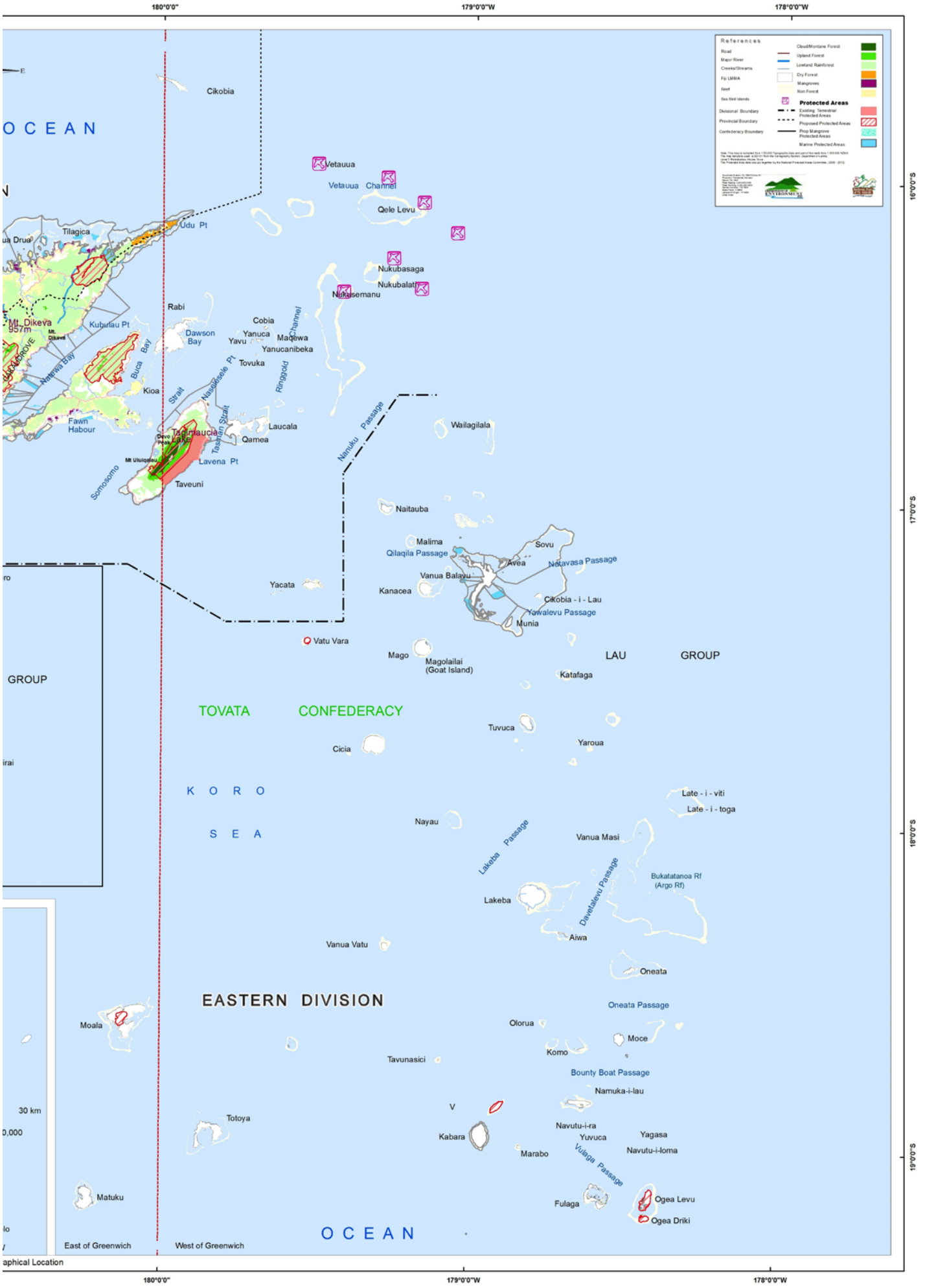
1 Jupiter, S., Tora, K., Mills, M., Weeks, R., Adams, V., Qauqau, I., Nakeke, A., Tui, T., Nand, Y., Yakub, N. 2011. *Filling the gaps: identifying candidate sites to expand Fiji's national protected area network*. Outcomes report from provincial planning meeting, 20-21 September 2010. Wildlife Conservation Society: Suva, Fiji. 65 pp.

2 Some sources indicate a target of 20%, but the 17% figure conforms to Aichi Target 11.

Map 1: Priorities for additional protected areas in Fiji



Map 1: Priorities for additional protected areas in Fiji



However, the mapped priorities remain subject to further refinement, especially as the PAC seeks to optimize the balance between multiple conservation objectives. For example, Klein et al. (2014) demonstrated how protected area network design in Fiji can change by increasing emphasis on ecological links between terrestrial protected areas and coastal ecosystems (e.g. the impact of reduced river run-off on coral systems).[3] Similarly, additional analyses focused on climate change adaptation, disaster risk management, and other green infrastructure approaches could inform further refinement of priorities. The current priorities emphasize biodiversity considerations, but this lens does not necessarily capture areas critical for climate resilience.

A further layer of information that will be important for ranking and sequencing priorities for additional protection relates to land tenure. Generally a clear indication of which areas fall under customary, state, or freehold tenure would also inform an overarching transaction strategy. With respect to customary land, one consideration that made the Sovi Basin context attractive was that it involved a large area with a manageable number of landowning units. The Kilaka Forest transaction benefited from the fact that the entirety of the area belonged to one landowning unit. An analysis of the numbers of landowning units implicated in a given proposed protected area would help stratify the set of proposed areas by degree of ownership complexity.

The ultimate spatial configuration of any transaction, be it a lease, purchase, or easement, must be determined through stakeholder engagement on the ground as well as ground-truthing of ecological conditions. Nevertheless, the current map of proposed protected areas produced by the PAC offers a point of departure for planning a wider transaction strategy, and signals an appetite among conservation partners for a systematic approach to such planning.

2.2 Policy context

The Government of Fiji has affirmed that the conservation lease pioneered in the Sovi Basin initiative and replicated in the Kilaka forest is an approved and suitable approach.[4] In combination with a government commitment to the above-mentioned Aichi Target of protecting 17% of terrestrial areas, this suggests that the policy context is favorable for a concerted effort to promote and support additional use of leases in Fiji. This is reinforced by ratification of international agreements such as the Ramsar Convention, the Nouméa Convention, and the Convention on Biological Diversity, and policy documents such as the Fiji Biodiversity Strategy and Action Plan, Fiji's Action Plan for Implementing the Convention on Biological Diversity's Programme of Work on Protected Areas, and the Fiji Forest Policy Statement.[5]

That said, in addition to these notable commitments to expanding areas under conservation management the Government of Fiji also seeks to spur economic growth and development and enhance food security. Therefore there is a strong policy emphasis on promoting agriculture, including emphasis on community-driven agricultural development as well as climate-smart agriculture.[6] The Sovi Basin experience also illustrates that mining ventures attract strong government support. The Government of Fiji established the Land Bank under the Ministry of Lands as a mechanism for streamlining the process for issuing leases to development investors.[7] Thus, in locations where conservation priorities overlap

3 Klein, C., Jupiter, S., Watts, M. and Possingham, H. 2014. Evaluating the influence of candidate terrestrial protected areas on coral reef condition in Fiji. *Marine Policy* 44(c): 360-365.

4 E. Erasito. 2018. pers. comm., Feb. 21; S. Mangubhai. 2018. pers.comm., Apr. 13.

5 Clarke, P. and Gillespie, C. 2009. *Legal Mechanisms for the Establishment and Management of Terrestrial Protected Areas in Fiji.* IUCN: Suva, Fiji.

6 Ministry of Agriculture. 2014. *Fiji 2020 Agriculture Sector Policy Agenda "Modernizing Agriculture."* Government of Fiji: Suva, Fiji.

7 http://fijilive.com/fijliive-print-story.Fijilive?26711.Fijilive

with significant agricultural development potential or mineral resources, the policy context may lean in favor of development over conservation. This points to the importance of multi-stakeholder land use planning processes with participation by all relevant government agencies, as well as the desirability of progress toward a national land use plan for Fiji. That said, given the prevalence of customary land ownership, for many areas of conservation interest communities themselves exercise significant decision-making rights irrespective of government policy.

2.3 Legal context

There are three main types of land tenure in Fiji: state lands, freehold lands, and customary lands held in trust for the native communities.[8] Customary, or iTaukei, lands are by far the most prevalent.[9] The genesis of this three-pronged system dates to the late 1800s. In 1874, upon the cession of Fiji to United Kingdom, the acting authorities suspended all sales between native landholders and non-native landholders to better assess the ownership of land. Land that had already been transferred to foreigners, approximately 162,000 hectares or roughly 8% of the total, was deemed to be Crown Grant Lands or Freehold.[10] Land in communal possession became iTaukei lands (formerly termed Native Lands). Land without title or customary owners became the Crown lands now referred to as State lands.

The latter two categories of land tenure, State and iTaukei lands, are defined as inalienable under the 2013 Constitution of Fiji (See article 28).[11] As a result, in Fiji unlike in other areas in the Pacific, most land cannot be permanently transferred. The notable exception to this is Freehold land. Even in the case of a need for a public purpose or expropriation the land will revert to the customary owners once that purpose is extinguished. This precept also extends to State land.

More than 82% of the land area in Fiji is held in communal ownership and therefore inalienable.[12] Consequently leases are the pre-eminent way to obtain an interest in land. Communal land is under the administration of the iTaukei Land Trust Board or TLTB, a government body formerly known as the Native Lands Trust Board. The TLTB was created in 1940 to serve as the governance body of not only all customary lands but also of the leases that could be granted on those lands.

---

8 Does land lease tenure insecurity cause decreased productivity and investment in the sugar industry? Evidence from Fiji https://www.researchgate.net/publication/237325986_Land_tenure_system_in_Fiji_the_poverty_implications_of_expiring_ leases [accessed Apr 30 2018].

9 https://onlinelibrary.wiley.com/doi/pdf/10.1111/1467-8489.12133 Please note that there also other communal regimes relating to Rotuman and Banaban communities.

10 NLTB, http://nltb.com.fj/land.html

11 2013 Constitution on Fiji- 28. *(1) The ownership of all iTaukei land shall remain with the customary owners of that land and iTaukei land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State in accordance with section 27. (2) Any iTaukei land acquired by the State for a public purpose after the commencement of this Constitution under section 27 or under any written law shall revert to the customary owners if the land is no longer required by the State. (3) The ownership of all Rotuman land shall remain with the customary owners of that land and Rotuman land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State in accordance with section 27. (4) Any Rotuman land acquired by the State for a public purpose after the commencement of this Constitution under section 27 or under any written law shall revert to the customary owners if the land is no longer required by the State. (5) The ownership of all Banaban land shall remain with the customary owners of that land and Banaban land shall not be permanently alienated, whether by sale, grant, transfer or exchange, except to the State in accordance with section 27. (6) Any Banaban land acquired by the State for a public purpose after the commencement of this Constitution under section 27 or under any written law shall revert to the customary owners if the land is no longer required by the State.*

12 Farran, Sue, South Pacific Property Law, Routledge-Cavendish (April 2002)

The system that serves to support these different land tenure models is based on the Torrens Land Registration system, which was originally implemented in 1858 in Australia. This system relies on registration of rights before a central registrar that provides definite recordation of any real property interest in land. In Fiji, this is the Registrar of Titles, who also serves as a register for leases.

An aspect that must be borne in mind and that has been a source of tension is that all subsurface and mineral rights in Fiji are held by the government, which has curtailed the ability to explore in any area except those listed in the Mining Act as expressly reserved.[13] One valuable exception is Forest Land protected by the Forest Act. Consequently, conservation land may be fully protected if recognized under this act.

A. Purchases

Land purchase as a conservation tool is relevant to only the 8% of land in Fiji that is freehold, as the remainder is native or State land that is not available for sale.[14] Moreover, much of freehold land is in urban or other areas that are not of interest for conservation or climate resilience. Aside from properties subject to current purchase initiatives by the National Trust of Fiji (NTF), there is no mapping of freehold areas that might overlap with conservation priorities. NTF is explicitly empowered to purchase property for cultural or environmental conservation, and nothing precludes other Fijian entities or individuals from doing so. However, foreign entities face obstacles in using purchases as a conservation strategy; a prohibition against purchases of foreign land in urban areas may not be an issue, but a legal requirement to build a new home within 2 years after purchasing vacant freehold property may conflict with conservation or climate resilience objectives.[15] Thus, foreign organizations or individuals wishing to use purchases likely are best served by partnering with a Fijian entity such as the NTF.

B. Easements

Easements in essence are alienations of certain real property rights and as such would not be allowable on either State or iTaukei land in Fiji. This is not the case for Freehold lands. The Lands Transfer Act specifically allows for easement on freehold properties. Easements in Fiji may be appurtenant, requiring a dominant tenement (the property whose owner holds certain rights over an adjoining property), or in gross, which means an easement granted to a certain beneficiary. Easements on Freehold land must be registered in order to be enforceable in Fiji as per the Land Transfers Act.

Easements for conservation are not expressly provided for in Fiji, although easements for light and scenic purposes (meaning, for example, an easement that prohibits erecting a building that would block light or views on another property) are permitted under Fijian law. However, the Land Transfer Act, principally Part VII – Restrictive Covenants, does define a legal construct that functions much like easements and can be applied for conservation objectives.[16] The act establishing the National Trust of Fiji empowers the Trust to make use of this construct, which includes the right to enforce the agreement.[17]

---

13 Fiji Mining Act http://www.paclii.org/fj/legis/consol_act_OK/ma81/

14 https://fijirealty.com/buying-in-fiji/

15 http://www.munroleyslaw.com/doing-business-in-fiji/buying-or-dealing-in-fiji-land/

16 Government of Fiji. 1970. *Land Transfer Act* [Cap 131]. Laws of Fiji.

17 Clarke, P. and Gillespie, C. 2009. *Legal Mechanisms for the Establishment and Management of Terrestrial Protected Areas in Fiji*. IUCN: Suva, Fiji.

C. Leases

Leases in Fiji exist under two regimes: the Agricultural Landlord and Tenant Act (ALTA), which provides for Agricultural Leases with a fixed duration of 30 years, and TLTB leases which focus on commercial, residential, and other uses which can be granted for up to 99 years, in accordance with common law principles.[18] Both leases are granted by the TLTB as the trustee for all communal land in Fiji.

The ALTA resulted from the sugarcane boom of the 1970s. The need for arable land far outstripped the existing availability in non-native lands, giving rise to the need for a regime that allowed for agricultural development on customary land by non-native holders. The leases are viewed by the native population as being more favorable to the tenants as the valuation of rents is limited to the unimproved capital value (UCV) of the land, i.e. as if it were held as a fee simple plot. This could lead to landowners receiving as little as $112 dollars a year for nearly 8 hectares of land.

As with all leases, the challenges lie in their impermanence. The expiry of the first ALTA leases in 1997 led to protests from landholders and threats of non-renewal. This is an ongoing dispute that has yet to be resolved, but the Fijian government has already intervened to increase the percentage of UCV paid from 6% to 10%, and creating the Committee for the Better Utilisation of Land to ensure fair calculation of UCV.

TLTB leases granted under the powers established by the National Land Trust Act are more flexible and allow for a range of purposes. It is under this regime that the Sovi Basin lease with the National Trust of Fiji was enacted. This lease allows for the conservation and sustainable management of the area. Similarly to the ALTA leases, the landowners may object to any renewal. Consequently, it is crucial that landowners not only be engaged with the conservation mission but also receive economic benefits that are perceived to be fair.

2.4 Social and cultural context

Of the four PICTs examined in this study, Fiji has the fewest problems with land recognition of customary landholding. This is largely due to the country's colonial legacy of land administration, a written record of land registration including names of land-owning clans and their members. The TLTB uses this record for determining ownership and distribution of lease payments.[19] This means that for most land transactions there is no need for extensive and ongoing recording of genealogies, land boundary surveys and determination of clan membership. However, this does not mean that there are no uncertainties around ownership and no conflicts between competing landowners.

In the past land was plentiful and most governance of land revolved around allocating land for subsistence farming; the notion of transacting land for lease revenue or selling land for money was unheard of. Up until today land is not used communally but on an individual basis by a family or a household. However, in most regions there are communally held areas for water rights, fishing rights, grazing rights, and so on.[20] These are often the areas of interest for conservation. Absolute rights to land are not transferable in principle by custom and law, and sacred attributes and people's identities are attached to land.

---

18 Under Common Law the longest length of an easement is 99 years. This is in order to avoid perpetual contracts, also known as the rule against perpetuities.

19 Vukikomoala K, Jupiter S, Erasito E, and Chand, K. 2012, *An analysis of international law, national legislation, judgements, and institutions as they interrelate with territories and areas conserved by indigenous peoples and local communities*. Report No. 19 Fiji. Natural Justice and Kalpavriksh: Bangalore and Delhi.

20 Rakai, Mele E.T. et al. 1995, Traditional land tenure issues for LIS in Fiji. Survey Review 33(285), p. 249.

The British administration classified Fijian social structure into a generalized hierarchy in Native Land Commissions that worked for indirect rule. Although initially defied by the cultural variety in the region, nowadays 'traditional' (*vakavanua*) tenure throughout the country is based on this model that has a distinct hierarchical system of control and authority.[21] The systematic registration of land followed this model and is, as said, now regulated by the TLTB that works through the chiefs (the contemporary 'indirect rulers') in the Native Land Commission. Most people see this system as traditional, not least because it has allowed communities to retain the advantages of their *vakavanua* tenure system.[22] These advantages include the principle that land cannot be sold and that people realise the importance of maintaining land-based customs and traditions.

Land owned by indigenous people (*iTaukei*) is inalienable and managed according to what people perceive as native ways (*vakavanua*). Land rights and tenure systems, including those that are altered through a lease for instance, are governed by the main land-owning unit - *mataqali* ('clan'). Proper local level *vakavanua* governance depends largely on maintaining good relationships and mutual understandings within the society. Perhaps even more important are leadership qualities with respect to oratory skills, negotiation skills, and vision.

Photo by user M M on Flickr, 2008

The TLTB has the power to grant leases or licenses for unoccupied native lands surplus to the Fiji owners' needs, and to grant or refuse consent to all dealings in such leases and licenses.[23] Through this system, all available land has been brought into production and this has greatly supported the country's still booming economy. Local ownership is in the meantime protected and considered to be inalienable, and the system can provide local villagers with a reliable source of income. Discontent among landownership and tenants generally relates to high operational costs of the TLTB, and economic

21 Ibid, p. 252.

22 Ibid., p. 256.

23 Fingleton, Jim, 2008, *Pacific Land Tenures: New Ideas for Reform*. FAO Legal Papers Online #73, www.fao.org/legal/prs-ol, p. 13.

disparity between iTaukei and settlers is another source of frustration.[24]

While the idea and practices of a traditional communally-oriented system are still around, a Western individually inclined system has been introduced in parts of the country, especially in urban and commercial farming areas. Along with other factors, this duality in land tenures has contributed to the economic disparity that exists today between Fijians, on the one hand, and the various settler groups, particularly those of Indian origin, on the other.[25] The individual tenure under which the settlers held their lands facilitated access to development funds and operated on the more fertile lands. Land under communal tenure has not seen such opportunities, also because they are less fertile and because of widely held non-materialistic *vakavanua* values and attitudes.

Facing challenges of growing individualism, urbanization and culture change in general, current leaders often have a hard time maintaining family and kinship ties and the principles of sharing and caring. At the same time chiefs tend to assume new roles that are often entrepreneurial in nature and this can invite resentment and distrust. Also, at provincial and national levels, the power of the chiefs is declining, in particular since the first military coup in 1987. More recently, in early 2012, the Bainimarama government abolished the Great Council of Chiefs or *Bose Levu Vakaturaga* (it is possible that a future new government might revive this body). Amidst these challenges and uncertainties, chiefly power continues to be important as the main body of governance at the local level as well as its representative role in local and provincial politics.

Attempts to transact land for conservation will likely encounter some of these issues, particularly with respect to expectations around revenues flowing to the landowning groups. Those not living on the land and not involved in the decision-making processes may cause problems. Such problems can only be overcome through inclusive consultations of all members of the landowning units and ongoing efforts by the facilitating NGO and the chiefs.

In addition, leasing land (for conservation for example) necessarily dictates a degree of alienation in order to exchange temporary rights of use for income, and that alienation may be compatible with customary objectives if the landowners have control over the leasing process. The real or felt alienation that may occur largely depends on the time spent on consultation and the size of the area considered. If consultations happen haphazardly, landowners will likely disagree with the outcome and if the area is large, the consultation will need to include more *mataqali* and therefore likely run into more issues around boundaries and particular uses of the land that have been negotiated between the clans.

2.5 Implementation capacity

An effort to support wider use of land and land-rights transaction tools in Fiji would benefit from the presence of several actors with relevant direct experience, mandates and appetite. Collectively, the government, the National Trust of Fiji, the University of the South Pacific, and conservation NGOs represent the requisite technical capacity as demonstrated by initiatives such as the conservation leases for Sovi Basin and Kilaka Forest, and the government's own lease initiative in a REDD+ project at Emalu.

Moreover, the majority of these actors already are actively working together in various projects and initiatives, and therefore have a track record of combining their capacities to achieve conservation objectives. Indeed, their collaboration under the aforementioned Protected Areas Committee could be conducive to a focused effort on expanding use of transaction tools.

---

24 Shah, Krishn, 2004, Facilitating property developments in Fiji: The legal mechanisms. Paper presented at the Pacific RIM Real Estate Society, Bangkok, 25-28 January, 2004, p. 5.

25 Rakai et. al, 1995: 247.

The National Trust of Fiji plays a central role, given its specific mandate as reflected in being the leaseholder for the Sovi Basin, leading an effort to execute a land purchase to protect the Nakanacagi Cave, and openness to exploring opportunities to demonstrate the use of easements (conservation covenants) as per the National Trust of Fiji Act. The NTF has on-the-ground site-management experience in a variety of ecosystems and stakeholder contexts, and good working relationships with all the other key actors in government and the NGO sector, as well as USP. Thus, the NTF is ideally positioned to spearhead an organized effort to scale-up use of land and land-rights transaction tools.

USP, often in collaboration with environmental NGOs, provides essential research and monitoring functions to numerous initiatives in Fiji. It benefits from a dedicated core of researchers who are active in applied research (both social and ecological) of direct relevance to conservation, and a steady stream of students eager to enter into this field. USP will be central to continued efforts to refine fine-scale site definition and prioritization that could feed into the spatial components of a transaction strategy.

One area that may merit further attention relates to legal capacity. Legal services are readily available in Fiji to execute transactions, but must be retained for each initiative; actors such as the NTF or its partner conservation NGOs do not have the legal capacity in-house to conduct due diligence, draft transaction documents, and the like. For a large programme of purchase, lease and easement activities it may be cost-effective to secure such capacity on a permanent dedicated basis through in-house staffing in the appropriate institution or through dedicated *pro bono* support.

The preceding comments on capacity relate to experience, mandate, and appetite, as well as technical know-how on the basis of demonstrated experience. In this regard, Fiji appears well-positioned to embark on a concerted effort to expand use of transaction tools. However, capacity is constrained in terms of human resources and logistics, which could be functions of available funding (more on this below). Table 2 below shows an indicative mapping of key capacities present among the actors in Fiji.

TABLE 2.2: ESSENTIAL CAPACITIES FOR LAND & LAND-RIGHTS TRANSACTIONS AMONG FIJI ACTORS

	Legal mechanisms & processes	Government policies & procedures	Community & stakeholder engagement	Social & ecological baselines & monitoring	Conservation management	Fundraising & financing mechanisms
Dept. of Forestry	X	X				
Dept. of Conservation	X	X	X		X	
iTaukei Land Trust Board	X	X				
National Trust of Fiji	X	X	X		X	X
Univ. of the South Pacific		X	X	X		
Conservation NGOs[26]	X	X	X	X	X	X

26 Including Conservation International, Fiji Environmental Law Association, International Union for the Conservation of Nature, Live & Learn International, NatureFiji-MareqetiViti, Rainforest Trust, Wildlife Conservation Society, and the World Wildlife Fund.

2.6 Financing options

The feasibility of conducting land or land-rights transactions hinges on the availability of funding. An obvious first question might be how much funding is required to launch an effort to expand use of these tools. The answer to that question is beyond the scope of this exercise. Instead, we note that in Fiji there are multiple complementary initiatives to assess the likely financing requirements for establishing and managing a comprehensive national protected area network (marine as well as terrestrial). These include efforts by Conservation International under an initiative funded by GEF with FAO as Implementing Agency, IUCN, UNDP's BIOFIN programme, and WCS. The PAC will serve as an important forum for validating results once these analyses are completed and harmonized, leading to a robust set of figures to inform a national strategy for land and land-rights transactions for conservation and climate resilience.

As for where funding might come from, Fiji offers a wide range of examples of sources that have supported relevant initiatives. Although availability of bilateral funding has been limited, protected area initiatives have benefited from multilateral support through the World Bank, UNDP and UNEP, and GEF. The Sovi Basin initiative demonstrated private sector appetite for financing conservation leases, in the form of funding from the Fiji Water company. Protected area work in Fiji attracts support from private foundations (for example the MacArthur Foundation and the Walton Family Foundation) as well as NGO-hosted financing mechanisms such as the Global Conservation Fund and the Critical Ecosystem Protection Fund. The National Trust of Fiji successfully has entered into partnerships with institutions such as the Rainforest Trust and the San Diego Zoo to raise funds for purchases. Thus, although there is no meaningful way to present a quantitative estimate of the potential funding available for advancing further land and land-rights transactions in Fiji, it appears clear that such initiatives are attractive to a wide range of potential sources.

The use of a conservation lease in Fiji has been described as a form of Payment for Ecosystem Services (PES).[27] The Kilaka Forest and Sovi Basin leases can be seen as PES schemes in which international willingness-to-pay for conservation is channeled to remunerate landowners for the service of protecting critical habitat for biodiversity. The REDD+ initiatives at Emalu and Drawa also are forms of PES,[28,29] and the prevalence of hydropower in Fiji suggests possible scope for PES linked to watershed maintenance. The range of relevant activities taking place in Fiji indicates appetite at implementation and policy levels for pursuing the possibilities, which favors the feasibility of expanded use of transaction tools.

The aforementioned Protected Areas Committee (PAC) has prepared a policy brief making the case for a National Protected Area Trust Fund (NPATF), based on a study of protected area financing options commissioned by WCS and WWF.[30] The brief lists several possibilities for housing a national protected area fund, including a newly established protected area management authority, the National Trust of Fiji, the Fiji Public Trustee Corporation, and the Ministry of Environment. The Sovi Basin Trust Fund is presented as an example, though the brief does not discuss the possibility of expanding the Sovi Basin mechanism to accommodate additional areas; this possibility is currently being examined by Conservation International. Payments for Ecosystem Services, leases, project finance, and debt-for-nature-swaps are noted as related financing options for protected areas; these could be used

27 Lumelume, R., Manghubai, S. and Dulunaqio, S. (no date). "Achieving Forest Conservation in Fiji through Payment for Ecosystem Services Schemes." (presentation). Wildlife Conservation Society.

28 Ministry of Fisheries and Forests. (no date). The Fiji National REDD+ Pilot Site: Emalu, Navosa Province. Factsheet: The National REDD+ Unit. Suva, Fiji. Available at: https://www.pacificclimatechange.net/sites/default/files/documents/CCCPIR-Fiji_Fiji%20REDD%2B%20Site%20Emalu%20Study.pdf

29 http://www.nakau.org/drawa–fiji.html

30 Nimmo-Bell. 2016. *Options for sustainable financing of Protected Areas in Fiji.* Draft final report for the Protected Areas Committee, Government of Fiji. Auckland, New Zealand.

independently for particular transactions or used in combination with a NPATF. An effort to expand the use of transaction tools, with an emphasis on leases, could accompany a push for a national financing mechanism to reinforce political will to enact protected area legislation and create paths to permanent protected area status for Fiji's wide variety of conservation areas.

2.7 Management sustainability

After a transaction is executed, sites will require ongoing management of some form to ensure that conservation and climate resilience objectives are met. At a minimum, ecological monitoring at some frequency will be needed to verify progress toward objectives. In most cases a large part of management will involve continuing stakeholder engagement, particularly with local communities and landowners as well as with relevant government agencies to reinforce recognition of and support for the conservation management regime at a particular locale. Where a lease impacts on local livelihood options, management may involve programming to help landowners pursue alternatives. At sites under significant pressure, management will require vigilance and enforcement measures. Finally, given the current absence of protected area legislation and ongoing efforts to address this gap, management may also involve seeking and responding to opportunities to strengthen protected area status as they emerge over time.

In Fiji three possibilities present themselves for management of sites managed for conservation and climate change resilience. First, government agencies such as the Department of Environment and Department of Forestry include such management authority and responsibility in their mandates, as does the Fisheries Department for coastal sites. Second, site management is one of the core purposes of the National Trust of Fiji. Finally, conservation NGOs can lead site management, typically in partnership with relevant government agencies as well as local communities.

However, there is a dearth of spare capacity on the part of any of these actors for long-term management of additional sites. Thus, in addition to availability of funding being the constraint to wider use of land and land-rights transaction tools, it also constrains the extent to which any of the relevant actors can accept additional management responsibilities. For example, the NTF identified staff numbers, legal expertise, and scientific expertise relating to protected area management as critical areas for capacity development before adding significantly to its portfolio of sites.

2.8 Fiji: Conclusion

A survey of feasibility considerations for expanded use of land and land-rights transactions to achieve conservation and climate resilience goals suggests a highly conducive context in Fiji. A Protected Area Committee that includes government, NGO and academic partners has identified priority sites, and the need for placing additional areas under conservation management is clearly recognized in government policy. Experience with conservation leases and land purchase initiatives demonstrates legal feasibility, and there are also as-yet unused legal provisions for conservation covenants (equivalent to easements). The constellation of conservation actors including government agencies, the statutory body National Trust of Fiji, the University of the South Pacific and environmental NGOs collectively embody ample technical capacity, mandates and appetite for increased use of transaction tools.

Although funding is a significant constraint (for transaction costs themselves as well as to support the capacity of actors to absorb long-term management responsibility for additional sites), conservation and climate interventions in Fiji enjoy a broad base of donor and private sector support that lends confidence in financing potential given a clear, robust strategy. Such a strategy would benefit from further refinement of spatial priorities as well as articulation of a national conservation financing mechanism (potentially through expansion of the Sovi Basin endowed trust fund to accommodate

additional sites). However, in addition to replication of the Sovi and Kilaka conservation lease models, further purchases beyond the Macuata or Nakanacagi initiatives, and demonstration of conservation covenants or easements, Fiji would benefit from improved protected area legislation that includes provisions for permanent protected areas.

TABLE 2.3: SYNTHESIS OF FEASIBILITY CONSIDERATIONS FOR FIJI*,**

	PURCHASE	EASEMENT	LEASE
State of identification of conservation priorities	2	1	4
Policy context	4	2	4
Legal context	5	3	5
Social and cultural context	4	1	5
Implementation capacity	5	2	5
Financing options	4	2	4
Availability of solutions for long-term management	4	3	4
Average Score	4	2	4.4

* Each factor is scored from 1 to 5 where 1 means *least conducive to feasibility*, and 5 means *most conducive to feasibility*.

** The numbers reflect initial scoring based on desk review, interviews with key informants, and group discussions in stakeholder workshops.

Photo by user Ian Sutton on Flickr, 2004

3. VANUATU

3.1 Conservation priorities

Vanuatu offers terrestrial conservation opportunities throughout the country, as described in Vanuatu's National Biodiversity Strategy and Action Plan (NBSAP) and its Directory of Wetlands. The NBSAP was first developed and endorsed in November 1999, and an updated version was released in June 2018.[31] It states:

> *Seventy four percent (74%) of land in Vanuatu is covered with natural vegetation. Forest types include tropical lowland evergreen rain forest, broad-leaved deciduous forest, closed conifer forest, montane rain forest, cloud forest and coastal forest. Other notable vegetation includes swamp forest on Efate, kauri pine strands on Erromango and scattered mangrove forests covering around 3,000 ha (most of which occur on Malekula Island). Lowland forest has largely been cleared and replaced by anthropogenic vegetation but … low montane forests are generally well preserved and occupy large areas.*

Under the Constitution of the Republic of Vanuatu, consideration of the environment is a national priority – every person has a duty to protect Vanuatu and to safeguard the national wealth, resources and environment in the interests of the present and future generation. Through policy instruments such as the National Sustainable Development Plan (NSDP) and the National Environment Policy and Implementation Plan (NEPIP), Vanuatu has set explicit national conservation targets. Specifically, Strategic Area 2 of the NBSAP (Forests and Inland Waters Ecosystems Conservation and Management) reiterates Vanuatu's commitment to Aichi Target 11, articulating national targets as:

1. By 2030, at least 17% of important biodiversity areas, livelihoods and kastom importance are conserved through community and government effective management measures.[32]

2. By 2030, at least 15% of natural forest and 10% of wetland areas are conserved through effective community and government management measures.

3. By 2030, 30% of Vanuatu's natural forest (Forestry) is being actively managed and protected.

Vanuatu has what the NBSAP calls a rudimentary system of conservation areas, but these were not selected through formal planning processes based on ecological knowledge or biodiversity values. The NBSAP notes that the World Database on Protected Areas (WDPA) lists four formal protected areas.[33] The NBSAP further states that the Department of Environmental Protection and Conservation (DEPC) has registered three formal forest areas and one mangrove area totalling an estimated 11,000 ha, and that protected terrestrial and inland waters amount to 4.2% of total land area. This discrepancy points to the need to further clarify definitions of protected area status, and a clear inventory of sites and their respective protection status. This need reflects the challenges of protected area definition, designation, establishment, and management in the context of Vanuatu's customary land ownership. Limited progress on protected area establishment also reflects competing land uses such as logging in lowlands and mining in highlands.

---

31 Department of Environmental Protection & Conservation, National Biodiversity Strategy and Action Plan, 2018. Available at: https://environment.gov.vu/index.php/projects/nbsap-project.

32 Note that the Aichi Target is to achieve this goal by 2020.

33 Erromango Kauri Forest Conservation Area; Nguna-Pele Marine Protected Area; President Coolidge and Million Dollar Point Marine Reserve; and Vatthe Forest Conservation Area.

As an alternative to conventional, government-managed protected areas, various approaches to community-managed conservation areas have been piloted in Vanuatu's Key Biodiversity Areas (KBAs) for both terrestrial and marine areas. Government and civil society partners have promoted Locally Managed Marine Areas (LMMAs), which are seen as a way to empower local people to manage their marine and coastal resources. Similar approaches have been promoted for terrestrial sites, including community conserved areas (CCAs).

In 2017, local people in the interior of north-west Efate conducted a biodiversity assessment and concluded that the forest is in good health. The assessment was conducted by the Vaturisu Council of Chiefs and Shefa Provincial Government's Efate Land Management Area (ELMA) project in collaboration with The Pacific Community (SPC)'s Restoration of Ecosystem Services and Adaptation to Climate Change (RESCCUE) project. The goals of the assessment and the involved projects are to establish the ELMA as a conservation area to protect customary forests from agricultural and settlement encroachment.[34]

This case illustrates that given the extent of opportunities, optimizing use of conservation funds to meet national targets requires effective prioritization of specific sites and engagement with communities. Apart from the effort in north-west Efate, the most significant efforts to date to identify priority sites for conservation in Vanuatu are the compilation of Key Biodiversity Areas (KBAs) in the East Melanesian Islands Biodiversity Hotspot Ecosystem Profile prepared for the Critical Ecosystem Partnership Fund (CEPF) in 2012, and listings of priority sites for protection and/or conservation management in the individual sections on each province in the NBSAP. The Ecosystem Profile identifies 27 KBAs in Vanuatu, two of which are Alliance for Zero Extinction (AZE) sites: Aneityum and the Santo Mountain Chain.[35] The NBSAP notes a third AZE site on Vanua Lava and Mota for the Vanikoro Flying Fox (*Pteropus tuberculatus*).

The NBSAP (pp. 43-34) summarizes conservation priority areas as follows:

> *Homo Bay and Ranwas in South Pentecost (high species diversity and vulnerable); Tanna (remnant conservation); Petaview catchment on Epi; mangroves on Malekula, Efate, Moso, Emau, Emae, Aneityum, Tanna, Santo and Vanua Lava (including rehabilitation); catchment of Creek Ai, Efate (high biodiversity value); Shefa Province (birds and their habitat); Mota Lava (flying foxes); Vanua Lava (crocodiles); Hui, Tegua, Loh, Toga Linua and Metoma in the Torres Group (coconut crab); Malo, northwest Malekula, Vanua Lava, Santo and Efate (bat roosting caves and feeding areas); Lake Letas (a registered CCA, one of the*

34 https://vanuatuindependent.com/2018/06/01/forest-north-west-efate-good-health/, last consulted, 21 August 2018. Also see Efate Land Management Area (ELMA) Bioblitz, Summary Report, RESCCUE, 17 May 2018, available at: http://www.spc.int/DigitalLibrary/Get/pdt3d, last consulted, 21 August 2018.

35 As noted in the CEPF Ecosystem Profile, these sites are the highest biological priorities for conservation as their loss would result in global extinction of at least one species. The criteria for AZE sites are: 1. Endangerment - An AZE site must contain at least one Endangered (EN) or Critically Endangered (CR) species, as assessed on the IUCN Red List; 2. Irreplaceability - An AZE site should only be designated if it is the sole area where an EN or CR species occurs, contains the overwhelmingly significant known resident population (>95%) of the EN or CR species, or contains the overwhelmingly significant known population (>95%) for one life history segment (e.g. breeding or wintering) of the EN or CR species; and 3. Discreteness - The area must have a definable boundary within which the character of habitats, biological communities, and/or management issues have more in common with each other than they do with those in adjacent areas (http://zeroextinction.org/site-identification/aze-site-criteria/).

national wetland sites as well as the first Ramsar Site for Vanuatu); Tongoa, Ambrym, Efate and Epi (Megapode bird); Tanna and Vanua Lava (Collared Petrel), Vanua Lava (Vanuatu petrel); and these six IUCN/CBF hot spots Aneityum, Futuna, Tanna, Tongoa Laika Island Santo Mountain Range, Gaua (Banks).[36]

This summation shows the wealth of needs and opportunities, but site prioritization is complicated by the fact that Vanuatu's biodiversity remains poorly known with detailed studies limited to a few genera, focused on the country's larger and more accessible islands. As noted in the NBSAP, much of Vanuatu's biodiversity has only been classified by indigenous knowledge systems and has yet to be documented. The studies of flora and fauna in Vanuatu that do exist indicate an extraordinary wealth of endemic and rare species.

TABLE 3.1: KEY BIODIVERSITY AREAS IN VANUATU[37]

KEY BIODIVERSITY AREA	PROVINCE	TOTAL AREA (HECTARES)	LAND AREA (HECTARES)
Ambae	Penama	15,396	15,396
Ambrym	Malampa	17,605	17,364
Aneityum	Tafea	3,850	3,850
Epi	Shefa	13,742	9,590
Erromango	Tafea	32,717	30,454
Futuna	Tafea	1,077	1,042
Gaua	Torba	18,725	18,725
Green Hill	Tafea	2,030	2,030
Homo Bay	Penama	2,063	2,046
Loru	Sanma	14,053	8,555
Maewo South	Penama	3,768	3,685
Mota Lava	Torba	3,562	3,362
Mount Tukusmera	Tafea	5,969	5,969
Neck of Malakula - Crab Bay	Malampa	22,246	17,676
North Efate	Shefa	61,201	38,345
Pentecost North	Penama	5,197	4,929
Ringi Te Suh	Malampa	9,732	2,836
Rowa Reef	Torba	4,637	360
Santo Mountain Chain	Sanma	168,360	167,482
Small Nambas	Malampa	21,390	21,156
Tongoa – Laika	Shefa	3,441	3,246
Torres Islands	Torba	8,261	373
Ureparpara	Torba	5,881	4,198
Vanua Lava	Torba	14,851	14,165
Vatthe	Sanma	11,332	5,785
West Malo	Sanma	5,645	5,596
Wiawi	Malampa	4,273	4,166
TOTAL:		**481,004**	**412,381**

With respect to site prioritization in response to threats, biodiversity is most at risk in lowland and coastal areas and small islands; more intact areas are found in high altitude forests on larger islands.

36 NBSAP 2018, pp. 43-44.

37 CEPF (2012)

Threats mentioned in the 2010 Vanuatu National Assessment Report are natural disasters such as cyclones, flooding and coral bleaching; deforestation, mangrove destruction, and land degradation; invasive alien species (IAS); overfishing; and air, land and marine pollution.[38] The NBSAP states that hunting and exploitation affect 66% of threatened species, while agriculture and invasive alien species impact 20% and 15% of threatened species respectively. Collectively the relevant policy documents and analyses signal recognition of the importance of ecosystem protection as well as climate resilience, though site prioritization for resilience is not evident.

In sum, definition of conservation priorities requires further work to inform a possible transaction strategy. Indeed, the NBSAP highlights an urgent need to inventory and map species, habitats, existing conservation areas, and priorities under Strategic Area 1, Objective CA1a.[39] Then, under Objective CA1b, the results of this mapping effort are intended to inform a national planning process for conservation area prioritization and establishment, including attention to protected area types and categories.

3.2 Policy context

Vanuatu has signed and ratified the United Nations Convention on Biological Diversity (UNCBD), joining the other 190 CBD parties to protect global biodiversity.

Vanuatu also includes conservation of the environment as one of the three main pillars of the aforementioned NSDP, which is directly linked to policy objectives of the NEPIP (more on this below). Other relevant policies that will be discussed below range from climate change and overarching productive sector policies, and other natural resource sector management policies also include measures towards protection, conservation and sustainable use of biodiversity.

However, in small developing states with economies in transition, environmental protection often ends up at the bottom of the list of development priorities. In a recent outline of the government's priority action agenda it features as the last issue under the 6th chapter on 'primary sector development and the environment'. Following a discussion on the challenges of developing agriculture, forestry and fisheries into commercially viable sectors, this agenda turns to environmental protection and conservation.[40] The following statement signals the view of the environment as a means for economic development: "The development of these natural resources will be the main way of raising incomes and creating employment. It is therefore critical to ensure that that environment is protected."[41]

Nevertheless, Vanuatu has had a conservation strategy in place since 1993. Over the last two decades, this plan has evolved into a policy that seeks to address environmental issues, including climate, biodiversity, land resources, water, coastal and marine, and waste and pollution.[42] Launched in 2014, the National Environment Policy and Implementation Plan (NEPIP) serves as a framework to link existing

38 Vanuatu National Assessment Report: 5 Year Review of the Mauritius Strategy for further implementation of the Barbados Programme for Action for Sustainable Development, 2010. Available at https://sustainabledevelopment.un.org/content/documents/1380Vanuatu-MSI-NAR2010.pdf

39 NBSAP 2018, p. 32.

40 *Government of Vanuatu Priorities Action Agenda 2006-2015: "An educated, healthy and wealthy Vanuatu"*, Department of Economic and Sector Planning Ministry of Finance and Economic Management, June 2006, available at https://mjcs.gov.vu/images/research_database/government-of-vanuatu-priorities-action-agenda-2006-15.pdf

41 Fingleton, Jim, 2008, *Pacific Land Tenures: New Ideas for Reform*. FAO Legal Papers Online #73, http://www.fao.org/legal/prs-ol, p. 3.

42 Vanuatu National Environment Policy and Implementation Plan, 2016-2030. Available at: https://reliefweb.int/sites/reliefweb.int/files/resources/VANUATU%20NEPIP-Final.pdf

environment-related policies and thus provides a roadmap for Vanuatu's long-term environmental actions. The main aim of the NEPIP is to strengthen national coordination of the rapidly expanding work and responsibilities of the Government and other stakeholders for coping with the increasing scale and complexity of environmental needs and requirements. The key underlying act for this policy is the Environmental Management and Conservation Act No. 12 of 2002, now the Environmental Protection and Conservation Act CAP 283 (the EPC Act). Today, the EPC Act is a key part of a suite of laws that provide for various aspects of environmental management, protection and conservation.

The EPC Act resulted in the establishment of the Department of Environmental Protection and Conservation (DEPC). Although the DEPC was originally established as the Environment Unit in 1986, it was upgraded to a department within the Ministry of Lands in 2010 and is now a part of the Ministry of Climate Change Adaptation, Meteorology and Geo-Hazards, Environment, Energy and Disaster Management (MCCA). The DEPC is the national focal point for a number of multilateral environmental agreements and is responsible for ensuring that development activities conform to the Government's commitments under these international and regional instruments.

The EPC Act originally was designed to be a comprehensive legislative framework covering all aspects of the environment, but in practice it focuses on Environmental Impact Assessment (EIA), Bioprospecting, and Community Conservation Areas (CCAs). The CCA is the key instrument for conservation and has grown in popularity as a means to protect certain areas.[43] For example, recently Ifira Marine Management (IMM) announced the establishment of its new Ifira CCA, stretching from Prima at La Colle River all the way to Dream Cove, thus including Port Vila harbor.[44] Its stated goal is a ban on all fishing inside the CCA and the key enforcement mechanisms are an on the spot fine of VT 400,000 (around USD$3,600 or €3,100), and provisions in the EPC Act allowing for legal proceedings. The CCA option is a response to the fact that the localized customary system of land and resource management limits the ability of government to pursue conservation without the support of landholders.

The situation of land in Vanuatu was included as an example in a recent study entitled Building a Pathway to Successful Land Reform.[45] In Vanuatu, constitutionally vested, inalienable land ownership rights rest with customary tenure, with recognition of leasing arrangements by ministerial consent. All land in Vanuatu belongs to the indigenous 'custom owners' and almost all land is held under customary tenure, whether leased (9.3%) or un-leased (89.7%). However, customary land is often leased without the consent of the custom landowner groups. Successive Ministers of Land have signed off on almost half of all leases over customary land without any consultation with custom landowners. In most other leases, leadership, usually a male chief or a small number of powerful men, leased customary land without the knowledge or consent of the broader group of landowners.

The NBSAP, as the principal conservation policy document, includes the following mission statement in section 5: To (1) manage and safeguard biological resources through government, provinces and local communities so as to maintain fully our natural and cultural heritage for all Ni-Vanuatu; (2) guide governments, provinces, local communities, landowners and landholders in the sustainable management of Vanuatu's natural resources; (3) ensure that all Ni-Vanuatu, including future generations, are able to benefit from biodiversity and enjoy its use; and (4) protect the custom, intellectual and legal rights of

43 Techera, Erika J., 2005, Protected Area Management in Vanuatu, *Macquarie Journal of International and Comparative Environmental Law*, 2(2), http://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/MqJICEL/2005/10.html

44 'Ban on fishing in Port Vila Harbor as part of Ifira Conservation Area', *Vanuatu Daily Post*, 31 March, 2018.

45 McDonnell, Siobhan, 2015, *Building a pathway to successful land reform in Solomon Islands*. Available at: http://dpa.bellschool.anu.edu.au/sites/default/files/publications/attachments/2017-01/building_a_pathway_report_web_version_complete_low_bandwidth_rev1.pdf

Ni-Vanuatu as resource custodians and users.[46]

This mission statement puts Ni-Vanuatu (the people of Vanuatu) at the centre of conservation. This reflects the nation-wide sentiment around community sovereignty over natural resources.[47] The centrality of this sentiment, combined with historical experience with leases alluded to above, is a significant contributor to widespread suspicion and antipathy towards leases, let alone purchases of land, ever since the colonial period. The emphasis on local communities is further reflected in perspectives on the protected area system, captured as provisions for Community Conservation Areas (CCAs) in the EPC Act. The limitations of formal protected area establishment in Vanuatu's context of customary land ownership, as well as limited government capacity, suggest that the CCA approach offers a better model.

The NBSAP states that "protected areas should also be established and managed in close collaboration with, and through equitable processes that recognise and respect the rights of indigenous and local communities, and vulnerable populations."[48] Many of these areas have CCAs, but it is not always clear how well they serve conservation or how sustainable they are. Nevertheless, there are a number of encouraging examples to build on, including Uri, Narong, Wiawi, and Ringi Te Suh marine reserves on Malekula established in 1991, Mystery Island reserve on Aneityum (1995) and Spuaki Conservation Area on Nguna (1998). Early government-initiated, top-down CCAs in Vanuatu also include the Kauri Forest Reserve (Erromango; 1995) and Vatthe Conservation Area (Santo; 1993).[49]

There has been significant buy-in from local communities and organisations for CCAs, as indicated by the many that have been established to date. These arrangements pursue conservation and sustainable resource management while allowing community members to continue to use their areas in accordance with their traditions and needs, and have been piloted throughout Vanuatu. As of 2012 there were around 50 listed CCA sites (though not necessarily legally registered under the EPC Act); the number has grown considerably since then. Most are community-driven initiatives, while some have been catalyzed and supported by initiatives such as the GEF 4 Forest Protected Areas Management (FPAM) project, which supported sites such as Lake Letas and the Kauri Reserve; the Nakau Programme; and the Critical Ecosystem Partnership Fund (CEPF).

As a matter of policy, the DEPC in the NBSAP has articulated protected area targets in terms of CCAS, namely to have 90% of community management committees complying with their CCA reporting obligations by 2020, and 10 registered CCAs in Vanuatu by 2020.

3.3 Legal context

In Vanuatu, land tenure is a mix of indigenous custom (kastom), common law and civil law regimes owing to Vanuatu's historic amalgam of cultures.[50] Both French and English laws applied concurrently in Vanuatu while jointly managed by the United Kingdom and France under the Anglo-French Condominium

46 *Department of Environmental Protection & Conservation, National Biodiversity Strategy and Action Plan*, 2018. Available at: https://environment.gov.vu/index.php/projects/nbsap-project.

47 Compare the mission statement in Fiji's NBSAP: "To conserve and sustainably use Fiji's terrestrial, freshwater and marine biodiversity, and to maintain the ecological processes and systems which are the foundation of national and local development."

48 NBSAP 2018, p. 30.

49 https://environment.gov.vu/index.php/biodiversity-conservation/conservation

50 Forsyth, Miranda, Understanding Judicial Independence in Vanuatu, State, Society & Governance in Melanesia, SSGM DISCUSSION PAPER 2015/9, Australia National University. Available at: http://ssgm.bellschool.anu.edu.au/sites/default/files/publications/attachments/2015-12/DP-2015-9-Forsyth-ONLINE_0.pdf

of the New Hebrides. However, these laws had not been drafted specifically to address life in Vanuatu but rather were applied *mutatis mutandi* (i.e. applied as needed and reasonable).

When Vanuatu became independent, one of the main outcomes was that ownership of all land reverted to the traditional landholders.[51] This concept is enshrined in the Constitution of Vanuatu in Article 73, which establishes that all land is owned by the indigenous people and may not be alienated from their use. This may pose a challenge to the use of easements as restrictions applied under easements can be considered an alienation of the rights of the land holder. Conversely, it also means that subterranean and mineral rights are held in the same manner and are subject to government management for the benefit of the customary landholders.

Due to this broad restriction on alienation of all lands, in Vanuatu, non-customary landowners need to rely on leases and strata titles (meaning title to improvements) to allow a form of temporary possession of customary land. Further, to manage all these interests, Vanuatu maintains a land registry system based on the Torrens system which requires registration for the enforcement of rights.

Leases require government review to ensure compliance with the constitution and to safeguard the

Photo by user Adrien Cretin on Flickr, 2004

interests of indigenous and local landholders. This requirement can lead to confusion in the process, delays in receiving the valuations, and inaccurate valuations that can be lower than what would be offered in the open real estate market. Other challenges include low lease payments and non-enforcement of lease conditions or statutory requirements for planning and environmental impact assessment.[52] These issues are compounded by indigenous people's own challenges in community management of land, resources and revenues. Some communities have been able to organize themselves as trusts, such

51 Burlo, Charles, Land alienation, land tenure, and tourism in Vanuatu, a Melanesian Island nation, GeoJournal (1989) 19: 317. Available at: https://doi.org/10.1007/BF0045457

52 Regenvanu, Ralph, Issues with Land Reform in Vanuatu, Journal of South Pacific Law (2008) 12(1), Available at: http://www3.paclii.org/journals/fJSPL/vol12no1/pdf/regenvanu.pdf

as Ifira Trustees Ltd. and Mele Trustees Ltd in the areas near Port Vila.[53] However, most communities struggle with internal management. Another issue is that in case of confusion and dispute over customary title, the government of Vanuatu retains the title, leading to additional tensions.

Land reform efforts as of 2006 sought to address these challenges. The land reform process focused on improving government management of customary lands to ensure that communities are fully protected and that there is clarity in the use of leases. One outcome was the 2013 Custom Land Management Act No. 33. A key feature of this legislation is a defined process by which customary landowners can settle disputes over traditional land rights.

The EPC Act is the central legislative instrument governing conservation in Vanuatu. The Act provides for the conservation, sustainable development and management of the environment and covers administration (through DEPC), environmental impact assessment and biodiversity. It seeks to consolidate and supersede existing legislation administered by other government agencies such as the Ministry of Agriculture, Livestock, Forestry, Fisheries, and Biosecurity, and the Ministry of Lands and Natural Resources. "Together with these other agencies, DEPC works to achieve its vision of a clean, resilient and sustainable environment".[54] The EPC Act is the most comprehensive national environmental legislation to date and specifically enables the declaration and registration of Community Conservation Areas.[55]

As customary ownership is critical to the success of any policy evolving from the EPC Act, the 2013 Custom Land Management Act is crucial. This Act aims to strengthen the legal framework concerning title to custom land and concerns management of custom land by customary institutions. It formalizes the recognition of customary institutions termed 'nakamals' and 'custom area land tribunals' to determine the rules of custom which form the basis of ownership and use of land in Vanuatu. In general the Act provides the basis for group ownership of custom land.

The EPC Act defines 'community' as 'a social group of any size whose members reside in a specific locality, share government, and often have a common cultural and historical heritage; including but not limited to a group of individuals, family group, tribe or village'.[56] However, the Act and DEPC do not provide guidance on how to address factions or new generations who do not embrace customary government, or the implications of members who do not reside in the locality.

A. Purchases

As virtually all land in Vanuatu is native land and no land is freehold, land purchase is not an available option. Land transactions take the form of leases, discussed below.

B. Easements

Legislation in Vanuatu draws a distinction between easements and profits ("right of taking"). Easements are rights linked to a piece of land (the dominant tenement) that allow the proprietor to

53 Fingleton, Jim, Pacific Land Tenures: New Ideas For Reform, FAO Legal Papers Online #73 July 2008. Available at: http://www.fao.org/3/a-bb106e.pdf

54 https://environment.gov.vu/index.php/environment-conventions-and-agreements

55 The National Parks Act provides for the declaration of national parks and nature reserves for the protection and preservation of such areas, but it has never been used for these purposes and has been superseded in policy and practice by the DEPC's emphasis on CCAs. (Organo, V. 2018. pers. comm. June 12.).

56 DEPC. No date. *Community Conservation Area (CCA) Information Booklet*. p. 3. Available at: https://environment.gov.vu/images/Forms/EMC%20Information%20Booklet%20Final.pdf

exert rights over another property (the servient tenement), such as rights of access. Profits on the other hand do not require the existence of a dominant tenement but do require a right to extract goods or services.

Easements under the current legal regime in Vanuatu are only alienable from customary landowners by the government for a public purpose as established in the Land Acquisition Act. These limited takings are made to allow for rights of way or other public purposes. However, as provided in the constitution once their purpose has been met or is no longer relevant, they revert to the customary owners. This limited capacity to contract for easements means that any conservation easement would have to be placed by the government with the understanding that it serves the public national interest. If an easement were to cease to be in the public interest (or deemed so by a court, for instance), all rights to the land would revert to the customary landowners for their use or lease.

An additional subtlety is that easements may be granted over leased properties. In Vanuatu, the advent of strata titles as provided under the 2006 Strata Title Act allows for the creation of property rights like fee simple possession of improvements made during the life of the lease. In other words, although the leaseholder will not have ownership of the land, he may be entitled to ownership of any improvements made to the land.

C. Leases

Leases are the principal instrument by which land is transacted Vanuatu.[57] Leases allow non-community landowners to have possession and quiet enjoyment of the properties (meaning that the owners must ensure that no one interfere with the tenant's right to possession and lawful use). In 2012, there were 13,815 leases in Vanuatu of which 6,803 are in rural locations. These leases have a statutory length of up to 75 years and may be renewed. A key feature of leases in Vanuatu is the requirement that while a lease may be terminated by the customary landowners, they would be required to reimburse the tenant for any improvements. This has proven prohibitive at times and led to continuous renewals of the leases.

A lease may be granted for a variety of purposes from residential to commercial. The Land Leases Act does not limit the types of purposes for which a lease may be granted. Section 68 of the Land Leases Act in particular allows for restrictive agreements, such as those needed by conservation easements, (e.g. no logging or no development). For these restrictive agreements to be in force they must be registered.

Leases may offer a promising alternative for private conservation. The flexibility of a lease as an instrument would allow a conservation investor to ensure that the needed provisions are tailored to the conservation objectives while providing an income stream to the customary landowners. It also provides a considerable degree of security as it takes advantage of the Land Registry to memorialize and help enforce its covenants.

The key challenge for land-based transactions then is identifying all legitimate members of a landowning group. One attempt to facilitate this process was an amendment to the Custom Land Act (Act No. 12 of 2014), in which Subsection 17(1) initially read as follows: "Any decision by a *nakamal* to determine the custom owners of the land must be made at a meeting of the *nakamal* referred to in section 16 and two-thirds of the adult members of the *nakamal* must be present at that meeting. For joint-*nakamals* -

57 Sue Scott, Milena Stefanova, Anna Naupa, and Karaeviti Vurobaravu, Vanuatu National Leasing Profile: A Preliminary Analysis, World Bank Briefing Note, Vol 7 issue 1, May 2012, accessed at http://documents.worldbank.org/curated/en/652341468124775547/pdf/699940BRI0P1170I0Leasing0Profile0BN.pdf

two-thirds of the adult members of both *nakamals* must be present at such meeting." The amendment sought to reduce the obstacle these requirements posed by putting the decision on who are the custom owners in the hands of those present at the *nakamal*, rather than a vote by two-thirds of all adult members of the *nakamal*.

Under the RESCCUE project, local capacity and potential funding for conservation have been identified for the North Efate area.[58] When consulted, government officials stressed the cultural challenges of leasing land in Vanuatu (see below) and the limited capacity of the government to implement existing laws that govern leasing. Apart from limited oversight by the government, current lease agreements in Vanuatu generally are made directly between the landowner and the lessee. Permitted land use or development often is not explicitly stated, and lease agreements typically do not include conditions linked to customary community uses and values.[59] Therefore RESCCUE identified the need for further development of guidelines to help landowners understand the regulations and consequences of land leasing.

Last but not least, despite provisions in national legislation on land and environment, customary law is *de facto* ignored by courts and solely (and unofficially) administered by communities and chiefs.[60] It has been noted that judges have been reluctant to apply it because they have considered *kastom*, which is inherently local, to be ill suited for application in national courts.[61] Therefore efforts to pursue land transactions for conservation which may be linked to custom may encounter resistance in the practical application of state law. However, tensions between custom and government frameworks should be put in the perspective of increasing monetary motivations for claiming landownership in sites where land is becoming more valuable, such as expanding urban areas and mining sites.

A recent example is the emergence of the Vete Indigenous Land Association, a group of individual and group claimants primarily from the island of Tongoa and the Shepherd Islands. This association maintains that they have been excluded from land decision processes on Efate, which they assert is their traditional land.[62] Seeing this example, other groups are now emulating the Association's strategies and arguments, increasing complications and conflicts surrounding ownership claims elsewhere in Efate. Interestingly, some attempts to gain recognition of land claims have included efforts to establish CCAs. This suggests that CCAs are seen by some as quasi-legal claims on land and could, at a later stage, be used for insurgent ownership in situations where people feel that the state has inappropriately granted recognition of land rights.

Overall the jurisdiction of Vanuatu stands out, like that of most island nations, as exceptionally democratic, but due to the often-intimate connections between societies and government day to day governance is often conducted in informal ways. This offers both opportunities and drawbacks for democratic transparency and accountability. Vanuatu's legal regime continues to evolve and appears to be strengthening as progress is made toward resolving land tenure issues. Indeed, Vanuatu scores

---

58 See the report entitled "Feasibility Study of Financial and Economic Mechanisms for Integrated Coastal Management in North Efate, Vanuatu." RESCCUE, December 2016, available at: https://www.spc.int/sites/default/files/wordpresscontent/wp-content/uploads/2017/05/Financial-Instruments-Feasibility-Assessment.pdf, last consulted, 21 August 2018.

59 Ibid., p. 28.

60 Forsyth, Miranda, 2009, *A bird that flies with two wings: kastom and state justice in Vanuatu*, ANU Press.

61 Ibid.

62 Wilson, Dorah L.J., 2011, Vete: The emerging movement on Efate, Vanuatu politics and indigenous alternatives, PhD Thesis, University of Hawai'i. Available at: https://scholarspace.manoa.hawaii.edu/bitstream/10125/24273/1/WILSON_2011_r.pdf, and see http://dailypost.vu/news/a-gathering-of-port-vila-custom-land-claimants/article_126df823-b315-596f-b749-a57a6fc72317.html

above average on the World Bank's rule of law index when it comes to the solidity of its institutions, though there still is a significant need for improvement.[63] Various forms of corruption persist including conflicts of interest (for instance when government officials are involved in land disputes) and failures to follow proper procedure.[64] Nevertheless, developments such as the prosecution of corrupt officials indicate continued progress on transparency and rule of law.[65]

3.4 Social and cultural context

Vanuatu is a culturally diverse country with generally long-standing and widespread resentment against foreign regulations of land and resources, including current government. Conservation in this context will often be related to ancestral wisdoms and the ambiguous but meaningful concept of *kastom* ('custom'). Since independence in 1980 and the adoption of a Constitution that mandated the return of all rural lands to custom owners, 'village land trusts' became a popular concept.[66] Village Land Trusts are legally recognised bodies that make decisions on behalf of the custom owners. However, apart from the village-based Ilfira Trustees Ltd. and Mele Trustees Ltd. which enjoy exceptional solidarity, no successes have been reported.

Photo by user Thomas Ballandras on Flickr, 2004

Most trusts began to function without customary control and therewith lost legitimacy and authority. The problem was that they "were incorporated at too high a level – that is, the village, which is a

63 https://www.theglobaleconomy.com/Vanuatu/wb_ruleoflaw/

64 Transparency International Vanuatu National Integrity Assessment. Available at: https://www.transparency.org/whatwedo/publication/vanuatu_national_integrity_system_assessment_2014

65 'For the first time, Vanuatu jails corrupt legislators.' Available at: https://www.economist.com/news/2015/10/26/for-the-first-time-vanuatu-jails-corrupt-legislators

66 Fingleton, Jim, 2008, *Pacific Land Tenures: New Ideas for Reform*. FAO Legal Papers Online #73. Available at: http://www.fao.org/legal/prs-ol, p. 9.

settlement unit, but not a traditional landowning or land-managing body".[67] Thus, navigating the land tenure context in pursuit of conservation requires a degree of institutional capacity to overcome poor leadership, corruption and business failure. A key lesson learned from the relatively successful village land trusts mentioned above, Ilfira and Mele, is how they have reinforced, rather than undermined, traditional authorities and the village structure. Only when these were replaced did the trusts start to stumble. Corporate structures for owning and managing customary land work best when they combine traditional and modern institutional structures, and embrace both group and individual levels of social organization in the local community.

Particularly in regions characterized by resource exploitation such as logging and coconut plantations and foreign investments such as property development and tourism ventures, people establish 'corporate groups' as semi-legal bodies to manage property rights and royalty payments, compensation or other revenues. As a result, land transactions typically are highly individualised and dominated by powerful men who are self-proclaimed owners and arbiters of 'traditional ways'.

With respect to field project work in Efate, RESCCUE has reported problems with the 'community' which mainly have to do with leadership. The traditional function of the chief as caring for the people and their place (*ples*) has over the last few decades been replaced by an assertion of chiefly landownership. The chief has become the landowner and the authority over the people when it comes to transactions with the state and other outside parties. As a result, a lot of 'customary land' is being leased by powerful local chiefs who in fact do not have a rightful claim in *kastom* over land. Here lies a major risk for lease agreements.[68]

There are three lessons to be learned from these experiences:

- The 'custom' claims to land that will multiply when conducting baseline studies for determining landownership in the context of a proposed transaction must be interpreted in their legal, social, political and historical context. At present most custom claims have emerged from legal processes, not out of custom itself.

- When seeking constructive and sustainable engagement with the people who live on and use the land identified as priorities for conservation, a distinction has to be made between custom claims secured through legal action and claims with legitimacy grounded in community custom.

- It is critical to find out whether the community representatives, the chiefs, and other leaders are genuinely interested in working through customary tenure frameworks in relation to conservation.

Conservation initiatives should take as their point of departure an acknowledgement that the work must be shaped by processes in which customary tenure is being adapted to new demands placed on land, motivated by individual commercial interests. Adaptation to these new demands has prompted a number of recent initiatives such as 'village land trusts' in Vanuatu, but as these arose from heightened political activity among national leaders their robustness at the local level may be limited. Moreover, many self-proclaimed customary leaders have been entangled in political and judicial corruption, eroding trust in modern leadership and the state among local communities. These factors suggest that conservation initiatives initiated at the local level likely will be more able to secure legitimacy in the eyes of landowners and therefore result in more robust arrangements.

67 Ibid., p. 10.

68 Suzie Greenhalgh, interview, 10 May 2018

Once the cultural power of law and related individualism in ownership is recognised as unsustainable, the implications of *kastom* for land and conservation can be considered. The goal then is to recognise and identify the potential of 'custom' management of land as a conservation tool, even if adapted to current circumstances as long as the conservation approach is not dominated by ill-fitting legal concepts. Conservation should focus on relationships and arrangements grounded in custom that avoid, to the extent possible, the manipulation of custom (and law) by self-interested elites or self-appointed representatives.

One movement that conservation efforts may fruitfully tap into is known as *kastom ekonomi* and 'self-reliance and sustainability', terms that refer to a growing tendency in Vanuatu to focus on indigenous economies instead of 'modern development' and 'progress'. This should be seen as local attempt to encompass modernity; it is directed at utilising aspects of the traditional economy and customary ways as a basis for achieving 'self-reliance'.[69] It is thus well-aligned with the bottom-up, community driven process to improve sustainable resource management embodied in the Community Conservation Area mechanism.

In conclusion, the cultural and social will for the enforcement of acquired rights and conservation agreements should thus come from the community itself, in particular in rural regions where the government is largely absent. Moreover, in a region that struggles to achieve a production economy following a Western standard, exhibits heavy reliance on foreign aid and ongoing sales of land to foreign 'investors', and is undergoing a deterioration of customary ways, a new generation of indigenous people are increasingly keen to bridge capitalism and urban worlds with traditional economic potentials and rural livelihoods. These movements are essentially creative new spins on the standard Western-style development discourse. Although they may seem revolutionary, most do not exclude or resist the state and there is considerable overlap with the development industry. That said, traditionalism may run counter to full-blown democracy, and defer other aspects of social equity. For example, there has been a notable lack of women as executives of both the abovementioned successful trusts; the Mele land trust had one female director on its initial board.'[70]

3.5 Implementation capacity

There are few conservation actors in Vanuatu, and none engaging in formal transactions over land or land rights for conservation or climate change resilience.

The focal government institution for facilitating conservation leases is the Department of Environmental Protection and Conservation (DEPC). DEPC is housed within Ministry of Climate Change Adaptation, Meteorology & Geo-Hazards, Environment, Energy and Disaster Management, which in Vanuatu enjoys relatively more prominence than analogous ministries and departments in many other countries and territories. This prominence is due in part to considerable funding and technical support from various sources. Nevertheless, owing to the wide geographic spread of Vanuatu's many islands, not to mention the large number of communities throughout the country, DEPC's ability to execute or oversee on-the-ground conservation transactions is constrained.

The set of organizations likewise is limited in number as well as scope when it comes to transaction

69 Rousseau, Benedicta and John P. Taylor, 2012, Kastom Ekonomi and the Subject of Self-Reliance: Differentiating Development in Vanuatu, in S. Venkatesen and T. Yarrow (eds), *Differentiating Development: Beyond an Anthropology of Critique*, Berghahn, pp. 169-186.

70 Fingleton, Jim, Anna Naupa, and Chris Ballard, 2004, *Making Land Work, Reconciling Customary Ownership and Development 2, Village and trusts in Vanuatu: 'one common basket'*, Canberra: DFAT. Available at: http://dfat.gov.au/about-us/publications/Pages/making-land-work.aspx

tools for terrestrial conservation. IUCN is an important source of technical support, but has not focused on transactions and is not involved in site-based efforts. Live & Learn, an Australia-based international NGO active in the Asia-Pacific region with a focus on environmental education, is implementing the Loru Forest Project, a REDD+ initiative on the island of Espiritu Santo.[71] Although Live & Learn have the capacity to engage in leases, they deliberately eschewed this option in Vanuatu due to anticipated obstacles presented by the customary land tenure context.

The dearth of actors with adequate capacity to pursue transaction tools in Vanuatu reinforces the DEPC perspective that for the time being the CCA remains the core tool for site-based conservation. In the absence of other capable actors, improved community management of their own lands and resources through establishment of CCAs, with support from DEPC (and others when available/appropriate), is a pragmatic response to the current context. Moreover, this view also aligns with wider challenges surrounding leases (and other tools) in Vanuatu's customary land tenure setting. However, the capacity for proactive outreach to communities relevant to particular KBAs or sites of importance of climate resilience to encourage consideration of CCAs also is very limited (see Box 3.1 for an exception).

BOX 3.1 CCAS FOSTERED BY THE EDENHOPE NATURE PRESERVE

The Edenhope Nature Preserve on Espiritu Santo offers a counterexample to the general capacity challenges facing conservation throughout Vanuatu. The anchor of this project is a 75-year lease covering 700 hectares, signed in 2010. Interestingly, the payment for the lease took the form of a single, lump-sum upfront disbursement rather than installments over time. Since then, the Edenhope team has built relationships with neighboring communities and cultivated wider interest in conservation and sustainable development, also as an 'antidote to conflict over land'.[72] With funding from CEPF, the team fostered a network of conservation champions in 22 communities along the Santo Mountain Chain, an area of recognized biodiversity importance.[73] The network now includes a conservation committee in every village. Through this outreach and together with the communities they identified potential Community Conservation Areas totaling about 34,000 hectares. The team is now working with three of these communities to prepare the documentation required for CCA establishment for submission to DEPC. Moreover, the owners of the land leased to Edenhope have been inspired to establish their own CCA, in an area 3-4 times the size of the leased parcel. Depending on availability of funding, the Edenhope team hopes to expand its work with existing and additional communities. However, although the lease is essential as a foundation for Edenhope's presence in the area, community work is focused on CCAs rather than additional use of transaction tools. This reflects concerns over 'handout culture' and lack of financial literacy, such that influxes of money can be socially and culturally debilitating. The emphasis of community work then is on building relationships and capacity, and reinforcing social and cultural values that align with conservation and sustainable development.

3.6 Financing options

The EPC Act provides for an Environmental Trust Fund, to be funded by penalties and bonds, intended to support research, monitoring, management of Community Conservation Areas (CCA), rehabilitation

71 Live & Learn is also supporting coordination of RESSCUE activities in Vanuatu.

72 Interview, 27 June 2018.

73 Conservation network begun on Santo west coast, The Vanuatu Independent, 4 September 2017, https://vanuatuindependent.com/2017/09/04/conservation-network-begun-on-santo-west-coast/

and other conservation activities. In principle, then, this could be a source of funding for transaction tools. However, given the emphasis of DEPC on CCAs, this use of funds would seem unlikely. In any case, the Environmental Trust Fund has yet to be operationalized.

Financing for the use of transaction tools then would rely principally on conventional conservation funding sources: bilateral and multilateral aid flows, and philanthropic support from individuals, foundations and the private sector. The challenge in Vanuatu appears to be less a matter of identifying funding sources, and more one of absorptive capacity. Without credible actors and initiatives to which funding for transaction-based conservation and climate resilience efforts can be directed, the question of financing options is moot.

3.7 Management sustainability

As with implementation capacity, the options for long-term management sustainability are limited. There are no organizations active in Vanuatu with the capacity, mandate and appetite for long-term management of conservation sites following application of a transaction tool. The government has a clear mandate but insufficient capacity, and strongly prioritizes CCAs over transactions, all the more so as transactions would increase management burdens. This leaves community self-management of CCAs as the long-term management solution, which is widely seen as obviating the need for transaction tools.

3.8 Vanuatu: Conclusion

Perhaps the most significant factor with respect to the feasibility of expanding use of transaction tools for conservation and climate resilience in Vanuatu is the strong emphasis on community resource management, in national policies as well as locally motivated action. This emphasis is reflected in the NBSAP's Objective CA2b, relating to the inclusion of CCAs in the formal national protected area system.

Given a general suspicion or antipathy towards leases, site selection for transaction tools is a quite delicate matter. In the event of a pilot/demonstration site proceeding with a lease, the process must be very well documented to serve as a useful demonstration. Given the anticipated challenges involved, there is an argument for only proceeding at a site or sites with very high biodiversity value and/or strategic value for climate resilience, to justify the effort and expense. Learning from experience in Fiji, the Kilaka Forest lease demonstrated the benefits of focusing on a small area with a well-defined group of landowners in a single clan. Thus, the ownership context and the overall costs of the initiative were manageable for WCS. At the other extreme, the Sovi Basin lease was worthwhile because the large area and high conservation value made it reasonable to engage in a context with 12 landowning groups, particularly given the significant funding committed at the outset to support long-term financing. Accessibility is also a critical consideration in site selection, given that extensive community engagement is central to both securing a lease and then managing the site.

Pursuing a lease given the contraindications described above requires clarity as to what a lease can accomplish above and beyond a CCA at a particular site, including a strong case for introducing payments into a context where conservation management is largely voluntary. We note that there are at least two cases where leases were considered as a possible tool but the notion was ultimately discarded, despite substantial technical and financial support for the projects relative to other sites; the Nakau/Live & Learn International REDD+ project at Loru Forest (see Box 3.2) and RESCCUE's efforts in North Efate. Nevertheless, there is a strong rationale for continuing to build on the RESCCUE work on

exploring leases in North Efate, including the development of guidelines on leasing for local landowners mentioned above.

BOX 3.2 NO LEASE FOR THE LORU FOREST PROJECT

The Loru Forest Project on the east coast of Espiritu Santo contemplated a lease but ultimately did not pursue it due to custom landowners' dislike of leases due to their record of misuse. Landowners from the Serakar clan initiated the Loru Forest Project when they recognized threats posed by further forest loss and degradation following logging in the 1990s. The promise of money by the loggers triggered land disputes that have since then subsided. Early conversations with Live & Learn revolved around ways to protect forest lands and ways to generate income for the local people without converting more land to coconut plantations or agricultural plots.[74] Live & Learn was instrumental in organising social and economic development, initially for the Serakar clan but gradually expanding to neighbouring communities. The option of a lease was investigated and discussed with the community, but people argued strongly against it because of their fear of losing the land. Since then Live & Learn and the Serakar clan agreed to register Loru as a CCA under the Environmental Protection Act, providing more certainty around Serakar's ownership claim to Loru. The area was surveyed by the Lands Department in 2014 and that documentation also further strengthens the claim while ongoing consultations with neighbouring groups have reduced conflicting claims.[75] So as not to threaten people's subsistence, local people are allowed to hunt for game and collect food products in the area. The project is now run by local community members as a REDD+ Enterprise with financial management being coordinated by Live & Learn. It is expected to provide opportunities for the youth in business administration and land management (nursery development).[76]

A key investment will be to support the government's planned and ongoing priority mapping, and to ensure that the characterization of ownership contexts is included in this mapping effort. Although virtually all areas will fall under customary ownership, prioritization should take into account the degree of complexity of the ownership context at a given site to help inform intervention strategy.

Thus, the feasibility exercise for use of transaction tools in Vanuatu boils down to the question of what a lease can do, in general and at a specific site, that improves on a CCA. To inform thinking on this point, we list rationales for and against pursuing a lease in Box 3.3 below. While several of these rationales apply to leases anywhere, not just Vanuatu (and thus can also inform reflection on leases in other PICTs), they may be of particular relevance to Vanuatu under current conditions in the country.

74 Nelson, A., Andre, G., Weaver, S.A., Warakar, S., and Henderson, R. 2014. Project Idea Note: Loru Forest Project, at Loru, Espiritu Santo, Vanuatu, for the Nakau Programme. 9 October 2014. Live & Learn International, Melbourne, Australia, p. 5.

75 Ibid., p. 27.

76 Ibid., p. 32.

BOX 3.3 CONSIDERATIONS FOR PURSUING CONSERVATION LEASES IN VANUATU

Rationales for pursuing a lease:

- Generally, one might expect a practical limit to the extent of protected areas a government can establish given social, political and funding constraints. Leases can then offer a way to extend long-term conservation status to areas beyond the formal protected area network.

- Even if government is open to gazetting additional areas, this process may be time-consuming and subject to ebbs and flows in political will and policy commitments. As a voluntary market-based transaction a lease may offer a more efficient solution in terms of both time and resources.

- Where protected area creation is not possible due to the nature of the tenure context, a lease can offer an alternative based on types of transactions with which owners already are familiar. In some instances the lease may also offer an interim solution to place an area under conservation management while working toward eventual protected area status of some kind.

- Using transaction tools such as a lease offers a way for conservation interests to proactively intervene in areas identified as conservation priorities, rather than rely on voluntary conservation motivations that may or may not manifest on their own.

- Related to the point above, there is considerable literature arguing for the efficacy of direct approaches such as leases and other transactions, compared to indirect approaches such as those that rely on alternative livelihoods or awareness raising and capacity building. Moreover, compared to indirect approaches or strategies based on voluntary sustainable management by resource owners/users, a lease may provide greater legal security and predictability to conservation investors as well as conservation planners.

Rationales against pursuing a lease:

- The need to clearly identify owners before entering into a lease carries a risk of fueling tensions and conflict over property rights among different claimants. The more complex the ownership context, the more burdensome and costly the engagement process will be.

- Although leases may offer a significant degree of assurance that conservation management status will endure, this security is not absolute. Leases may unravel for any number of reasons, such as landowner dissatisfaction or a government decision to grant mining concessions to the area.

- In some places, Vanuatu among them, leases are viewed with suspicion as a form of land alienation and a mechanism by which investors take advantage of customary landowners. Approaching a community with a lease proposition may therefore be detrimental to relations between the implementer and local people.

- The Government of Vanuatu has a clear policy and plan for increasing area under conservation management through the use of CCAs. Advancing a programme to expand the use of leases can conflict with this agenda, by changing the conservation narrative from a voluntary community-motivated process to a transactional exchange.

- Related to the previous point, CCAs are emerging without monetary compensation or incentives beyond the prospect of technical support for resource planning and management from the government. Introducing leases as a conservation tool can erode this locally derived motivation for applying conservation management.

- Under CCAs, communities themselves accept management responsibility. Conservation leases need an implementer willing to undertake this responsibility (in partnership with communities), requiring capacity, funding and oversight.

Protected area category definition, spatial prioritization and policy formulation and planning are currently fluid processes in Vanuatu, with key legislative, regulatory and execution mechanisms under development. An effort to apply conservation leases before these processes are more mature may complicate the government's task by impacting community perceptions, precedents, messaging, and conservation finance flows.

TABLE 3.2: SYNTHESIS OF FEASIBILITY CONSIDERATIONS FOR VANUATU*,**

	PURCHASE	EASEMENT	LEASE
State of identification of conservation priorities	1	1	3
Policy context	1	2	2
Legal context	1	3	5
Social and cultural context	1	2	2
Implementation capacity	2	1	2
Financing options	1	1	3
Availability of solutions for long-term management	2	2	2
Average Score	1.3	1.7	2.7

* Each factor is scored from 1 to 5 where 1 means *least conducive to feasibility, and* 5 means *most conducive to feasibility.*

** The numbers reflect initial scoring based on desk review, interviews with key informants, and group discussions in stakeholder workshops.

4. NEW CALEDONIA

4.1 Conservation priorities

Conservation International conducted a thorough assessment of New Caledonia's ecosystems in 2016 in the context of EU-funded programme BEST.[77] It presents a diagnostic of biodiversity in the territory and also of the context, current strategies, and proposed priorities going forward. However, there are knowledge gaps about biodiversity value and richness in the territory, and particularly on customary land where thorough investigation of fauna and flora has not been done in taboo and totemic areas for example. This type of research - with the community's prior approval - could complement a conservation strategy including transaction tools.

The Ecosystem Profile report noted the very high biodiversity value of the territory but also pointed to the threats. For instance, 67 species found in New Caledonia's dry forest are on IUCN's red list. There only remains 2% of dry forest's original area because of clearings, fires, grazing, invasive species and, more recently, urban development. Thus, dry forest is among the highest priorities for habitat protection throughout the tropics. A multi-stakeholder programme centered on the protection of dry forest has been led by the quasi-public Conservatory of Natural Spaces of New Caledonia (CEN). The goal is now to double area under protection, and to connect forest fragments, including high altitude patches.

Conservation of dense humid forest is another priority, particularly in Northern Province's mining areas where there are no Protected Areas (PAs).[78] The Ecosystem Profile identifies specific sites within dry forest ecosystems that require protection. Dry forests mostly can be found on private land (52%) and lands owned by New Caledonia (30%), and to a lesser extent on customary land (11%).

The Southern and Northern Provinces (that form the main island or Grande Terre) designed their respective environmental codes with support from the New Caledonia government. Decisions around environmental policies and strategies have been delegated to the Provinces in New Caledonia since 1999 under the "organic law", especially with respect to terrestrial conservation as maritime areas remain under New Caledonian or French authority. The Southern Province has four different levels of PAs while the Northern Province has six. As of 2015, there were a total of 71 terrestrial PAs in New Caledonia, 54 of which are in the Southern Province alone. The area under protection in Grande Terre represented about 4% of its surface in 2015.

Fire is among the greatest threats to biodiversity. For example, 58% of threatened flora has been impacted by brush fires according to RLA Flore NC.[79] They are generally caused by human activity. Exotic invasive species are another significant threat. A strategy designed to address invasive species at the territory level is being coordinated by one of CEN's units. Land use change has also created a substantial pressure on the environment, with urban development identified as a particular concern (e.g. the population of Greater Nouméa is projected to increase by 36% between 2005 and 2020). Agricultural activity and grazing have also contributed to transforming natural spaces. Other threats include hunting (especially of endemic species, although the data is not sufficient to more precisely characterize the impact of hunting), a fairly ineffective waste management system which can cause pollution, and disproportionately high pressure placed by visitation on the most popular natural areas. Also, the building prohibition on the coastline that is in effect in France does not apply in New Caledonia, which has encouraged more development along the coast.

77 "Profils d'Ecosystèmes de la Nouvelle Calédonie", June 2016

78 Ibanez. et al., 2014.

79 Tanguy, 2016.

The mining industry historically has constituted the main threat to biodiversity and caused the most significant environmental damage in New Caledonia. For instance, the arrival of large mining company Vale caused a major upheaval in the Southern Province because the area had no prior mining activity and the extraction site had particularly high biodiversity value (e.g. 90% of species found there are endemic to the island, and the area features unique underground rivers). The Ecosystem Profile mentioned an estimated 200 km^2 of land as having been severely impacted by mining in 21 municipalities. In turn, degraded sites can have further negative impacts on their surrounding areas and could even lead to the displacement of populations, which compounds the mining industry's negative impact on the environment and climate resilience. Rehabilitation of these areas would cost 160 billion FCPF (or over 1.34 billion Euros) according to the Ecosystem Profile report.

Mining operations all take place on land owned by the government (all references to 'the government' in this section apply to the government of New Caledonia). The environmental performance of mining operators – the three larger ones at least – has improved in recent years, and there is also better oversight and monitoring today. For example, prospecting is performed by helicopter, impact studies are conducted, and there are now regulations in place concerning land clearing, fires and the set-up of reserves. Mining companies were given until 2017 to comply with the new operating rules in the mining code. When asked about the threat that the mining industry represents for the environment in the future, observers note that the context is vastly improved today and compensation measures have become the norm (see below). However, as one put it, "mining is the economic activity that prevails over everything else".[80] Now, smaller mining operators (so-called « petits mineurs ») who do not do any processing in New Caledonia represent a higher level of risk.[81]

Photo by user David Stanley on Flickr, 2018

80 Interview, May 3rd, 2018

81 Interview, May 1st, 2018

The CEN and French state agency ADRAF (Agency for Rural Development and Land Use) have been the biggest land purchasers in New Caledonia among public agencies, the CEN in pursuit of conservation objectives and ADRAF with a goal of land redistribution. Both have been confronted with a sharp increase in property prices. According to the head of ADRAF, the price of land has increased tenfold in 20 years to reach today an average of 2 million FCFP (about 16,800 Euros) per hectare.[82] Expansion of urban areas and significant speculation in the Northern Province resulting from mining industry's continuing demand for land are the main causes of this increase.

Thus, outright purchase has become expensive and less favored as a strategy. The CEN's experience in its efforts to preserve dry forests is telling: the CEN's Director pointed out that not only are the high biodiversity value land parcels worth protecting small in number, but also they have to be for sale and affordable as multiple bids may push their prices even higher. This is why CEN now prefers to pursue agreements with landowners. The introduction of easements could provide an additional tool for such a strategy. An example of this type of agreement is in the Southern Province where the provincial authority secured commitment from farmers owning dry forest tracts that they would not clear their land, in exchange for waiving property tax obligations.

Similarly, on customary land (where any land sale is prohibited) the design of easements and other agreements could also be useful. There are an estimated 100,000 hectares of customary land under the ownership of so-called GDPLs (Groupement de Droit Particulier Local). The GDPL construct was developed to enable any type of productive use of land, but has evolved into a broader economic entity that groups community members and owns customary land. These 100,000 hectares are "ready to use" as they are organized in GDPLs; with limited activity to date on these lands, many more agreements, leases or easements could potentially take place.

There may also be an opportunity with mayors and customary leaders of areas that were struck by heavy flooding and landslides in 2016. Several observers noted that these natural disasters served as a wake-up call among those community leaders.[83] Customary lands are, at least on the main island, administratively attached to municipalities.[84] Often, the total area of the municipality can be extensive, most of it being composed of customary land and a much smaller portion by the town itself. Mayors are responsible for preventing and dealing with natural disasters occurring in their municipalities, including in areas under customary tenure. Thus, mayors and customary leaders may be interested in exploring use options that would reduce the potential harm inflicted by natural disasters. Such an approach would link directly to climate resilience.

4.2 Policy context

New Caledonia's three regions – Northern, Southern, and Loyalty Islands Provinces – enjoy significant autonomy in decentralised bureaucratic structures and government services.

The Provinces have been delegated authority for environmental policies and regulations. According to the head of the Southern Province's environment department this control over the environmental code affords them a lot of flexibility.[85] It is fairly easy for instance to amend the environmental code and make

82 Interview, May 16th, 2018

83 Interviews: April 15th and May 1st, 2018

84 We mean "terres coutumières" here and not "aires coutumières" that have a much broader and more cultural and linguistic meaning. The entire New Caledonia territory is actually under eight "aires coutumières" and within the territory, there are "terres coutumières" (customary lands) as well as land owned by the government, the provinces, or private landholders.

85 Interview, May 6th, 2018

small changes when needed ("those amendments can be finalized in two months"). In his own words, "we already have dynamic and adaptable tools – do we need more tools?"

Several tools at the Provinces' disposal enable them to protect biodiversity. For example, the Southern Province has prohibited the destruction of native ecosystems (called "patrimoniaux", such as mangroves) and any damage would incur sanctions. The Provinces also have the authority to classify a private land area as a reserve without the owner's approval or compensation. However, this practice unsurprisingly was rather unpopular and is not in common use anymore. Another example of flexibility is the various levels of protection that can be applied to a PA, from the most stringent with no entry allowed to the looser "natural park" category where zoning of specific areas within the reserve is possible for more effective protection, and where leases for some kinds of productive activities are possible. In the Loyalty Islands Province, the concept of spaces "par destination" (by design) is being tested, whereby a dry forest parcel would be designated as such whatever the current situation of that parcel or its ownership, as encouragement to maintain the ecosystem (although this does not carry the same legal weight as patrimoniaux). The rationale is that it would improve the likelihood that the parcel remains untouched. The Provinces have also worked with the aforementioned CEN to transfer preexisting contracts between the Provinces and landowners, or to collaborate on the management of some dry forest parcels on public provincial land.

This range of tools currently in use or being explored explains the widespread skepticism about the relevance of a focus on transaction tools. This opinion was shared by representatives from the Northern and Southern Provinces (and also in French Polynesia). However, the monitoring and enforcement required for existing tools to function is a concern for the Provinces, both because of the limited resources available and because of the risk of high incidence of infractions (despite the threat of prosecution). Thus, there is an opportunity for the transaction tools under review in this project to complement the current set of tools at the Provinces' disposal, particularly in the design of win-win agreements that would increase the probability of compliance and reduce the incidence of infractions. Indeed, the existing set of tools relies largely on regulatory constraints, whereas the transaction mechanisms under review reflect a more market-based motivation for landowners and users to comply.

Existing conservation mechanisms are complemented by land use planning tools at the territory, provincial, "intercommunal" and municipal levels. The territory produced in 2008 a framework document called "NC 2025" that is a land use and development master plan. At the provincial level, in preparation for a more specific planning exercise, a document called "master plan for space use and economic development" (French acronym SAEDE) was prepared, which is actually more a diagnostic exercise than a plan. At the "intercommunal" level (covering several municipalities), a "master plan for land use and urban planning" (French acronym SDAU) is a 15-year prospective document drafted by the province and the municipalities in question (under the province's authority), as done for Voh – Koné – Pouembout – Poya in the Northern Province for instance.

Finally, municipalities develop their own "urban planning master plans" (French acronym PUD) under the aegis of the municipal council; the Province is consulted in this municipal planning exercise but has no decision-making power. In the Northern Province for instance, over half of the municipalities had a PUD process under way (six had their PUDs completed and approved) as of June 2017. The existence of municipal land use plans brings clarity and transparency to land use decisions. They also expose the tradeoffs, tensions and political decisions around land use at the municipal level. It is not surprising that increasing job opportunities for the population may be a higher priority than environmental protection for a mayor. Attracting new hotels and small industries will bring employment but may also result in pressure on the environment. Having the Province involved in the PUD process provides some safeguards against the possibility of favoring aggressive development of productive activities at the expense of biodiversity and climate resilience – but it is not a guarantee.

Unfortunately, there is a persistent lack of consistency and coordination between provincial and municipal interventions. Prescriptions on native ecosystems (including dry forest) found in the Southern Province's environmental code for example can be overlooked by municipalities when designing their PUDs, without repercussions. The PUD process is supposed to include an environmental impact assessment. This is a recent requirement dating to 2017, thus few of the existing PUDs included such an assessment. Nevertheless, moving forward this does offer an opportunity for better decisions affecting the environment and improved coordination between Provinces and municipalities. Ideally, a well-documented PUD designed in coordination with the Province's environmental and development priorities could be a valuable tool to help determine local conservation strategies, identify land parcels requiring protection, and decide what mechanisms would be best suited. This would align with a landscape approach to conservation. Observers agree that this is not yet a reality, but one that various stakeholders are working towards.[86]

Photo by user Ron Lubensky on Flickr, 2015

Mining remains a powerful economic force in New Caledonia. Although mining operations are conducted more responsibly now with respect to the environment, political decisions around land use are likely to favor whatever the mining industry desires, and this is unlikely to change soon. That said, opportunities do exist in partnering with the mining industry. As discussed further below, compensation requirements imposed on mining operators open the door to possibilities for cooperation.

On Grande Terre, a little over 60% of the Northern and Southern Provinces is public land (mostly owned by the government of New Caledonia – 53%), about 19% is customary land and 18% is in the hands of private landowners, according to the ADRAF data. Loyalty Islands are composed only of customary lands. On public and private land, transaction tools could be helpful in agreements or partnerships

86 RESCCUE workshop, Nouméa, June 14-15th, 2018

directly with landowners or with landowners and users such as farmers. The situation is different on customary land as purchases / sales are not an option and the planning tools mentioned above do not apply. The land redistribution process managed by ADRAF in favor of the Kanak community is essentially complete. Only 0.4% of ADRAF's land stock is now available, and new purchases are rare because of the significant rise in land prices and the lack of clarity on ownership in some areas.

Questions surrounding what to do with land, and the notion of development and productive use ("mise en valeur"), have been described as a "political hot potato".[87] As such, most politicians avoid issuing strong opinions on the topic. On the ground however, there are customary leaders interested in a holistic view of land use, one that would include possible areas with productive activities but also taboo / restricted areas, hunting reserves, and commons. This could present an opportunity for wider use of long-term leases and easement-like agreements, in addition to what is currently done on customary land (see below).

4.3 Legal context

New Caledonia's land tenure regime has faced many challenges in its evolution. Its path seems to diverge almost diametrically from that of French Polynesia, which has tried to frame customary rights within the framework of existing French law. Instead New Caledonia has created new legal instruments to allow for the management of the legal rights over customary lands.

Since 1853, New Caledonia's land tenure has been influenced by the laws of the French Republic. French administrations historically have attempted to assert these laws over the communal regimes that had existed prior to their arrival. This on its own led to conflicts between the Kanak, the native population of the island, and the new inhabitants. These tensions reached their peak in the 1980s, as a result of which the Matignon Accord was signed in 1989. This agreement would form the legal basis for land reform and redistribution to the Kanak people. It also granted New Caledonia the initial path to self-determination, and it is through this accord that customary land-owning rights began to be examined. This was expanded further in 1998 with the signing of the Nouméa Accord which gave the New Caledonia government the right to manage their affairs except for five key areas: currency, foreign policy, immigration, police and military.[88] One crucial development following implementation of the Matignon Accord was the creation of ADRAF, which focuses on the redistribution of land, as previously mentioned, and to do so has invested resources in land purchases and anthropological research to facilitate the devolution of land to the hands of the customary holders.[89]

This mix of systems has resulted in land being managed as three distinct types of titles or land ownership regimes: private, public and customary.[90] Besides customary land, the private category involves those lands that have been provided to non-customary right holders, and public relates to land owned by the New Caledonia territory and by the Provinces.

One way of managing land that has been pioneered in New Caledonia is through the GDPL mechanism. A GDPL allows customary land owners to jointly manage land as a customary group in accordance to the group's decision-making process. Although the fact that the land cannot be alienated or divided still impedes certain types of transaction, the GDPL does grant customary landowners the ability to more

87 Interview, June 4th, 2018

88 Le Meur, Pierre-Yves, Politique et savoirs fonciers en Nouvelle Calédonie: retour sur une expérience d'anthropologie appliquée, Journal de la Société des Océanistes, 132, 1er semestre 2011, https://journals.openedition.org/jso/6286

89 ADRAF, Histoire, http://www.adraf.nc/a-propos-de-l-adraf/informations-generales#chiffres

90 https://www.cci.nc/sites/cci/files/2018-02/cci-nc-le_foncier_en_nouvelle_caledonie.pdf

actively manage the land as they are able to enter into agreements, such as leases, that would allow for a productive economic use of the land. The GDPL represents a group, tribe, clan, or family. The GDPL appoints a representative (generally, the head of the clan when it is a clan), but he/she does not have decision-making authority; any decision is made by the entire community. By extension, GDPL now often refers to a piece of customary land associated with the location of the group or clan in question. According to ADRAF, GDPLs own about 100,000 hectares in New Caledonia as noted above; one out of five GDPLs leases land.

CEN-Legal Review of Mechanisms

The CEN is the most active entity in New Caledonia in the field of transaction tools and strategies. Historically, it has made outright purchases of land from private owners. Because of the rising costs of land and the limited supply of valuable parcels from a biodiversity standpoint, CEN mostly strikes agreements with landowners that are simple contracts with respective obligations for both parties. Cases of financial compensation paid to the landowner are rare. CEN has also worked with the territory's government and provinces. This cooperation has generally entailed free transfers of land (e.g. dry forest parcels) to be managed by CEN.

CEN commissioned a legal review of the mechanisms it uses and others that exist in French law that could be well suited for its work.[91] The main findings of this review related to CEN's current work include:

- The contracts signed between CEN and private landowners offer a lot of flexibility but they can be easily recused, and with no significant consequences, especially in the absence of financial retribution.

- In the case of sale of a parcel for which CEN has a contract with the former owner, the contractual obligations may be overlooked by the future owner unless the wording of current contracts is tightened.

- Although fragile legally, CEN's "sustainable collaboration contracts" are among the more successful of CEN's tools, offering an easement-type tool with conservation activities for use when the possibility of a lease is less relevant.

- It is possible that prices may well exceed 700,000 FCFP per hectare (a little under 6,000 Euros) especially in the Southern Province.

- When considering a larger area (where public and private land coexist), CEN can combine the use of regulatory and contractual tools.

Regarding contractual tools, the main recommendation of the legal review was to use a combination of conservation easements, contracts (like the sustainable collaboration contracts), "rural leases with environmental clauses", and "real property environmental obligations" (*obligations réelles environnementales*) as introduced by French law in 2016. These obligations are a middle ground between easements (although they may extend for 99 years, they are not in perpetuity) and the collaboration contracts (they are viewed as a form of compensation and come with financial incentives).[92]

---

91 "Etude juridique pour l'amélioration de la maitrise foncière des forêts sèches en Nouvelle Calédonie", GIP-CEN, Cabinet Plaisant (2016).

92 Ministères de la Transition Ecologique et Solidaire, 25 juin 2018, https://www.ecologique-solidaire.gouv.fr/obligation-reelle-environnementale

A. Purchases

According to ADRAF, less than 16% of land in New Caledonia is in private hands, the rest being public (mostly held by the New Caledonia government with 47% and the provinces with 8%) and customary land (about 27%).[93] The territory's 1999 organic law dictates that customary land is inalienable, non-transferrable, incommutable, and untouchable (the so-called '4i'), such that no land purchases are possible on customary land. As to public land, leases have been preferred to sales of land by the territorial or provincial government. For the remainder, there are no legal obstacles to purchases but ADRAF and CEN NC have slowed down land purchases in the past few years because of the significant rise in land prices. As the head of CEN NC pointed out when asked about parcels of high biodiversity value that CEN might be interested in buying, challenges include willingness on the part of the owner to sell at the right price and the presence of other buyers willing to offer higher amounts.[94] Thus, although land purchase is possible in New Caledonia, as a conservation tool it has become a less preferred option than long-term leases, largely as a consequence of rapidly rising property prices.

B. Easements

Easements as currently prescribed are cumbersome to apply as the law presupposes the existence of two adjoining land parcels (such that the easement connects the two plots). Therefore the design of conservation easements – besides the use for adjoining parcels – requires either an adjustment to the French Civil Code, which observers agree would be long, arduous, and not necessarily successful, or integration into New Caledonian civil law. The legal review commissioned by CEN identified articles 636 and 687 of the Civil Code as areas to amend to enable greater use of easements by CEN (i.e. broader application than the current narrow interpretation, and extension of eligibility to public landowners). The other way to make conservation easements more widely applicable in New Caledonia would be to integrate the broader formulation of easements (i.e. no adjoining parcels needed, and valid for public and private landowners) into New Caledonian civil law, as New Caledonia enjoys autonomy with respect to civil law. A representative from the Economic, Social, and Environmental Council (French acronym CESE) said that she could submit the proposed legal amendments to the relevant elected officials, which would initiate the process.[95] A legal expert estimated that it could take between 18 months and three years for territorial law (*Loi du Pays*) to be passed by New Caledonia's Congress and integrated into Provinces' environmental codes and thus for conservation easements to become applicable.[96]

C. Leases

The amount of public land for sale is limited. In 2017 the New Caledonia government predominantly used long-term leases (generally over 30 years) on public land, primarily to provide security to farmers with long-term leases at a low cost.[97] The application of rural leases is possible in public, private, and customary lands. Although rural leases originally were designed to accommodate farmers, France's 2006 agricultural policy law (*loi d'orientation agricole*) provided an expanded definition for rural leases to include environmental clauses or obligations. A New Caledonia law to establish an agricultural and pastoral code replicated these rural leases for the territory in 2016. The goal as stated in the law was to "apply practices on land with rural leases for the preservation

93 http://www.adraf.nc/component/cartographie/?zone=generale&type=TP

94 Interview, April 23rd, 2018

95 RESCCUE workshop, Nouméa, June 14-15th, 2018

96 RESCCUE workshop, Nouméa, June 14-15th, 2018

97 Interview, April 15th, 2018

of water resources, biodiversity, landscapes, product quality, soil and air, the prevention of natural hazards and the fight against erosion".

Land in customary areas has specific features that were institutionalized in the territory's 1999 organic law. Those specificities are commonly referred to as the "4i": inalienable, non-transferrable, incommutable, and untouchable.[98] As such, only leases have been used on customary lands as purchase / sale is prohibited, which is unlikely to change in the foreseeable future. Leases have been used on customary land for over 20 years according to ADRAF in a report published on the subject in 2014.[99] Leases can be found in all the municipalities harbouring customary land on the main island, for a total of 14,000 hectares and 260 leases, mostly in the Northern Province (61% of leases in New Caledonia) as of 2014 according to the ADRAF report. The leases are generally simple documents, often for farming purposes. When there are written contracts, they are often signed with a GDPL. There have been discussions around creating a specific lease on customary land for a number of years but this has not yet materialized, despite consensus that it would be an improvement towards simplicity, clarity, and legal robustness.

Leases on customary land can be complemented by a customary act, an official document that captures what the community will have agreed to do (e.g. lease some land). The official function of customary public officer was created with a view to formalizing and solidifying agreements taking place on customary lands. That officer facilitates any transaction and prepares the customary act. It is also the customary public officer's function to check any land tenure questions and make sure that everyone is represented and recognized on the community side.

The use of leases on customary land became more common with the development of a major mining project in the Northern Province in Koné. Their duration and use were varied (use could be a housing development for instance), but this process served as an important step towards making those tools more common and for community and operators to understand what a fair deal means and how to sustain it. The existence of a land tax on areas over 200 hectares also has acted as an incentive to put to use a number of land parcels that previously were idle. ADRAF has provided assistance in the drafting of lease documents.

The two categories of leases in most common use are housing leases (meaning on new housing development or land where housing will soon be built) and rural leases. Housing leases constitute the majority of contracts (75% in Northern Province and 50% in Southern Province). Generally, beneficiaries of social housing development on customary land were Kanak people who could then access home ownership. Those houses are then in turn often leased, including to non-Kanak people. In those cases, there are in fact two layers of property, one related to the land that remains collective and cannot be seized, transferred, etc. according to the 4i principles and the other related to the built environment where individual ownership exists. In terms of area, rural leases make up the vast majority (12,200 ha out of the 14,000). Leased land represents about 14% and 10% of customary land in Northern Province (e.g. Voh, Poya, Koné) and in Southern Province (e.g. Païta, Moindou, Bourail) respectively.

As for those renting the land, they are referred to as "internal market" (mostly, members of an existing GDPL) and "external market" (non-members of the Kanak community). The greatest potential for new leases in the future is with the internal market as a certain number of GDPLs have kept some land with the view of leasing it whereas the potential for external market is much more limited, either out of a choice by the clan to keep the land for themselves or because the land available is

98 In French: « inaliénables, incessibles, incommutables et insaisissables »

99 "Etude sur le bail et les mises a disposition de terres coutumières en Nouvelle-Calédonie" (September 2014)

of poor quality or is subject to conflict within the community.

The duration of rural leases is generally around 15 years while leases to non-Kanak people usually are set for 10-12 years.[100] The possibility of 99-year leases has been discussed but has not been commonly used to date. It may pose the problem of reverse tenure when the community who owns the land becomes dependent on the infrastructure built by the investor leasing the land.[101] Thus, the greatest potential for more leases is related to the so-called internal market. As the legal/ regulatory context evolves, a lease instrument designed specifically for customary land could help boost transactions if it helps increase clarity, simplicity, and accountability – as could conservation easements potentially once they are usable in New Caledonia.

Currently, the main risks for leases are that a community may decide to abrogate the lease, or a conflict can arise with or within the community. No guarantee or collateral can be part of any customary contract as per the 4i. However, according to the head of ADRAF, there have been "few" of these instances when contracts were broken or conflicts arose.[102] Nevertheless, the other party has little recourse. It can bring a lawsuit against the GDPL, which is legally feasible, but it is likely that the court will find the GDPL insolvent. (See below for measures before signing a contract and when it is under way to reduce risk).

Overall, the set of land tools and mechanisms available in New Caledonia is fairly broad and varied. So far, leases and agreements (more or less formalized) have been used most often, but the introduction of newer mechanisms (with laws recently passed in France now under consideration in New Caledonia) and CEN's interest in expanding the set of tools it uses should lead to additional flexibility and new options. In the Loyalty Islands, the Provincial government is even experimenting with the idea of developing a legal personhood (*personnalité morale*) for nature. Out of the mechanisms under review in this study, only conservation easements would be a new tool in New Caledonia. With the required political will, easements could be used within a small number of years. The financial compensation component of most transaction tools would be a new element in the New Caledonian context, where various types of conservation agreements as mentioned above usually do not come with a financial clause.

4.4 Social and cultural context

New Caledonia's contemporary system of land ownership and tenure resulted from colonial efforts to introduce a system of individual land ownership.[103] Through a number of government policies known as *cantonnement* from the mid-19th century onwards, customary land tenure and traditional leadership (*maîtres de la terre*) were superseded by administrative constructions such as *grand chefs* and *petits chefs*. People were forced to live in villages that became the government-controlled administrative units for tribes (*tribu*), which, as an administrative concept, became the proprietor of land in *réserves*.[104]

These measures caused confusion and obliged communities to follow the orders of *chefs* to surrender territory in return for monetary compensation. Meanwhile settlers and their cattle began to use Kanak lands. The dispossession of land brought about a rupture of the many ties that bind Kanak and land, and conflicts arose for which traditional mechanisms of land control and redistribution were no longer

100 Interview, May 16th, 2018

101 Interview, June 4th, 2018

102 Interview, May 16th, 2018

103 Ward, Alan W., 1982, *Land and politics in New Caledonia*, Canberra: Research School of Pacific Studies, Australian National University.

104 Ibid., p. 3.

useful. The emerging confusion over land ownership and leadership over clans, adopted clans, and others living on the land persists until today.

> *The jealousy and competition for limited resources, and the rigid notion of a collective property, incommutable and inalienable, directed by the chiefs, has also contributed to the frustration of commercial agriculture by individuals or families (although lack of agricultural extension services and reliable collecting, processing and marketing facilities have also been serious inhibitions).*[105]

Following the Second World War, the French government introduced a number of land reforms but tensions remained. Following a period of tension and violence between the French government and Kanaks in the 1980s, attempts at "decolonisation" have not yet resolved issues around land, as "colonial land expropriation has left deep scars on the collective Kanak memory."[106]

Over the last few decades the territory has seen a significant resurgence of indigenous identity and claims on rights over land. In the government, "priority is now given to training of Kanak civil servants, police officers, judges, doctors, teachers, nurses, and so on."[107] It should be no surprise that Kanak politicians' main concern revolves around land claims. A key demand has been to extend their *réserves*, because of a real need for space due to their growing population, but soon this became a way to repossess lands lost during the *cantonnement*.[108] Nevertheless, the fear of government land confiscation persists today.[109]

The 1998 Nouméa Agreement establishes a legal framework for the development of a custom land cadastre. Point 1.4 of the agreement's guidance document states that: "Customary land must be registered so that customary rights to a piece of land are clearly identified."[110] This means that customary land in New Caledonia is defined by the so-called "4i" principles (see above) that reflect both the community's traditional vision of land and a political choice to permanently secure land for a population whose traditional holdings were profoundly disturbed by colonization.

As pointed out by Pierre-Yves Le Meur, land reform in this context is paradoxical.[111] On the one hand it is about converting private or public land into customary land using old colonial categories, while on the other it aims to recognise customary rights in Melanesian terms. The aforementioned ADRAF's purpose is to facilitate reconciliation between the requirements of civil law and customary traditional organization. In particular, the legally recognized structure of GDPLs is made up of people of customary civil status and is governed by customary law. The first land GDPLs were set up in the early 1990s to benefit from land rights granted by ADRAF under customary law. Since the text governing the GDPL is not restrictive, a GDPL can include purposes of many kinds: cultural, economic, social, etc.[112]

---

105 Ibid., p. 5.

106 Winslow, Donna, 1991, Land and Independence in New Caledonia, *Cultural Survival Quarterly Magazine*, June 1991, available at: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/land-and-independence-new-caledonia

107 Ibid.

108 Ibid.

109 Ibid.

110 Cited in Le Meur, Pierre-Yes, 2011, Land policy and knowledge in New Caledonia: a look back at an applied anthropology experiment, *Journal de la Société des Océanistes* 132(1): 93-108, available at : https://journals.openedition.org/jso/6286

111 Ibid.

112 ADRAF, http://www.adraf.nc/dossiers-thematiques/gdpl

From the creation of ADRAF in 1989 and even more so after the Nouméa Agreement and the 1999 Organic Law, return of land to Kanak people and recognition of customary rights are done in terms of restitution or compensation. This led to a situation of institutional pluralism where claims on land were recognized in the form of financial compensation, which some individuals sought to exploit using cultural narratives and resulted in contentious local politics. In any case, this stage of the complex process of land reform and redistribution is now completed; only 0.4% of ADRAF's stock is available and the institution is buying very little new land.

A significant amount of Kanak live in towns nowadays and attempts at reclaiming customary land have taken place within a new set of economic aspirations and opportunities.[113] In the *réserves*, people generally enjoy a significant level of security but many seek opportunities elsewhere as uncertainty over succession and usufruct rights frustrate people. As a result, people tend to distance themselves from the idea of collective ownership and register individual and family titles to land under the *droit commun*, free from restriction on inalienability.[114] More entrepreneurial Melanesians also began to acquire land from settlers on lease or sharecropping arrangements, and occasionally even by purchase.

Photo by user gérard on Flickr, 2015

These developments also put in perspective the often heard culturally-based explanations for uneven development progress in New Caledonia. These explanations suggest that because of its collectivist nature and personalized networks of reciprocity, Melanesian societies have a limited capacity to engage with the modern economy. Traditionally, the Kanak society was a non-market economy based on subsistence agriculture with customary exchanges, in which land had a strong symbolic value with no notion of monetary value. An example of this perspective on property is the practice of allowing successive generations of other families to use one's land without compensation. With the deterioration of customary ways, Kanak societies nowadays allow for engagements with capitalism that profit individuals and families. However, as a consequence these societies have largely lost their cultural buffers against inequality.

Productive use of land is a "political hot potato" as one of the experts we interviewed said. The notion of productive use ("mise en valeur") was introduced and emphasized by the colonial power. This goes beyond a simple dichotomous vision of societies (western vs. customary). When the process of land

113 Ward, Land and politics, p. 11.

114 Ibid., p. 12.

redistribution started in the 1970s a condition posed by the government was for the land to be put to use. Today, that notion remains strongly present (even when it is not embraced). A strongly suggested productive use could conflict with the notion of redistribution in which the community maintains flexible choices as to what to do with the land it owns. The debate exists also within the Kanak community: can there be a different model, drawing on tradition rather than the market economy? Another informant mentioned the perception of productive use as a moral obligation by many.

A noteworthy aspect is the work that is conducted with customary leaders to adapt and increase the effectiveness of the environmental code. As noted, Provinces have authority over their environmental codes. One of our interviewees described her work with customary leaders during the drafting of a provincial environmental code so that their concerns would be taken into account. The rationale was that involving customary leaders in the drafting process would increase the likelihood of compliance with the code.

Finally, the prevalence of mining in New Caledonia raises the issue of social and cultural impacts, as well as environmental impacts. In areas around mining ventures, in particular in the Southern Province, provincial levels of government are seen to provide "inadequate environmental and social protection" and lacking the will to address the mining industries' negative impacts. As Horowitz points out, this is only partially due to inadequate legislation; in fact, protective legislation exists but there is little political will to enforce it, making New Caledonia an 'ideal place' for investors.[115] Horowitz notes that for projects of any scale in New Caledonia:

> *… both customary legitimacy (Kanak people's sense that a project has support from customary authorities) and indigenous legitimacy (the international community's acceptance of a project or group as representative of Kanak interests) are important stakes.*[116]

In conclusion, after decades of marginalization and alienation from land and custom, the value of both 'official' and 'traditional' customary authorities is important to most Kanak.[117] Throughout New Caledonia, Kanak tend to judge the legitimacy of any endeavor according to whether it has been initiated and/or supported by customary authorities.[118] As we have also observed in the other PICTs, in New Caledonia, people highly value their customary ways of doings things and this means that any conservation project ought to seek customary authorities' approval. Conservation projects that recognize people's cultural heritage or work in tandem with cultural heritage conservation may gain more traction. In any case, when plans for distribution of financial returns from conservation projects such as application of transaction tools are added to local politics around custom and leadership, this, as anywhere else in the PICTs, can easily aggravate local tensions.

For any transaction or agreement happening on customary land, thorough engagement and outreach work with the community will be essential. The number of conflicts occurring with contracts made on customary land reportedly is low, despite the common stereotype of complexity and difficulty.[119] More

115 Horowitz, Leah S., 2017, Indigenous by association: Legitimation and grass roots engagements with multinational mining in New Caledonia, in Horowitz, L. S. and M.J. Watts (eds.), *Grassroots Environmental Governance: Community Engagements with Industry*, Routledge: London and New York, p. 87.

116 Ibid., p. 88.

117 Le Meur, Pierre-Yves, 2013, Locality, mobility and governmentality in colonial/postcolonial New Caledonia: The case of the Kouare tribe (xûâ Xârâgwii), Thio (Cöö), Oceania 83(2), 142.

118 Horowitz, Leah S. 2008, "It's up to the clan to protect": Cultural heritage and the micropolitical ecology of conservation in New Caledonia. *The Social Science Journal* 45(2): 258-278.

119 Interviews: May 15th and 16th, 2018

importantly, experience shows that there are effective ways to mitigate the risk, covering the entire project cycle from the preparation and design of the agreement to its day-to-day operations.

- Holding extensive consultations is essential. The agreement is made with the entire clan, not only with its chief or representative. As several observers noted, "there is no such thing as someone speaking on behalf of the entire clan".[120] Conflicts have arisen when some clan members felt that they had not been heard.

- As mentioned above, the job of the "customary public officer" is central, both to help ensure complete representation and to check any possible land tenure problems. On land tenure, the officer's role will be to make sure that those owning the land are identified and that they then participate in the consultation / negotiation.

- Over the course of the agreement, the community engagement work must continue as frequent contacts reduce the likelihood of problems. One potential source of problems is when there is change in the clan's leadership. Being proactive with the new leadership will be effective, even more if helped by the outgoing leadership.

- It has been commonly observed also that when the agreement was between the community and a family of European origin but who knows the environment or the clan well, or has been around for a while, contracts were more stable over time.

Some mayors could be interested in seeing transaction tools applied in their municipalities. First, it is important to remember that customary lands despite their autonomy are all affiliated with a municipality (for instance, it is the municipality's responsibility to orchestrate the connection to the drinking water supply or the power grid). The east coast of the main island suffered severe landslides and flooding in 2016, which raised the awareness of elected officials and much of the population (on customary land and elsewhere) about catastrophic natural events and the need for preventative measures. Furthermore, as noted, mayors are responsible for designing municipal land use plans. Thus, there may be an opportunity, particularly in those communities badly affected by weather events, to work with elected officials, the provincial Environment Department, Kanak local leadership and communities on land use and management measures that could help mitigate future severe weather events and improve resilience to climate change.

Any initiative at the local level will be affected by the aforementioned debate regarding development of productive activities and of productive use ("mise en valeur"). Within a typical community some will be in favor of encouraging productive use (including selling land to outside investors on private land) while others are more eager to conserve the land or develop it differently. Pursuing conservation transactions necessarily means an encounter with this debate as it is taking place within local government and communities.

Mining operators have an obligation to compensate for the possible damaging impact of their mining operations. The larger ones have worked with the provincial governments where their operations are based. Thus, taking into account the significant work done between the mining operators and the Provinces, the question will be whether the mechanisms under review could offer new options for compensation work in particular (see below for further details). There have been a few examples of "repossessions" of portions of mining concessions where mining companies agreed to stop operating a mine located in their concession, under the condition that the particular mine will not be reallocated to another operator. This reduction of their environmental footprint could be included in future compensation conversations.

120 Interview, May 15th, 2018

4.5 Implementation capacity

CEN and the Southern and Northern Provinces are major actors and stakeholders in the application of mechanisms for land and land rights transactions, for both public and private land, as shown in previous sections. The two Provinces will likely be a party or a partner in any future transactions. As mentioned above, CEN is seeking to improve the effectiveness of its interventions by optimizing the use of contractual tools at its disposal, including the more recent options introduced in French legislation. In its 2017 annual report, CEN mentioned that a working group would identify priority sites for land intervention and design a strategy in 2018. Any strategy to expand use of transaction tools must clearly align with the work of CEN, including consideration of priority sites chosen and how / whether the transaction tools under review could be applied.

CEN also plays a leadership role in the implementation of dry forest protection and invasive species management strategies. By statute, CEN's existence originally was limited to a 10-year period (until 2021). If CEN were to cease operating beyond 2021, the properties it owns today could be in jeopardy. However, it is highly likely that its existence will be renewed.[121]

Conservation International and WWF are the only international NGOs present in New Caledonia active in terrestrial conservation (Pew Charitable Trusts, a US-based global non-profit organization, funds marine conservation projects through its Pew Bertarelli Ocean Legacy Project). They have the greatest resources among environmental non-profits and as such, are well-suited actors or partners for the implementation of land-based conservation mechanisms.

According to the aforementioned Ecosystem Profile report, there are about 20 local environmental non-profits in New Caledonia. Out of those, only a few have a terrestrial focus and carry out activities that would make them relevant partners or actors. ASNNC is the oldest environmental non-profit in New Caledonia and has the broadest mission. SCO is BirdLife International's partner for New Caledonia. Its activities focus on working on the territory's Important Bird Areas (IBAs) and also on managing invasive species that affect sea birds. Beside publishing educational tools, Mocamana designs projects by bringing together various stakeholders, such as public and private land owners, non-profit organizations, companies, and elected officials. This experience of acting as a broker should be valuable in the implementation of land-based mechanisms.

Dayu Biik is an organization run by community members around the Mont Panié Reserve, which it co-manages with the Northern Province. It focuses on the area's sustainable development and community livelihood improvement. It has also worked since 2012 in the Tendo catchment area to improve the provision and quality of drinking water, in cooperation with the municipality of Hienghène and customary leaders, through invasive species control and reforestation and landslide stabilization activities.

Action Biosphere is an advocacy organization that has been active in New Caledonia for over 20 years. Its modus operandi is not the implementation of conservation projects like the other NGOs mentioned in this section. However, Action Biosphere could be a valuable partner as land and land rights transaction mechanisms become more widely used in the territory. Action Biosphere, Dayu Biik, and WWF were among the 17 founding members of Ensemble pour la Planète (EPLP) in 2006. EPLP also focuses on advocacy and covers a broad set of environmental issues in its work. On customary land, smaller community organizations could be viable actors. Many such organizations are used to receiving grants and carrying out activities geared at improving their communities.[122] As mentioned previously, municipalities have a vested interest in land uses that are most effective at boosting their climate resilience and minimizing the effect of catastrophic weather events. Thus, on public land that

121 Interview, April, 23rd, 2018

122 RESCCUE workshop, Nouméa, June 14-15th, 2018

they own (or is owned by the Province) or on customary land within the municipalities' boundaries, mayors could find it helpful to use land transaction tools.

4.6 Financing options

The range of estimates of the price of land per hectare in New Caledonia is quite wide. As noted, the legal review conducted for CEN indicated that the price may well exceed 700,000 FCFP per hectare (a little under 6,000 Euros). The head of ADRAF however, mentioned a price of 2 million FCFP per hectare (about 16,800 Euros) based on recent transactions and market assessment.

Public funding accounts for most of the funding for environmental protection and climate change resilience in New Caledonia. This is consistent with the major role played by the territory's government and the Provinces, either in carrying out environmental activities or distributing funding to organizations that do such activities. Public funding originates from various sources, namely the French state, the New Caledonian government, French cooperation agencies (e.g. AFD), and the EU (mostly the European Development Fund, EDF, that funds the INTEGRE and BEST projects for instance).

The aggregate level of private funding dedicated to conservation or climate change resilience is unclear. Besides the mining sector whose contribution is addressed below, some companies with economic interests in the territory have set up foundations or simply make contributions to environmental causes. For instance, the Catala-Stucki Foundation that focuses on conserving marine ecosystems is supported by the transportation operator (Mary-D) in Amédée Island. Also, Conservation International and WWF receive a significant share of their funding for their activities around the world from private sources. However, according to the 2015 State of the Environment report, corporate sponsorship ("mécénat d'entreprise" in French) – which comes with a 60% tax credit for gifts to nonprofits – is under-utilized for environmental support.

The mining industry also funds projects in the communities where it has operations. For example, Société Le Nickel (SLN – partly owned by France and by New Caledonia's Provinces) supports education-focused, research, or environmental actions, particularly in Thio where it is the town's major employer. The company has also made small grants to community organizations through awarding the so-called "Nickel de l'Initiative" for over 20 years. However, the mining industry is already heavily solicited for sponsorship and philanthropic activities, and is not likely to be interested in additional requests from newcomers.[123]

As mentioned above, mining companies are required to offset negative environmental impacts of their operations. Currently, ad-hoc offsets (*compensation à la demande*) and financial compensation are used in New Caledonia while supply-driven offsets (*compensation par l'offre*) are being tested in the Southern Province.[124] Ad-hoc offsets are designed based on the specific project and carried out by the operator or an external service provider. Financial compensation is limited to a payment, generally to a non-profit organization or public entity. Supply-driven offsets consist of credits originating in actual compensation actions (e.g. habitat restoration) that can be bought by operators seeking to offset their activities.

Several observers indicated that the balance of power in favor of the large mining operators also manifests itself in negotiations with the Provinces around compensation.[125] For instance, Vale simply pulled out of negotiations with the Southern Province because they were dissatisfied about where it was

123 RESCCUE workshop, Nouméa, June 14-15th, 2018

124 Interview, May 6th, 2018

125 Interviews: May 3rd & May 17th, 2018

going. The Province has no recourse since the threat of withdrawing the company's license to operate could only be done with political support at the highest level.

However, an opportunity could present itself with the funding of projects *ex situ*, meaning in sites that are not in or near the mining companies' own operations. The possibility of funding a land purchase or a conservation easement on parcels that are of high biodiversity value or contribute to climate change resilience could be an appealing value proposition for a mining operator because of its strong win-win component. Even a lease between a conservation NGO and a landowner (to enable the NGO to conduct conservation activities) could be funded by a mining operator. Furthermore, as the land mechanisms under review in this project are tested on pilot sites, the notion of innovation, experimentation, and novelty could be "sold" to the companies, in addition to the possibility of integrating these operations into their compensation negotiations, making that option even more appealing.

Finally, there is an existing funding system already in the context of the mining industry, called Fonds Nickel. This Fund, established in 2009, has received mandatory contributions from the mining industry with amounts required from each company set based on the size of their operations. However, the Fund's main purpose is to support post-mining land restoration, which is distinct from a targeted effort to protect highly threatened / high biodiversity value sites.

4.7 Management sustainability

The presence of international conservation NGOs and local non-profits such as Dayu Biik with extensive experience and/or credibility in their community will be an asset when implementing newer transaction tools such as conservation easements or taking on sizeable and complex transactions. These entities will also be able to act as conveners or brokers with local non-profit organizations or community organizations that will need training as their exposure to transaction tools has been limited to date. Long-term management in many sites necessarily will rely on local organizations and community organizations, requiring such training as well as technical and financial support from relevant government agencies and international NGOs.

CEN and the Provinces on Grande Terre have significant experience using leases and conservation agreements, and to a lesser extent purchases, and also in cooperating with each other. Through the legal review that it commissioned, CEN now has a clear roadmap regarding types of tools and optimal ways to use them going forward. As such, CEN should play a leading role in the wider use of transaction tools supported by the Provinces. However, to ensure that this key actor can help address long-term management sustainability needs, the long-term status of CEN needs to be solidified.

Ongoing connections between the conservation world and communities will be essential for success. This will require far greater coordination and interaction between actors in government, civil society, and the NGO sector than is currently the norm in New Caledonia. For long-term management sustainability, the Northern and Southern Provinces' Environment Departments, CEN, and international NGOs such as WWF and CI have an important convening role to facilitate such coordination.

4.8 New Caledonia: Conclusion

The transaction tools under review could complement the current set of mechanisms at the Provinces' disposal, particularly in the design of win-win agreements that would reduce the incidence of infractions by increasing the financial rewards of compliance through formalized transaction agreements. The financial compensation component of most transaction tools would be a new element in the Caledonian context.

So far, leases and more or less formal conservation agreements have been the most frequently used transaction or transaction-like tools. The major entities using these tools are the CEN New Caledonia and the Southern and Northern Provincial administrations. Private landowners have been involved as well as farmers, in particular when they have leased public land from the Provinces.

The introduction of newer mechanisms, with laws recently passed in France and now under consideration in New Caledonia, and CEN's interest in widening the array of tools it uses, should expand the range of options. The recommendations of CEN's legal review of the various mechanisms at its disposal pointed to the notion of a "legal toolbox", in that the different characteristics of these transaction tools make it possible for CEN to apply the most appropriate and relevant mechanism for a specific context. With the required political will, conservation easements could be used within the next few years.

There is potential to expand the use of transaction tools on customary land as well. Despite the somewhat loaded nature of the notion of productive use ("mise en valeur") in customary land and the constraints around the use of land emanating from the 4i principles, leases have been fairly widely used for housing and agricultural purposes in particular. The main potential for expansion lies in the "internal market", meaning within communities already residing on customary land. GDPLs may also choose to expand their activities, using their land as an instrument for economic empowerment.

The feasibility of expanding leases in this direction hinges on effective communications and stakeholder engagement. With respect to social and cultural considerations, the feasibility of using leases is furthered on customary land by traditional linkages between people and the land. Engagement and relationship management will benefit from mutually trusted intermediaries and emphasis on the fact that a correctly structured transaction will reinforce ownership, cultural links, and local management capacity

Institutionally, beside the CEN New Caledonia and the three Provinces, WWF and CI are the biggest non-profits present in the country and active in terrestrial conservation. Dayu Biik has gained valuable experience working in the Mont Panie reserve and could inspire smaller community organizations to get involved in conservation on customary land. Environmental non-profits such as EPLP or Action Biosphere have focused their actions on advocacy. Finally, municipalities could play a role in the broader use of transaction tools as landowners or as managers/stewards looking for solutions to mitigate the risk of major weather events for instance.

TABLE 4.1: SYNTHESIS OF FEASIBILITY CONSIDERATIONS FOR NEW CALEDONIA*,**

	PURCHASE	EASEMENT	LEASE
State of identification of conservation priorities	3	3	3
Policy context	3	1	4
Legal context	5	2	5
Social and cultural context	4	2	4
Implementation capacity	5	2	5
Financing options	2	1	3
Availability of solutions for long-term management	5	4	5
Average Score	3.9	2.1	4.1

* Each factor is scored from 1 to 5 where 1 means *least conducive to feasibility, and* 5 means *most conducive to feasibility.*

** The numbers reflect initial scoring based on desk review, interviews with key informants, and group discussions in stakeholder workshops.

5. FRENCH POLYNESIA

5.1 Conservation priorities

According to a review of French Polynesia's environmental policy conducted in 2017 by the Chambre Territoriale des Comptes (a sort of public administration audit body), "there does not appear to be a protection strategy designed for the entire French Polynesia territory, or even at the archipelago level".[126] Considering "the various Protected Areas (PAs), [that exist today] seem to be the result of history and successive additions that in the end make it a system with little coherence".

To this day, the government[127] has not been able to finalize a broader conservation strategy. The territory's Environment Ministry was created in 2003 and then organized a broad consultation with various stakeholders (so-called Estates General of the Environment). In 2010, it was announced that a biodiversity strategy would be presented to the French Polynesia assembly for its approval. However, the strategy has yet to be finalized. A "sector policy" for biodiversity or nature was in fact designed by the Environment Department (called DIREN) but for internal use only. More consultations need to happen with other biodiversity stakeholders (municipalities, NGOs, other government departments) before a broad strategic document can be finalized.

The Federation of Environmental NGOs (Fédération des Associations de Protection de l'Environnement, or FAPE), shared a list of its projects with DIREN, seeking feedback and hoping to coordinate. However, according to a FAPE representative, DIREN has not yet been able to respond. Similarly, some FAPE members have been consulted over time by the government but the process has lacked structure and has not yielded concrete outputs. As discussed below, the limited conversations between government and civil society reflect a long history of tense relations. "Indigenous French Polynesians still struggle to have a voice in political, economic and environmental decision making bodies; although momentum for meaningful change and just representation is gathering."[128]

An effort to formulate local environmental charters was launched in 1994. Documents were drawn up for Tahiti, Raiatea-Taaha, Moorea, Huahine and Bora Bora, but they have not been implemented. As noted in the Chambre Territoriale report, "there have been plenty of working groups and strategic documents but too rarely have those processes produced anything concrete".

This dearth of direction is probably explained in part by the fact that no less than seven public administration departments are in charge of environmental issues, falling under different Ministries, which poses a challenge with respect to coordination. Furthermore, since 2010 the Environment Ministry has always been attached to a larger ministry with other portfolios (e.g. health, solidarity, & family; energy & mining; or culture & craft), which can result in challenges with respect to prioritization and visibility.

Finally, the definition of a broader conservation strategy is made even more difficult by a significant lack of data, as pointed out in the Chambre Territoriale report; there is no forest inventory, no data on

126 Chambre Territoriale des Comptes (PF): Rapport d'observations définitives – Collectivité de la Polynésie Française (politique de l'environnement) – Exercices 2010 et suivants (2017) https://www.ccomptes.fr/sites/default/files/2017-10/PFR2017009_0.pdf

127 The territory's central authority (which enjoys a large degree of autonomy from France) is commonly referred to as "le Pays" (the Country).

128 Bambridge, Tamatoa 2017, Introduction, The rahui: A tool for environmental protection or for political assertion?, in Bambridge, T. (ed.), *The Rahui: legal pluralism in Polynesian traditional management of resources and territories*, Canberra: ANU Press, p. x)

erosion and resulting sedimentation, on air quality (an air quality research center was planned but did not materialize), on land use, or on the impact of waste. A water management center was created in 2006 but it has never actually been operated. Similarly, a planned research center focused on biodiversity and climate change was never created. Furthermore, it was announced in 1989 that a conservancy focused on the coastline, modeled after France's Conservatoire du Littoral, would be established; this never happened. In 2011 the creation of a conservancy with a broader mandate similar to the CEN in New Caledonia was discussed, but it did not happen either.

The geography of French Polynesia makes its environment inherently fragile. The territory is scattered around 5 archipelagos (counting 120 islands) over 5.5 million square kilometers, with a population of less than 300,000 inhabitants. As noted in the Chambre Territoriale report, "indigenous species are particularly vulnerable because they occupy a limited land area (e.g. 300 endemic species listed in Rapa over only 43 km^2), because of their low population number, and their limited capacity to resist competition and predation by species imported by man". The report also cited evaluations by the territory's government: "biodiversity is threatened", "many lagoons [are affected] by overfishing", "the territory's waters and coastline are in bad shape", "too many freshwater rivers are polluted". Consequently, French Polynesia is the French Overseas Territory (FOT) that has the most extinct or threatened species. It ranks 16th in the global list of countries and territories with the highest number of threatened species.

Photo by user Arthur Chapman on Flickr, 2017

There is broad consensus among stakeholders from a range of sectors that the level of actual protection is low in French Polynesia considering the biodiversity that is at stake. Only between 2% and 4% of the land area is formally protected while for instance 80% of bird species are rare and endemic.[129] A total of 115 sites have been identified as significant from a conservation standpoint, including 15 that are viewed as of high priority or critical. A decree of the Council of Ministers established a list of "protected species" that includes 1,500 endemic species and any violation of that list is supposed to be prosecuted. However, according to the Chambre Territoriale report, there is little control or enforcement. The Protected Area (PA) system includes 32 sites on 15 islands, covering six categories of protection

129 Note that the Convention for Biological Diversity (CBD) goal for 2020 is that every country should have 17% of its land (terrestrial) under protection.

generally consistent with the IUCN classifications.[130] Twenty PAs have been created since 2010, but 18 of these are Marine Protected Areas. Moreover, existing reserves are not managed properly as they may lack a completed management plan (e.g. Scilly) or a management committee (e.g. Marquesas); the Chambre Territoriale report adds that a number of PAs simply "lack surveillance or are little or not managed at all". According to the report, a number of protection projects have been initiated in the past 30 years but they have not been completed (for example, a natural reserve that would have included the Pari cliffs in Tahiti). Only 14 hectares of land have been bought by the government for their protection (this purchase was linked to the proposed establishment of an organization analogous to CEN in New Caledonia, but ultimately this did not materialize). Thus, an inadequate level of protection constitutes an ongoing source of vulnerability for the territory's biodiversity.

Major sources of pressure on the environment have been significant population growth in the past two decades (and its resulting urbanism and urban development), illegal coastline development (embankments), erosion caused by human presence, invasive species (rodents on smaller islands in particular), and more broadly a change of society model from traditional to consumerism.

Only a very limited portion of the coastline has not been developed, in Tahiti in particular. On coastline development and proliferation of illegal embankments, the State of the Environment report points out that "on the coastline with increasing urban development, anthropization caused by embankments (mostly non-authorized) exceeds 50% in several islands and becomes more and more concerning: privatization of access to the water, disappearance of fish nurseries that would enable replenishment of fishing stock, and weaker protection of coastline".[131] About 700 embankments have been identified, mostly on Windward Islands, 50% of which were built without authorization. It has also been common for owners whose property borders a beach to build a small wall, which has led to the disappearance of nearby beaches in most cases. This situation is different from that of the illegal embankments since those walls are built on private property and they are legal if they don't exceed a certain size. However, they present a similar threat to the fragile coastline environment.

On housing development, aggregate extraction (i.e. sand from lagoons, coral from reefs, sediments or alluvium from rivers, and rocks) used for construction activities has caused major harm. It is also striking that aggregate extraction is largely unorganized at the territory level. In fact, there is only one quarry on public land (in the Marquesas Islands) and the lack of planning does not help. For example, the initial project submitted for the Mahana Beach resort development required over 3 million cubic meters of aggregates, more than was produced for the construction industry between 2008 and 2015. And yet, no quarry was previously identified for the supply of those aggregates.

Erosion is considered to have been mostly caused by housing development on the coastline and by agriculture, particularly pineapple cultivation. Encouraged by the government with a view to developing productive activities, pineapple farming led to substantial clearing of slopes that in turn caused erosion. The government's Agriculture Department has issued clear rules about acceptable slope levels for pineapple cultivation and has worked with farmers to educate them. In the pilot site of Opunohu in Moorea where INTEGRE, an EU-funded regional programme, is under way, erosion control is one of the main programmatic themes. Nevertheless, erosion remains a significant concern because it results in sedimentation that, in turn, is one of the main causes of river and reef degradation in French Polynesia.

The major invasive species are rats, deemed responsible for threatening 56 indigenous or endemic plants and threatening the extinction of three endemic terrestrial birds according to the Chambre

130 http://www.environnement.pf/les-espaces-naturels-proteges-et-geres-0

131 Seguin, F. Etat de l'environnement en Polynésie française 2007/2014 (Créocéan - Coordination by F. Seguin), 2015. Direction de l'Environnement

Territoriale report. *Miconia calvescens* (or Miconia) has continued spreading in French Polynesia and can now be found in areas beyond Tahiti such as Moorea and the Marquesas. Some of the affected plants are near extinct. However, the use of a fungal pathogen has enabled the regeneration of native and endemic species in underbrush and has slowed down Miconia's regeneration by 70%.[132] Overall, France's National Center for Biodiversity (Observatoire National de la Biodiversité) has identified 100 most invasive species in FOTs and 36 of these are found in French Polynesia.

Several observers note that the development of hydropower is likely to constitute a growing threat.[133] They think that it is very possible that entire untouched valleys will be used for hydropower as part of the government's development strategy for the territory (the land would be purchased from private owners when needed). In its land use strategy they believe that the government will choose to allow hydropower in some valleys while keeping others untouched to maintain balance and make it more acceptable for the population and broader civil society. Others expressed concern over the risks attending the purchase of entire islands by very wealthy individuals.[134] French Polynesia remains one of the rare places in the world where buying a paradise island is still possible. Some islands are of very high biodiversity value and house very fragile or threatened species. Even in the absence of development or of productive activities, ignorance could threaten the fragile environment.

Despite the somewhat bleak picture of the territory's environmental health described above, there are elements of resilience drawn from tradition and commitment to the land or related to policies aiming to address some of the threats mentioned. Traditional usage and collective ownership mechanisms such as *Rahui* (see below) could be further expanded. The few that have been revived have proved effective at managing the fishing stock sustainably and have been accepted by communities. They could also be applied to terrestrial settings. Even though some valleys in the interior may be "lost" to hydropower we should note that on various occasions communities have come together in response to new development projects and are now carrying out cultural and environmental activities.

A territory-level law (*Loi du Pays*) issued in 2016 has tried to address the issue of illegal embankments by offering to those that have occupied public domain with these embankments for over 5 years, and paid their due taxes, to declassify the land while asking that a three-meter wide band be maintained by the water. On the subject of sustainable use of resources, the territory has seen that there is significant price elasticity in consumption. As cited in the Chambre Territoriale report, consumption of water went down significantly once paying for it became the norm. Utility prices are a highly sensitive issue but this case proves that charging a socially acceptable rate can induce behaviors that are less harmful to the environment.

With respect to transactions for land or land rights, the territory's land tenure situation is an essential element. Most of the territory's land is under joint ownership (only 11.4% of the territory is public land), which to date has actually favored conservation. These properties commonly have dozens of joint owners, which has made leases or other types of agreements as well as sales rare because of the ownership complexities involved (see below). That said, it is also widely recognized that many properties are under-managed, or not managed at all. Furthermore, numerous private and public land parcels are subject to conflicts over tenure claims, and thus these areas are even less available for use or transactions. However, as mechanisms to resolve joint ownership situations become available (details on this below), the supply of land for use and purchase, and the resulting threats of unsustainable development, are going to increase. That is where the transaction tools under review could be valuable.

---

132 Seguin, F. Etat de l'environnement en Polynésie française 2007/2014 (Créocéan - Coordination by F. Seguin), 2015. Direction de l'Environnement

133 Interviews: Paul Roger de Villers (April 26th, 2018), Mahé Charles (May 2nd, 2018)

134 Interview: Philippe Raust (May 17th, 2018)

Like in New Caledonia, there have been some attempts to reach right of way agreements with landowners when community organizations or the municipality seek to organize public hiking trails. However, as in New Caledonia, such agreements are often verbal and landowners can change their minds overnight. Transaction tools could be valuable to help formalize such agreements and provide incentives for improved compliance. There are efforts under way already under the leadership of the Tourism Department and a non-profit active in hiking trail management along with municipalities, as mayors are liable for any incidents that may occur on those trails and are also responsible for ensuring safety in their town's municipal boundaries.

In valleys that will remain untouched and unaffected by hydropower development for instance, more active conservation work with the communities that have often shown their commitment to the land is possible. Partnerships with conservation NGOs are an obvious choice and would not require the use of the mechanisms under study. But a long-term lease or an easement could provide extra incentives for the community to see conservation activities performed, including in a context of sustainable productive activities and multiple uses. As discussed below, the perpetuity element of easements may not appeal to landowners who may be reluctant to cede property rights. However, to improve the situation surrounding construction of walls on beaches, easements restricting their construction could be a viable solution.

Photo by user Éole Wind on Flickr, 2017

The notion of easements also may be better received if linked to the long-term protection of culture and traditions. Participants in a workshop conducted in the course of this study all agreed that there is a consensus in French Polynesia on the importance of culture and traditions (it has been a more recent revival for some), whereas conservation as a goal may be more controversial.[135] Thus, the association of cultural and conservation elements when the protection or sustainable use of a land parcel is being discussed was viewed by the workshop participants as likely more effective.

135 RESCCUE Workshop, Papeete, June 19th, 2018.

Land purchase has been used sporadically as a public policy tool in the past. For example, the government bought the *Domaine Opunohu* from a private landowner. It now houses an agricultural high school, a training center focused on agriculture, and land parcels rented to farmers for pineapple cultivation, as well as cultural monuments and forests. This example is generally viewed as a success story, thus transaction tools could help other multi-use projects become a reality.

Reactions to the possibility of using transaction tools are mixed. Among some, there is discomfort with the prospect of providing financial incentives to landowners and farmers to actually comply with an existing land use plan, when they are actually obligated to comply with those plans as a matter of regulation or legally bound to comply with contractual obligations. Also, even when joint ownership situations can be settled and an agreement can be reached with the owners, the financial compensation provided can be so diluted that it cannot be an effective incentive. For instance, in the case of a phosphate mine on Makatea Island, the mining operator reached an agreement with the 2,000 or so joint owners, which resulted in an annual payment of US$50 per owner. That agreement raised skepticism as to the owners' level of interest or involvement.

5.2 Policy context

In French Polynesia, the notion that there is little land available is very present according to several of our interviewees, thus the prospect of "freezing" land for the purpose of conserving it is shocking to most. The transaction tools under review would not necessarily "freeze" land but that is how they would be perceived at first. More broadly, in a territory that still struggles with poverty it is expected that there will be more of a focus on economic development, productive activities, and the provision of social services – which could constitute headwinds for conservation strategies.

As stated by one government official, "nothing can be done on the environmental front with politicians if environmental measures do not have social and economic benefits".[136] Another added, "the environment is not the government's priority".[137] Quoted in the Chambre Territoriale report, the Environment Minister himself indicated that "the environmental policy is not considered a priority. It is still too often perceived as an obstacle linked to a series of constraints to urban and economic development".

The Chambre Territoriale report makes the overall assessment that "many [regulatory] tools to protect terrestrial and marine areas [exist] but [they are] too rarely put into effect". Similarly, "political instability since 2004 has not helped in the emergence of a coherent public policy". Furthermore, there is a lack of "vision and political buy-in".[138] For example, there have been "repeated failures since 1984 at putting in place a general land use plan for the territory". Therefore, there is no coherent broader framework for municipality-level land use master plans (Plan Général d'Aménagement, or PGA). A new process at the territory-level is under way with an expected completion date of December 2019.

PGAs must be initiated and conducted by municipalities themselves. They have to be approved by the territory's public administration to be enacted. Less than half of all municipalities (17 out of 48) had completed their PGA as of 2016. Over 20 had initiated the process but did not complete it. The Union for the Promotion of French Polynesia Municipalities (French acronym SPCP) says that this is due to a lack of proper technical expertise among municipal agents, and to the fact that mayors have not asked the government for technical assistance (that could be provided if asked). Moreover, mayors now also are responsible for the provision of drinking water and for waste treatment and disposal (and sanitation by 2020), which constitute competing priorities with the process of establishing a PGA.

136 Interview May 2nd, 2018

137 Interview April 27th, 2018

138 The exact words used in the original document for political buy-in are: "portage politique fort".

A PGA can have a finer level of detail in the form of a so-called PAD (Plan d'Aménagement de Détail) that is detailed land use for a particular area within that municipality. The marine management plans are called PGEM (Plan de Gestion d'Espace Maritime) and are drafted separately from PGAs, even in coastal areas. On the marine side, only one PGEM had been completed and approved as of end of 2016. In the Fakarava atoll (in Tuamotu) a PGEM was adopted in 2007 but then scrapped in 2016 because it was deemed too complex for effective implementation. In addition to the fact that the majority of municipalities do not have a land use plan, the Chambre Territoriale report notes that there is no PGA in several areas with fragile biodiversity or important urban planning issues (e.g. mountainous areas, Bora Bora, Faa'a). It also points out that the recommendations from the PGAs are poorly followed and carried out, which could affect the environment negatively. In its assessment of these planning tools, the Chambre Territoriale report concludes that, "experience has shown that PGAs and PGEMs, as they are designed, are more tools to organize space than to protect the natural environment". It added: "These tools because they are separate from each other consider terrestrial and marine environments independently of each other, which is not relevant, particularly in an island context".

Moreover, some observers point out that mayors can use PGAs to justify development projects that could be harmful to the environment.[139] The necessary territory's approval is a safeguard against possible excesses but the absence of a territory-level land use plan and strategy increases the risk for damaging development projects. However, according to one government official, reflecting an opinion shared by some of his colleagues in New Caledonia, the territory has the right planning tools: "we just have to adapt them to the level of protection that we seek".[140] He argues that the issue is rather one of enforcement: "it is then just a question of having the appropriate resources for enforcement, which we don't have".

The application of transaction mechanisms will be made easier by the existence of a PGA. Moreover, they could be relevant in the context of the expansion of farming as the government is keen to provide more opportunities for farmers. So far, they mostly have used public land for their crops and the use of transaction tools and new lease types such as "rural leases" could extend opportunities to private lands as well.

However, no matter the relevance or efficiency of these mechanisms, political and public priorities do not seem to include the environment. For instance, a farmer in Moorea decided to keep goats on his land without prior authorization, resulting in severe damage to the land but no legal consequences because local politicians were reluctant to have government intervene.[141] This reflects a policy context that may present challenges for efforts to expand conservation using transaction tools.

5.3 Legal context

French Polynesia houses several different land tenure and land registration systems. This is the result of history and geography as the takeover of French Polynesia by France happened over a number of years and gradually spread to the 5 archipelagoes currently composing the country. The Rapa Island in the Austral archipelago remains the only one with customary land ownership and no land registry. As far as the areas covered by a land registry, 20% are public lands and 80% are private lands, of which 50% are in joint ownership. As of 2017, the land registry for the territory (not including Rapa) was completed.[142]

139 Interview May 2nd, 2018.

140 Interview, April 27th, 2018.

141 Interview, April 27th, 2018.

142 Source: « Sécurisation foncière en Polynésie française – Restitution des travaux du colloque des 27 et 28 novembre 2017 »

The landscape of property rights in French Polynesia is fraught. Challenges result from the tension between customary rights of the indigenous/native populations and the failure of the Civil Code to adapt to these regimes. The French Civil Code as applied in French Polynesia since 1887 historically did not consider the mechanics of customary land rights. Instead it rigidly applied French legal concepts, initially requiring that land be divided and registered to individuals issuing them *Tomites* or titles indicating their ownership. A *Tomite* is the land title that originates in the property claim process initiated by the French a few years after they took over the original kingdom of Pomare. The notion of *Tomite* was then extended beyond the original kingdom. It was the first introduction of the concept of ownership into the territory. These land titles would give owners rights over their allotment allowing them to carry out activities without consulting the community. The subterranean and mineral rights would remain with the ruling government, in accordance with French law.[143]

Since the passage of the 2014 *Loi Organique*, French Polynesia remains an overseas collectivity of the French Republic. As such, French Polynesia laws are framed within French Republic's legal regimen, particularly the Civil Code. Although French legal principles remain applicable in French Polynesia, many areas, including aspects of property rights and transactions, have been devolved to the local French Polynesia Legislative Assembly.

The challenges of this hybrid system are ongoing, as customary tradition is layered under the context of French civil law.[144] One main example of this is the continuous struggle to title land in French Polynesia. As ancestors passed away, their heirs were all held to be equal landowners in the land. This leads to the concept of joint ownership or *indivisions successorales*.[145] Under *indivision*, all owners have equal share and rights in a property. They must agree to either divide the land or manage it jointly. This has become the main legal challenge to communal lands in French Polynesia, as prospective property rightsholders find themselves obliged to scour genealogies to establish their rights to the land.[146] The complexities of multi-generation joint ownership are compounded by French Polynesian traditions such as different family names in the same family (with siblings for instance) and the practice of familial adoption (by family members – called *fa'a'amu*) as well as a gap of multiple years in the late 19th century – early 20th Century period in the French birth registry. This in turn leads to land disputes resulting in continuous litigation on the property rights.

Joint ownership presents immense complexities because it goes back generations (seven generations back to the beginning of the French Protectorate in Tahiti): it is very common to have 100 to 500 joint

---

143 The *Tomite* results from a property claim process that was initiated by the French colonial administration in the late 1840s: the population was asked to claim whatever land they owned. The process was marred with injustices as only those who were educated, could write and speak French came forth, and those holding leadership positions (chiefs, etc.) often were favored. As noted in the socio-cultural context section, the sense of spoliation and injustice from that process lives on today. However, the process itself is unique in the history of the French Republic and, as unequitable as it was in some ways, it represented an attempt at recognizing formal property among the native people. Moreover, unlike in New Caledonia for instance, the native population quickly mixed with foreigners, such that the French Polynesian population is among the most diverse of the entire South Pacific today and indigenous, native, or customary characterizations cannot be applied in the same as in other territories / countries.

144 Bambridge, Tamatoa, What are the lessons to be learned from the *rahui* and legal pluralism? The political and environmental efficacy of legal pluralism.

145 Grauman, Teresa, Un projet de loi pour faciliter la sortie de l'indivision, https://la1ere.francetvinfo.fr/polynesie/tahiti/polynesie-francaise/projet-loi-faciliter-indivision-548207.html

146 Sage,Yves-Louis, Droit Foncier en Polynésie Française, Bref Examen Critique et Propositions de Réformes, Journal de Droit Compare de Pacifique, https://www.victoria.ac.nz/law/research/publications/about-nzacl/publications/special-issues/Sage.pdf

owners and, in some cases, over 1,000. Joint ownership has thus constituted a major obstacle so far to the supply of land for sale or other transactions. This is viewed as a major issue in French Polynesia as politicians and many others consider it as hampering the territory's development. Significant resources have been allocated to resolve joint ownership conflicts (referred to as "sorties d'indivision"). A new land court was created, housing three separate courts working simultaneously. However, resolution can be long and complex with some cases dating back over twenty years and counting more than 2,000 joint owners.

Practical steps have been taken to make ownership resolutions easier. The following amendments were passed by the French National Assembly: a preferred allocation to families that have had a number of years of use / usage on the land (have lived on the parcel for instance); also if some joint owners are not included initially in the resolution process they are entitled to the same rights but cannot challenge the ruling. Other options are being advanced to add flexibility but are still under review.

What has become more common in recently reached settlements is an allocation of the assets by family branch, implying that each branch will then arrange its own allocation. This is viewed as the most practical solution, but is not formally accepted by the French government, which means that it could be challenged successfully in higher court. Likewise, collective representation is not possible for cases reviewed by the three land courts. According to French law, each joint owner must be identified, with no maximum number. That identification process alone is time-consuming and will constrain the number of cases seeking a settlement. Related to collective representation, the French form of a trust called the "fiducie" has been promoted by legal experts in the territory. France does not recognize an EU law on trusts and produced its own legal framework, but this is fairly limited. Legal experts assembled at the aforementioned "Conference on Land Securitization" formulated a series of arguments why *fiducie* could help settle joint ownership conflicts. However, this is a work in progress.

Once the correct rightsholders are identified the interested parties can either sign an agreement before a notary or obtain a judgment from land courts to establish ownership as well as the border of the property. The rightsholder then must approach the Direction des Affaires Foncières[147] which will register their rights, allowing them to use the property more fully. This outcome is further supported by the effective rule of law in French Polynesia. As an overseas collectivity of France, the French rule of law prevails, and the corruption index reflects this finding.[148]

A. Purchases

In French Polynesia, the majority of land is privately owned. Legally, there are no obstacles to land purchases, but ownership of much land is shared by substantial numbers of people with some ambiguity as to who is a legitimate co-owner. Land transactions of any kind, but purchases in particular, can be encumbered by these joint ownership situations. Joint owners are usually family members whose number grows with each generation because of the *indivision* inheritance regime. Putting in place leases in this context is already challenging according to environmental non-profit organization SOP Manu's experience, as they always seek consensus among all joint owners before entering into a lease agreement.[149] Because of the more profound economic and emotional implications of a sale, purchases quickly become even more complex to arrange, even in the absence of the common situation of conflict among joint owners. However, there is a great deal of variety among landowners in French Polynesia, including some very large individual or

147 Direction des Affaires Foncières, https://www.service-public.pf/daf/actualites/

148 Transparency International, Corruption Perceptions Index, France https://www.transparency.org/news/feature/corruption_perceptions_index_2017

149 Interview, May 17th, 2018

institutional landholders. Thus, dealing with that sub-set of landowners for biologically significant parcels presents more potential because of the greater clarity in land tenure and simplicity of having a single interlocutor.

B. Easements

Easements, or servitudes, exist in French Polynesia as part of the Civil Code. Due to its affiliation with France, French Polynesian land tenure is based on civil law.[150] In this case easements exist in the form of servitudes which are traditionally granted for rights of way, scenic purposes and water access.[151] Further, easements under the French Civil Code are established as requiring both servient and dominant tenements. This relates to appurtenant easements in which the dominant tenement (land parcel), has certain enforceable rights (e.g. the right to use an access path) over a second parcel, the servient tenement. The only exception are those easements granted for public purpose, which in turn are limited to rights of way for the placement of electric poles, access to naturally running water, or coastal access, to name a few examples.[152] Such rights of way easements have particularly been challenged of late in French Polynesia.[153] Due to the nature of the easements they are exercised mainly between two tenements. The question has arisen whether existing easements should benefit the public at large, and should the public be able to claim rights to access under this regime. This point has yet to be resolved but it does suggest limited adaptability of easements to conservation purposes as currently defined in the Civil Code.

Easements as a conservation tool face another challenge. Currently, easements are meant to provide for the exercise of affirmative covenants (allow a dominant tenement the right to pass, access to light, etc.), rather than restrictions (not cut down trees) as is common in conservation easements. In that regard, a new law was passed in France to better allow for agreements that mimic conservation easements. *L'Obligation Réelle Environnementale* created by Loi 2016-1087 dated August 8th, 2016 allows for the existence of contractual agreements between a landowners and public institution, a public collectivity or a moral person to protect the conservation values of a property.[154] These rights are registered as real interests in land and are considered to last for as long as the property exists. *L'Obligation Réelle Environnementale* requires that it be issued by a notary as an "acte authentique" and registered in the local land registry. If there are tenants on the land they must consent.

This new instrument could provide a model for adaptation in French Polynesia as an alternative for conservation on private lands to which parties have either obtained title or are in the process of doing so. A territory-level law (*Loi du Pays*) would be necessary for conservation easements of this type to be applicable. It would have to be advocated by the Environment Department and presented by the Environment Ministry to the French Polynesia Assembly, after consulting French Polynesia's Economic, Social, and Cultural Council (French acronym CESC).

C. Leases

Long-term leases with farmers (on land owned by government) are common practice in French

150 Worliczek, Elizabeth, Customary Land Tenure and the Management of Climate Change and Internal Migration. Land Tenure Journal, 2-11 http://www.fao.org/nr/tenure/land-tenure-journal/index.php/LTJ/article/view/36/76

151 Direction des Affaires Foncières, http://www.dgae.gov.pf/article164-servitudes/

152 DGAE, Servitudes, https://www.dgae.gov.pf/article164-servitudes/

153 Servitudes, La Libre Circulation est une Obligation Juridique https://www.tahiti-infos.com/Servitudes-la-libre-circulation-est-une-obligation-juridique_a146674.html

154 https://www.efl.fr/droit/immobilier/details.html?ref=ui-6429bd77-0ace-4d3a-a3f0-8778a7cf9c5b

Polynesia. In the past few years, these leases increasingly include obligations, especially for pineapple farming, such as restrictions on production levels or prohibitions against cultivating slopes to limit erosion. However, enforcement can be a challenge, both because of limited resources on the government side and a lack of political will to impose more stringent obligations that would curb productive activities.

SOP Manu, BirdLife's partner organization in French Polynesia, has worked with the territory's government to lease an island (on public land) for free (in exchange for the "symbolic payment of one Franc") to protect endemic and threatened bird species present there. There is also an example of a non-profit organization entering into a short-term agreement (1 to 2 years) with private landowners to fence a property to keep out cattle and allow restoration of a small tract of native forest.

Conservation-related agreements between the territory's administration and private owners are not new; thirty to forty years ago, the territory struck agreements with a number of private landholders to carry out reforestation on thousands of hectares.[155] However, there are no recent examples. When discussing the few existing examples of leases and contracts, our interviewees pointed to their low legal value and robustness, suggesting an opportunity for positive impact through the use of strengthened mechanisms in the form of the transaction tools under review.

The relationship between French law and French Polynesia points to an important consideration: despite the territory's considerable autonomy the French Civil Code prevails in some areas, and joint ownership is one example of the need to fit solutions into the current Civil Code unless it is amended, which is a long and complex process that actors in French Polynesia are reluctant to pursue. Several observers mentioned new tools that could accommodate the Polynesian tradition of collective ownership but in fact would be not acceptable in the French Civil Code.[156] In particular, the potential for application of the *Obligation Réelle Environnementale* could be useful for those tracts whose ownership has been established. The most pragmatic approach would be to design creative contracts and agreements that integrate elements of Polynesian cultural practice, rather than attempt to change the French Civil Code.

5.4 Social and cultural context

The people who settled the islands of French Polynesia thousands of years ago molded the islands' ecological systems to their purpose and the ecological environment shaped their behavior and culture. As elsewhere in the four PICTs, people developed a deep connection with the land.[157] As one of our interviewees put it, "the land does not belong to us, we belong to the land". As will be explained below, this statement points to a growing movement among rural people to strengthen ties with the land and to reconnect with ancestors and engage in local historiography, which also offers opportunities for conservation.

At present, the region is experiencing major cultural revivals in the form of arts festivals (starting in the Marquesas but now popular throughout the region). The revival of culture also includes the forging of new or renewed relations with natural resources, spirits and ancestors, and the establishment of 'traditional ways' of organizing societies. This revival is part of a wider tendency to challenge policies

155 Interview, April 27th, 2018.

156 Interviews: May 2nd and May 28th, 2018

157 Page, Gabrielle, 2017, 'Sustainable Development in French Polynesia: Environmental Challenges and Cultural Challenges', Northeastern University Environmental Justice Resource Center, Climate Justice Project, https://web.northeastern.edu/nejrc/wp-content/uploads/2017/02/Gabrielle-Page-Research-v3.pdf

of the state towards commercialisation of land. People plant and harvest with a strong commitment to subsistence agriculture and emphasis on social practices of exchange and respect.[158] The trend towards commercialization is also reflected in the limited consultation between government and the NGO sector to coordinate conservation actions or to define the territory's environmental policy and strategy (as mentioned above). At the same time, people living on the islands face sea-level rise, increasingly severe weather events, and population growth. Realizing the need for conservation, many communities have embarked on reviving traditional resource management systems. A key example of this is *rahui*, a taboo system that enforces a prohibition over certain marine and land areas and/or species that is based on a strategy related to political and sacred power.[159]

> *Because of the Polynesians' attachment to an institution that they consider legitimate and effective, the independent or supervising states of the South Pacific now strengthen the **rahui** as part of their preservation policy and the development of lagoon resources…*[160]

It is important to realize that this revival comes with a significant level of reluctance towards agreement making around land transactions as these would be seen approximating land loss and thus loss of identity. There is a tradition of landlords and land users' long-term agreements without monetary retribution as is also found in New Caledonia, for instance. However, the Western definition of ownership has been "perfectly integrated" in the words of one of our interviewees. As such, the common perception of ownership has changed dramatically. Today, landlords would typically be reluctant to come to an agreement with users on their properties, as most would experience that situation as a loss of their sense of ownership. Likewise, the notion of perpetuity and restriction of property rights under easements drew a lot of skepticism among our participants in the abovementioned workshop. The consensus was that most landlords would have a hard time accepting restrictions to their property rights, whatever the compensation. In addition, in its comprehensive review of French Polynesia's environmental policy, the Chambre Territoriale report notes that,

> *…payment for ecosystem services and enforcement with possible repercussions in case of violations have been historically viewed by the population as constraints to avoid, whatever the environmental consequences. Arguments used in studies that have been conducted on the subject said that it did not correspond to the local culture and that the lack of or limited economic means of part of the population have forced government agencies to provide environmental services for almost free.*

The focus should revolve around the element of autonomy that transpires from *rahui* or similar systems as part of growing concern over natural resources. For example, on Rapa iti in the Austral Archipelago, people willingly ignore state regulations and can do so because of the island's relative geographical isolation from the major administrative centers. Even though officially abandoned in 1945, the *rahui* on Rapa iti has remained intact ever since.[161] Also in the Marquesas and Tuamotu, the revival of community management of land is both about political assertion and a response to the need to manage

158 Donaldson, Emily C. 2018, Troubled Lands: Sovereignty and Livelihoods in the Marquesas Islands, *International Journal of Environmental Studies* 75(2), 344. See also Richard Moyle, 2018, *Ritual and belief on Taku: Polynesian Religion in Practice*, Adelaide: Crawford House.

159 Ibid., p. 2.

160 Bambridge, Tamatoa 2017, The Polynesian "rahui" to help the environment, The Conversation, March 10, 2017, available at: https://theconversation.com/le-rahui-polynesien-au-secours-de-lenvironnement-73382

161 Ibid, pp. 9-10.

resources.[162] For most communities who apply the *rahui* the motivation is to maintain natural resources to ensure the community's food supply. This is not so much an issue for the exploitation of land because it is a relatively durable resource, but for the sea, people have found that fishing needs to be regulated for the marine resources to recover during a period with no human predation. This also means keeping fishermen from outside and large fishing boats (often from Tahiti) out of their waters, but here the issue of formal law enforcement arises. The communities do not have sufficient resources to impose penalties on outsiders who do not respect the local regulations while at the same time, state courts can be expected to rule in favor of the fishing boat.[163]

As systems such as *rahui* are a temporary ban enforced by local actors, its use in environmental protection lies in the hands of those local actors. If seen as instrument in conservation efforts, it is important to realize that there then will be a need for ongoing conversation between local and state norms because the revival of *rahui* often leads to confusion and questioning among the people about the real control of the *rahui* today. As for internal enforcement of customary regulations, often the threat of supernatural powers like ancestors and spirits but increasingly God, the effectiveness of the council of elders, and a general recognition of the need to regulate resources, appear sufficient. Marquesans, for example, 'maintain a unique connection to the land that does not correspond with legal ownership. Instead the true value of land lies in whether, and how, its history is bound up with your own, as well as the spiritual relationships it represents. Above all, it implies a 'cosmological concern with land as a source of life, with ancestral regeneration and custodial responsibilities.'[164]

Finally, it is worth noting that in the Polynesian tradition people make no distinction between terrestrial and marine areas. That perception also affects property boundaries since those who live by the water (ocean, lake) consider the lagoon for instance as an extension of their property, contrary to French legislation. From a conservation strategy standpoint, the continuum between land and sea, terrestrial and marine, is very much in line with so-called "ridge to reef" conservation strategies that are applied in island environments.

Photo by user Adam Reeder on Flickr, 2016

162 Ghasarian, Christian 2017, Protection of natural resources through a sacred prohibition: The rahui on Rapa iti, in Bambridge, T. (ed.), T*he Rahui: legal pluralism in Polynesian traditional management of resources and territories*, Canberra: ANU Press, p. 140.

163 Ibid, pp.

164 Donaldson, Emily C., 2018, Trouble lands: sovereignty and livelihoods in the Marquesas Islands, *International Journal of Environmental Studies*, 75(2): 343-360.

As mentioned previously, the territory's government has devolved increasing environmental responsibilities to municipalities: drinkable water supply, waste management, and sanitation (no later than 2020). The municipalities are being helped in this transition with training and technical assistance from the territory's government and with funding from the European Development Fund. That said, the transition will most likely constitute a significant distraction. Moreover, according to a few of our experts, mayors are generally rather conservative because there is little or no incentive for them to take any risks.[165] They are even reluctant to take a loan and prefer to rely on grants. Thus, mayors interested in innovative mechanisms are likely to be rare because of the pressure that most are under and risk-averse attitudes. The public administration at the country level plays a role as technical assistance provider but also as a form of control over municipalities. This may complicate alignment of environmental and conservation agendas at country and municipal levels.

Land tenure uncertainties extend to relations between municipalities and the government, as in transactions where municipalities realized that they did not own land but that ownership rested with the government. From one municipality to the next, the public land on municipal grounds can be owned by the "Pays" (government) or by the municipality. Therefore, as with private land, any future transactions on public land also require extensive due diligence and investigation of the ownership situation.

The historical context of land ownership is important. In the mid-19th century, the French administration organized a process by which the population was invited to submit property claims (part of today's French Polynesia was first declared a protectorate by France in 1842). That process lasted for a few years only and essentially froze land allocation in the various archipelagoes. What remains today is a strong sense that the process was unfair and led to a number of spoliations and frauds. As such, there are still ongoing claims, both for public and private land parcels (in about the same proportion according to several people interviewed).

Thus, there is a general consciousness of a track record of expropriation of land parcels by the government (for road construction for example) without prior consultation and recourse, with insufficient and unfair financial compensation. Such drastic practices are no longer the norm, but there persists a high level of concern or skepticism among landowners towards work or deals with the government. The government is often viewed as heavy-handed and top-down by the population and civil society, according to several interviewees including government officials.

The environmental nonprofit organization SOP Manu has developed significant experience in reaching agreements in joint ownership situations. Not unlike the advice provided in New Caledonia, careful preparation and follow-up is essential in joint ownership situations. In the preparation phase, the organization seeks to identify all the joint owners and engage all of them in the process. SOP Manu refuses to take sides in disagreements, as they are sometimes asked to do. Instead, when there are disagreements among joint owners (typically about ownership claims), they ask the joint owners to resolve the conflict among themselves and disengage until that resolution is complete. After an agreement has been reached, maintaining frequent contact with the joint owners is important. SOP Manu also believes there is value for the community in forming a management committee to work with the organization on environmental projects, to increase community buy-in as well as accountability. However, they have rarely managed to convince communities to create such committees.[166]

---

165 Interviews: May 2nd and May 15th, 2018

166 SOP Manu also shared experiences dealing with local communities where no land transaction was involved. Sheep are an invasive species in the territory, particularly in the Marquesas Islands. However, the community was reluctant to see sheep simply killed despite the absence of significant economic value. The organization decided to set up a small fund to purchase ten sheep per year for consumption during community events and celebrations, and thus draw down the invasive population.

A lesson shared during the Papeete workshop on land transaction tools was the value and importance of having community liaisons or facilitators every time a project is considered in a given island for instance. Geography and history make French Polynesia incredibly diverse in general, so careful introduction is needed and finding local liaisons who bring both knowledge of and credibility with the rest of the community is key. Finally, it was also observed that the municipality (mayor and municipal council) is the obvious main contact when reaching out to a community. However, it is important to organize – with the municipality's approval - consultation of the entire population.

5.5 Implementation capacity

Unlike New Caledonia, French Polynesia does not feature the presence of international conservation NGOs such as WWF and Conservation International active in terrestrial settings. The Pew Charitable Trusts, a US-based global non-profit, has an office in Papeete and works with local stakeholders on marine conservation through its Pew Bertarelli Ocean Legacy Project. According to the State of the Environment report, there are less than 40 organizations active in conservation. The report adds that those "non-profits are often created to take care of a localized problem, in a valley for instance. Once the problem has been solved the organization becomes less active". Twenty-three of these organizations are members of FAPE, the federation of environmental non-profits in the territory. FAPE was created in 1988 and counts over 30 member organizations. FAPE could play a leading role of convener or broker in the implementation of land-based conservation mechanisms.

SOP Manu, the non-profit organization focusing on the conservation of birds and affiliated with BirdLife International, is the biggest environmental NGO in the territory. It has experience dealing with multiple actors, namely public and private land owners (including dozens of joint owners), and also with users on public land in particular. However, SOP Manu has never made a land purchase, mainly due to lack of financial resources. Its agreements with owners or users are informal, mostly a simple written document and sometimes simply a verbal arrangement. Furthermore, there is generally no remuneration involved. As an example of a more common engagement, SOP Manu reached out to the public administration offering to remove invasive species on an island located on public land, for which they secured EU funding. That said, in the Marquesas Islands SOP Manu carried out conservation actions on public land, under an agreement that they would work with farmers to provide technical assistance and help them buy farming equipment. Thus, they have used quid-pro-quo arrangements in pursuit of conservation. Besides its conservation efforts on the ground, SOP Manu has also engaged in advocacy such as lobbying efforts to have the administration increase the number of protected areas.

The French Polynesian public administration and its various departments involved in environmental protection will be a major actor, primarily for transactions on public land but also on private land where its technical assistance could be helpful, or a challenge in cases where the transaction involved is deemed contrary to the territory's interest.

The Chambre Territoriale report mentioned a lack of resources for the government to conduct its environmental actions effectively. The public administration's geographic coverage is uneven, and government resources are limited outside Tahiti. From a staffing standpoint the Environment Department for instance has fewer staff than originally planned: 25 (including two positions that are filled by agents who are unable to work due to long-term disability) out of 42 planned positions. Moreover, as mentioned previously the effectiveness of the government's environmental actions might be hampered by the reluctance or opposition of politicians. There are examples of environmental code violations where department heads did not have the authority to take action against local politicians responsible for those acts. Thus, despite its central role, the government may not be as effective as it would like in its actions.

Given the limited reach of government, municipal administrations are particularly influential stakeholders.

They will be direct partners in transactions that take place on public land owned by municipalities. They are also key players in terms of the need to coordinate conservation efforts with the town's land use plan. Transaction-based strategies in French Polynesia therefore need to include components designed explicitly to achieve constructive engagement with municipal-level government.

5.6 Financing options

Similar to New Caledonia, public funding (government, France, EU) constitutes the main source for the support of conservation and climate resilience activities in French Polynesia. A feature specific to French Polynesia is the existence of four different environmental taxes. The receipts of two of those are allocated to broader environmental actions: namely, the tax for the environment, agriculture, and fishing (French acronym TEAP) also called "green tax" (equal to 2% of the value of imported goods) that averaged 2.5 billion FCFP per year between 2005 and 2015 (around 21 million Euros); and the environmental tax for recycling vehicles (French acronym TERV), based on the value of imported vehicles, that averaged 145 million FCFP between 2011 and 2015 (a little over 1 million Euros).[167] However, the TEAP has a broad mandate for use of these funds, conservation being just one of several supported needs (some of the others being waste management, sanitation, and river cleanup, for example). And of the relatively small amount raised by TERV, most of it is used for the actual recycling of cars.

The discussion above mentioned the possibility that some valleys may be transformed by the exploitation of hydropower. In that event, operating companies could be interested in funding the purchase of parcel or a conservation easement or lease on a specific plot involving a conservation organization with private landowners to protect watersheds and/or offset their negative environmental footprint.

Conservation actors in French Polynesia are eligible to receive funds from the Critical Ecosystem Partnership Fund (CEPF) as Micronesia – Polynesia is one of the biodiversity hotspots where CEFP funds are deployed.[168] Some private foundations (e.g. Fondation Total, the Pew Charitable Trusts) support conservation work in French Polynesia, but much of this support is more readily available for marine rather than terrestrial conservation, and many foundations that support global conservation work restrict their programming to developing countries.

French Polynesia seems to have attracted very little international philanthropy. Some major tourism actors may have struck partnerships to compensate for their environmental footprint, such as the Accor hospitality group whose Sofitel property in Moorea sits on a Marine Protected Area that it helps protect through targeted funding. However, more broadly and thinking in particular of major gifts coming from wealthy individuals caring for the environment and for French Polynesia, very few examples came up in our discussions. Everyone seemed to recount the story of Marlon Brando's actions that were highly regarded, but that happened many years ago.[169]

There would seem to be at least two potential avenues for securing funds from high net-worth individuals. First, when an individual invests in property in French Polynesia, a conservation partnership could be pursued to permit and finance an environmental organization or DIREN to carry out important conservation or climate resilience activities on the property, or a more conventional financial partnership that would simply consist of the person funding an environmental organization. Second, there would appear to be untapped potential for personal philanthropic contributions from individuals with a strong interest in the environment and also a passion for French Polynesia. French Polynesia's nature, biodiversity, and environment, both terrestrial and marine, remain unique in the world, and are complemented by

167 All figures from the 2015 State of the Environment report.

168 https://www.cepf.net/our-work/biodiversity-hotspots/polynesia-micronesia

169 Interview, May 17th, 2018

rich cultural heritage. And yet, partly because of distance, it is not as well-known as the Caribbean for example where wealthy individuals and families spend vacations and some have made land investments (through purchases or long-term leases).

Photo by user Fabio on Flickr, 2013

5.7 Management sustainability

Local non-profit conservation organizations should participate in future land transactions, be they purchases, easements or leases. As described above, SOP Manu has developed considerable experience with leases and conservation agreements. FAPE as the federation of environmental non-profit organizations has an excellent reach in the conservation sector and thus could be an effective convener or intermediary for future training sessions regarding land transactions. For example, SOP Manu could share its experience on leases and conservation agreements while outside experts could provide training on easements and purchases.

The Association for the Promotion of French Polynesian Municipalities (French acronym SPC for *Syndicat pour la Promotion des Communes de Polynésie française*) that groups 46 out of 48 of the territory's municipalities could play a similar role with its members (mayors and municipal councils) with respect to training on the various transactions tools as the level of familiarity of municipalities with these mechanisms is still limited. Communities will be important for long-term management of on-the-ground conservation work with respect to conservation leases and easements on customary lands. As one ingredient in institutional management capacity, the value of forming management committees in the affected communities has been consistently pointed out. Training around governance and the work of those committees would be helpful for most, given that management capacity generally is low when a committee is formed (which remains fairly rare).

At the country level, the various public administration departments involved in environmental issues add significant complexity to an effort to expand use of transaction tools. This may be overcome through improved interdepartmental coordination, structured around a concrete programme of action. Representatives from the Environment Ministry and Department, the Department of Land Affairs, the Department of Agriculture, and the Tourism Department would be critical participants in such processes.

As previously noted, the government will play an active role in transactions on public land (for purchases and leases as per precedents, and for conservation easements if/when introduced), or can act as a

convener between environmental actors and municipalities or private land owners. More proactive effort with respect to this convening role will be important, as various actors and stakeholders around land transactions rarely come together as a group. This role may fall naturally to the public administration, but organizations like FAPE and SPC could also play that role. For the introduction of conservation easements, expanded use of leases on private lands with farmers, greater involvement of municipalities, and possible future agreements with new investors in French Polynesia, it will be essential for these stakeholders to come together to design sustainable long-term management solutions.

5.8 French Polynesia: Conclusion

Overall, the supply of land for transactions historically has been limited in French Polynesia because of geography and of complex multi-generational joint ownership situations. To date, land purchases, leases, and more or less formalized conservation agreements have been used, but several constraints complicate efforts to apply such tools at scale. Despite the introduction of new provisions and resources to resolve multi-generational joint ownership situations, it is unlikely that the amount of land available for transactions will grow significantly in the near future.

The institutional landscape is comprised of French Polynesia's administration and government ("Le Pays"), including the Environment Department and other departments that impact environmental matters (e.g. Land, Agriculture), and of municipalities. Relations between these two levels of government are not always smooth, such that the reduced likelihood of easy and effective collaboration may hamper the feasibility of transaction tools (and other approaches).

There are a number of non-profits active in terrestrial conservation but most of them are small and local. The most notable is SOP Manu which has significant experience with leases and conservation agreements, but not with purchases for lack of adequate financial resources. With the help of FAPE to coordinate initiatives, SOP Manu could help build the capacity of smaller organizations related to conservation agreements and leases in particular. Likewise, should financial resources become available, SOP Manu could apply its technical expertise to land purchases for conservation.

Conservation easements could be effective solutions to solidify right of way agreements or avoid the proliferation of small walls on the coastline that lead to the disappearance of beaches. Right of way agreements have been used in French Polynesia but they have suffered from poor enforcement, as there have been multiple instances of landowners changing their minds with no recourse for the other parties. Small walls are popular among those holding property on the coastline. However, those embankment-type walls have caused severe erosion. In these two cases, the introduction of conservation easements could formalize agreements, make rights of way more permanent and freeze further development of small walls already present on the coastline. However, a broad cross-section of environmental stakeholders views easements with skepticism due to their permanence.

Perhaps the most feasible avenue for expanding use of transaction tools is to extend applications of leases through longer durations and more contracts happening on private lands (for instance, with farmers who have relied principally on public land). Particularly if further examination of conservation easements confirms resistance on the part of landowners, leases and contracts would provide a more feasible solution for French Polynesia. Longer durations will suit those willing to make longer-term commitments without imposing the irreversible binding nature of easements for landholders. Contracts with farmers on private lands will offer more economic opportunities to property holders and farmers in the form of incentives for conservation.

Finally, the provision of payments has not been the norm in the majority of available examples in French Polynesia. Indeed, like in New Caledonia, the absence of payments has often characterized transactions such as right of way and conservation agreements, and government agency representatives emphasize

enforcement of appropriate regulations as a higher priority than application of new tools. Although payments or compensation might be attractive to landholders, the feasibility of an effort to expand use of transaction tools could be hampered by this perspective on the part of key government stakeholders.

TABLE 5.1: SYNTHESIS OF FEASIBILITY CONSIDERATIONS FOR FRENCH POLYNESIA*,**

	PURCHASE	EASEMENT	LEASE
State of identification of conservation priorities	2	2	2
Policy context	2	1	3
Legal context	3	1	4
Social and cultural context	3	1	4
Implementation capacity	2	1	2
Financing options	2	1	3
Availability of solutions for long-term management	3	3	3
Average Score	2.4	1.4	3

* Each factor is scored from 1 to 5 where 1 means *least conducive to feasibility, and* 5 means *most conducive to feasibility.*

** The numbers reflect initial scoring based on desk review, interviews with key informants, and group discussions in stakeholder workshops.

6. CONCLUSION

The preceding analysis sought to characterize the feasibility of expanding the use of purchases, easements and leases in the four focal PICTs of the RESCCUE program. The factors considered for each PICT were the state of identification of conservation priorities; policy context; legal context; social and cultural context; implementation capacity; financing options; and availability of solutions for long-term management needs for sites. For the use of a particular transaction tool at a specific site, a thorough feasibility assessment will be required before proceeding; this report does not serve as a substitute for site-specific due diligence. Rather, it is intended to inform deliberation on whether investment in a wider strategy to expand use of transaction tools may be warranted and worthwhile in each focal PICT, and what form such strategy might take. In addition, the analysis may help efforts in other PICTs to structure thinking around the potential for increased application of land and land-rights transaction tools.

The analysis indicates that circumstances in each PICT with respect to transaction tools vary considerably, such that strategies to expand their use (if warranted to begin with) would take quite different forms. That said, there are several common points shared between Fiji, Vanuatu, New Caledonia, and French Polynesia:

- The definition of conservation priorities, though at different stages of advancement in the four PICTs, requires further refinement in all of them. In particular, climate resilience is not factored into existing priorities. Furthermore, to inform strategies for transaction tools, priority mapping must include thorough mapping of tenure and ownership details for potential sites.

- In each PICT, there are no legal obstacles to conservation purchases per se, but the amount of land that is available for purchase in priority areas for conservation or climate resilience is known to be limited in Fiji and Vanuatu and likely to be limited in New Caledonia and French Polynesia. Therefore a major investment to catalyze purchases is not warranted, though opportunistic responses to parcels that become available may be justified.

- In each PICT, legal frameworks accommodate the use of leases to achieve conservation and climate resilience objectives. This is attributable to the fact that leases are feasible in each country and territory to facilitate various types of investment in economic development (agriculture, forestry, tourism, mining, residential construction, etc.), and that the provisions for such leases can be adapted for conservation. However, even if legally practicable, the actual scope for using leases varies widely, primarily as a function of complexities surrounding tenure.

- Conservation easements are unknown in all four of the focal PICTs. Generally, provisions for easements in the various legal regimes envision affirmative rights such as rights of access, rather than restrictions on rights more typically relevant to conservation easements, such as giving up development rights. Moreover, on native or customary lands the notion of ceding rights in perpetuity is likely to encounter significant obstacles. Therefore conservation easements remain at an experimental stage, warranting a search for promising sites for pilot/demonstration initiatives. In New Caledonia and French Polynesia, conservation easements would require passage of territorial legislation.

Recommendations based on this analysis and on the global review of mechanisms for land and land-rights transactions will be presented in a companion report. Here, we offer the following brief summary conclusions with respect to feasibility for expanded use of transaction tools for conservation and climate resilience in each of the focal PICTs:

- ***Fiji:*** In Fiji there are compelling precedents for the use of long-term leases to achieve conservation objectives. There are a set of mutually supporting actors that collectively offer experience and capacity to pursue additional leases, and thereby progress toward national conservation targets. The National Trust of Fiji serves as a logical focal entity to orchestrate a broad-based strategy, given investment in the capacity needed to scale up its efforts. In the meantime, strategic purchases are in process, and there is interest in experimenting with conservation easements. A national prioritization of terrestrial conservation sites can help guide a transaction strategy, but is subject to further refinement. However, consultations and coordination would be required to ensure an appropriate balance between government and non-government efforts to secure and manage additional sites for conservation and climate resilience.

- ***Vanuatu:*** Given the nature of land tenure in Vanuatu, purchases are not possible and conservation easements would be difficult to apply in their conventional construction. This leaves leases as a possible transaction tool, but distrust of lease arrangements is widespread and capacity for site-management after securing a conservation lease is limited. Instead, key actors in Vanuatu (notably the Department of Environmental Protection and Conservation) emphasize the use of formally recognized Community Conservation Areas (CCA) to promote voluntary community self-management for conservation and sustainable resource use. Although a conservation lease could in principle reinforce a CCA (e.g. maintain incentives in the form of payments and provide a layer of legal robustness), it is not clear that under the present climate surrounding land issues in Vanuatu such an arrangement would solve more problems than it might cause.

- ***New Caledonia:*** Conservation efforts in New Caledonia benefit from the presence of a dynamic and capable actor in the Conservatoire d'Espaces Naturels (CEN). CEN itself has examined the potential for various legal mechanisms and transaction tools to advance conservation in New Caledonia. Having to date relied principally on a form of voluntary collaboration contract, they envision also using a combination of rural leases with environmental obligations, conservation easements, and an instrument related to easements, *l'Obligation Réelle Environnementale*. Moreover, the organization of customary land ownership over about 100,000 hectares under Groupements de Droit Particulier Local (GDPLs) facilitates transactions such as conservation leases on customary lands. Thus, expanded use of transaction tools is clearly feasible, constrained mainly by the availability of funding, especially in a context of rising land prices.

- ***French Polynesia:*** In French Polynesia there appears to be a strong sense that new transaction tools are less of a priority than efforts to ensure more consistent and effective application of existing tools and regulations. In particular, government planning tools for zoning and land use offer frameworks to rationalize and designate additional conservation areas (as is also the case in New Caledonia). Complex situations with respect to group landownership could make efforts to apply transaction tools arduous and expensive. Nevertheless, precedents set by agricultural leases do suggest potential for conservation leases. In addition, the introduction of environmental obligations into agricultural and other land use leases may offer a pragmatic way to pursue conservation objectives using existing arrangements.

TABLE 6.1 SUMMARY OF AVERAGE FEASIBILITY SCORES*

	PURCHASE	EASEMENT	LEASE
Fiji	4	2	4.4
Vanuatu	1.3	1.7	2.7
New Cal	3.9	2.1	4.1
French Polynesia	2.4	1.4	3

* Each factor is scored from 1 to 5 where 1 means *least conducive to feasibility, and* 5 means *most conducive to feasibility.* The figures in this table are the average of individual feasibility factor scores for each PICT, per transaction tool.