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Tenure and REDD+ in Malawi

Ministry of Natural Resources,
Energy and Mining
Department of Forestry



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Cover photograph:

Gina Althoff, PERFORM

Mchinji District – A woman standing with her child in a community woodlot planted by members of the local village natural resource management committee (VNRMC).

Acronyms

ADC	area development committee
AWU	association of water users
BeRT	Benefits and Risks Tool
BMC	block management committee
CEPA	Centre for Environmental Policy and Advocacy
CBD	Convention on Biological Diversity
CLC	customary land committee
CMC	catchment management committee
COP	Conference of the Parties
DEC	district executive committee
DFO	district forestry office
DEPD	Department of Economic Planning and Development
DESC	district environmental subcommittee
DoF	Department of Forestry
EAD	Environmental Affairs Department
EIA	environmental impact assessment
EMA	Environment Management Act
EMB	Environmental Management Bill
FAO	Food and Agriculture Organization of the United Nations
FCPF	Forest Carbon Partnership Facility
FDMF	Forest Development and Management Fund
FIP	Forest Investment Program
FMA	forest management agreement
FMB	forest management board
FPIC	free, prior and informed consent
FREL	forest reference emission level
FRIM	Forest Research Institute of Malawi
FRL	forest reference level
GDP	gross domestic product
GHG	greenhouse gas
GoM	Government of Malawi
IFMSLP	Integrated Forest Management and Sustainable Livelihoods Programme
IPCC	Intergovernmental Panel on Climate Change
LEAD	Leadership for Environment and Development
LFMB	local forest management board

LFO	local forest organization
LPFA	legal and policy frameworks assessment
MGDS II	Malawi Growth and Development Strategy II
MNREM	Ministry of Natural Resources, Energy and Mining
MRP	Malawi REDD+ Programme
MRRP	Malawi REDD+ Readiness Programme
MRV	measurement, reporting and verification
NCCP	National Climate Change Programme
NCCIP	National Climate Change Investment Plan
NCE	National Council for the Environment
NEAP	National Environmental Action Plan
NEP	National Environmental Policy
NEPA	National Environmental Protection Authority (proposed in EMB)
NGO	non-governmental organization
NFMS	national forest monitoring system
NSCCC	National Steering Committee on Climate Change
NTCCC	National Technical Committee on Climate Change
NWRA	National Water Resources Authority
PERFORM	Protecting Ecosystems and Restoring Forests in Malawi (USAID-funded project in Malawi)
PFM	participatory forest management
PROFOR	Program on Forests (multi-donor partnership)
REDD+	reducing emissions from deforestation and forest degradation and conserving, sustainably managing and enhancing forest carbon stocks
RExG	REDD+ Experts Group
SEA	strategic environmental assessment
SIS	safeguards information system
TLMA	traditional land management area
TWG	technical working group
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UN-REDD Programme	United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation
USAID	United States Agency for International Development
USFS-IP	United States Forest Service – International Program
VDC	village development committee
VFA	village forest area
VNRMC	village natural resource management committee

Executive summary

Reducing emissions from deforestation and forest degradation, and conserving, sustainably managing and enhancing forest carbon stocks (REDD+) has the potential to yield multiple benefits for Malawi. These benefits include support for more efficient, equitable and sustainable forest management, improved livelihoods for forest-dependent communities, and protection of critical ecosystem services and biological diversity. However, REDD+ also presents the very real risks of entrenching or even exacerbating existing inequalities in access to land and forest resources and the benefits they provide. Clear and secure land and forest tenure will play a critical role in reducing these risks and providing effective and appropriate incentives for sustainable forest stewardship in Malawi.

Malawi's land and resource tenure is defined by the country's legislative frameworks and by a rich body of customary law and practice. Between 65–75 percent of land in Malawi is customary land and between 51–65 percent of Malawi's forests are located on customary land.¹ Despite their importance, tenure rights to these customary forests remain ill-defined and lack effective protection in national legislation. Reforms on tenure and related land issues that have been ongoing since 2002 have recently been advanced through new land legislation.² The forthcoming implementation of these reforms provides a unique opportunity for Malawi to realize the country's national policy goals and to come into line with international standards on the responsible governance of land and forest tenure. This tenure assessment provides an overview of the key issues and options for supporting the implementation of these reforms while contributing to the overall enabling environment for more effective forest and REDD+ governance.

This assessment was undertaken to: (1) inform the development of a national REDD+ strategy; (2) integrate tenure considerations into ongoing policy and legal reform processes in the forest, climate, environment and natural resource sectors; (3) inform developments in land tenure reform to ensure they account for forest resource sustainability and the needs of forest-dependent communities; and (4) build broader awareness of how Malawi can address its resource tenure issues in a manner that supports REDD+ as well as sustainable and equitable management and development of forest resources.

Forest tenure is a broad concept that includes ownership, tenancy and other arrangements.³ Poorly defined or insecure forest tenure can undermine incentives for the protection of forest resources and drive their over-exploitation.⁴ In Malawi, where between 65-75 percent of land falls under customary jurisdiction, the clarity and security of customary tenure systems and how they relate to statutory provisions regulating tenure are key issues that will shape the implementation of REDD+. In particular, there is a need to focus on the various ways in which participatory forest management practices have emerged in Malawi, how they have interacted with customary practices of forest tenure and management, and how they continue to shape and inform forest and tree tenure.

1 USAID, 2010 (available here).

2 During the course of the work on this tenure assessment, the Government of Malawi passed the Land Act 2016 and the Customary Land Act 2016. Throughout this report these two significant pieces of legislation are referred to as 'new land legislation'.

3 FAO, 2014.

4 Bolin, Lawrence & Leggett, 2013 (available here).

Summary of findings

Clarity and alignment of forest and land tenure

Malawi is in a process of transition with respect to the legal basis for both land and forest tenure rights. While the existing (and evolving) legal and policy frameworks support strong tenure rights as a facet of community-based management, their implementation has been hindered by a number of factors, including the lack of a clear legal basis for defining forest tenure rights under various forms of management. This is an issue both for the existing forestry legislation and the new land legislation, as the laws lack a clear statement on the tenure status of community-managed forest land and land under co-management. In order to support effective, equitable and sustainable REDD+ planning and implementation, it is critical that forest and tree tenure be clarified in the Forestry and/or the Land Acts and that the role of various institutional players (including traditional leaders) be clarified and coordinated across the relevant sectors and planning processes.

Additional measures are necessary to improve collaboration and coordination among the relevant institutional players. Existing consultative platforms should be leveraged to facilitate more effective coordination between the forestry and land sectors, with participation from those sector representatives who are able to make policy decisions. Furthermore, a clear mandate should be provided to the coordination platforms to identify specific mechanisms for clarifying forest tenure in light of the new land legislation and in preparation for REDD+. Key stakeholders, including traditional authorities, community representatives and representatives of marginalized groups, should be actively engaged in ongoing dialogues to ensure that decisions impacting forest tenure rights are inclusive and accountable.

Harmonization of customary and legislative rights

The Malawi National Land Policy (2002) aims to recognize, demarcate and register customary tenure rights and to integrate them into the legislative framework for land administration, in order to ensure that customary tenure rights have a legal basis and are subject to transparency and accountability requirements that go beyond those that have been provided under customary practices.⁵ The Customary Land Act (2016) refers to the application of customary law in making allocation and dispute resolution decisions, but neither the Customary Land Act nor the Land Act (2016) provides a clear definition of customary law or how it should be elucidated for the purposes of land administration. Currently, there are no procedural safeguards to ensure that the determination of what constitutes customary tenure is undertaken in a transparent and accountable manner. Further, where customary law includes discriminatory practices, there are no provisions specifying how to align those practices with the land policy's objective of securing tenure without gender bias or discrimination against any citizen of Malawi. The Forestry Act (1997) must be amended (or new regulations created) to provide legal clarity on the precise tenure rights that accrue under various forms of participatory forest management, and how they relate to the land tenure changes proposed under the new land legislation.

Legal protection of all legitimate tenure rights

Broadly, the Malawi National Land Policy and the new land legislation address issues of equity and representation through the creation of a representative institutional system for land administration, including the establishment of democratically elected customary land committees. However, more specific criteria for decision-making on the allocation of customary land will be necessary in order to ensure accountability of land transactions to all members of society.

5 GoM. 2002. *Malawi National Land Policy*, sec. 4.6.

Procedural rights of access to information, participation in decision-making and access to justice should be legally mandated through an amendment to the Forestry Act or through the creation of a new regulation, in order to facilitate transparency, inclusiveness and accountability. Currently, no such requirement exists and practice has been lacking, leaving vulnerable groups open to exclusion.

Institutional frameworks and intersectoral coordination

An effective tenure system requires the existence of institutions that can ensure that rights are allocated and protected in an equitable and accountable manner, and that rights holders have meaningful avenues for addressing challenges to their rights through formal and/or informal dispute resolution mechanisms. One of the greatest challenges to Malawi's institutional frameworks for governing forest tenure is the uncertainty resulting from a lack of a legal framework for the effective implementation of participatory forest management (PFM). The failure of PFM arrangements to make a real impact on forestry management practices is often attributed by stakeholders to a lack of community capacity to understand and implement management agreements, but also to the fact that the agreements are not based on a clear delineation of tenure arrangements that would ensure that the benefits accruing from PFM are allocated to the communities involved.

Related to this issue is the need to more clearly define the process through which local forest management institutions are created and managed. While there are government-endorsed guidelines to support this process, they have been applied only intermittently and are often cited to be overly complex and costly. There is a real need to streamline the guidance and to ensure that it has a legal basis, either through an amendment to the existing Forestry Act or through a new regulation.

The role of traditional leaders in co-management and community-based management has also been raised as a critical institutional issue for effective governance of land and forest tenure. Under customary law, traditional authorities have the right to allocate and oversee land and resource use, but there is a lack of legal clarity on their role in relation to the community-based and co-management institutions involved in forest management. A clearer definition of the role of traditional authorities in the PFM process and in the preparation and implementation of management plans is required.

The lack of mechanisms for coordinating among sectoral institutions has had a negative impact on tenure clarity and security at the local, district and national levels. The Environmental Management Bill (2016) is proposing to establish an independent environmental authority that would report directly to the Office of the President and have a mandate to facilitate coordination across all natural resource management sectors. This presents an opportunity for the Department of Forestry (DoF) to mainstream REDD+ into this proposed high-level coordination mechanism and to raise the cross-sectoral implications and needs for coordination related to REDD+. It is also an opportunity for the land and forestry sectors to coordinate more effectively. The Department of Forestry and the Ministry of Lands, Housing and Urban Development (hereinafter the Ministry of Lands) need to play a key role in this process and to align it with their efforts to achieve the policy goals of clarifying both land and resource tenure and how it relates to other policy priorities. Other institutional platforms for coordination must also be leveraged to specifically address tenure and REDD+ issues, such as the Land Governance Working Group led by the Ministry of Lands, which could provide a forum for coordination on resource tenure issues.

Procedural rights

In order to understand how tenure rights might be affected by REDD+, it is necessary to have meaningful mechanisms for engaging stakeholders in the decision-making and implementation of land and forestry planning and management. A significant challenge to the effective administration and protection of both

land and forest tenure rights in Malawi is the lack of legal provisions for guaranteeing such procedural rights. Stakeholder engagement and public participation in forest decision-making and management are emphasized to the extent that participatory forest management is promoted in the Forestry Act. However, beyond publication requirements for the designation of protected areas, there are no further provisions within the Forestry Act to enable stakeholders or the public to access forest-related information or decision-making processes.

Similarly, while Malawi's land, forest and environmental policies and legislation broadly acknowledge the importance of community engagement in forest and natural resource decision-making, there is a paucity of specific requirements to guide stakeholder and public engagement. For example, there are no stakeholder or public consultation requirements specific to the licensing process, the declaration (or revocation) of a forest reserve or a forest protected area, the demarcation of village forest areas, or the development of a forest management agreement. For each of these processes there are critical stakeholder interests and rights involved, and there should be a very clear mechanism for when and how stakeholders should be consulted and the ways in which their feedback can influence decision-making. Integrating stakeholders into the decision-making not only provides the stakeholders with a mechanism for understanding and protecting their rights, but also a forum for identifying and mitigating conflicts and concerns that may otherwise derail implementation and enforcement.

This policy and regulatory gap is an acknowledged weakness by all stakeholders interviewed for this assessment, and is reflected in the uneven levels of engagement that have been achieved at various levels of decision-making and implementation – from the formation of forestry and other related policies to the creation of local forest institutions. The Environmental Management Bill attempts to remedy this situation by recognizing access to information, participation and justice as human rights, and requiring all lead agencies to create mechanisms to realize such rights. As the REDD+ national strategy is developed, as decisions about the form and function of local forest management institutions are determined, and as REDD+ projects come on line, it will be imperative that a more robust legal framework for ensuring meaningful stakeholder engagement is created and effectively implemented. This will be necessary not only to meet the safeguard requirements under the United Nations Framework Convention on Climate Change (UNFCCC), but also to achieve the broader policy goals of more effective community-based natural resource management, improved enforcement and intersectoral coordination.

Cross-cutting governance challenges: corruption and enforcement

Corruption presents a real risk to the effective implementation of tenure reforms to support REDD+. Whistle-blower protections are in place, but they are broadly regarded as being ineffective. A critical enabling factor for corruption in the forest sector and beyond is a failure of the existing legislation to provide specific criteria for official decision-making, stakeholder engagement and other procedural mechanisms for ensuring transparency and accountability. The lack of public scrutiny and stakeholder engagement in critical decision-making, such as when licenses are issued or revoked, creates an environment in which officials can act without accountability. There is an urgent need to create specific requirements for decision-making at the statutory or regulatory levels (see section on procedural rights above). These requirements should mandate that information be made public and that the decision-making processes be subject to specific stakeholder and public engagement requirements, so that officials can be held accountable to the decision-making criteria.

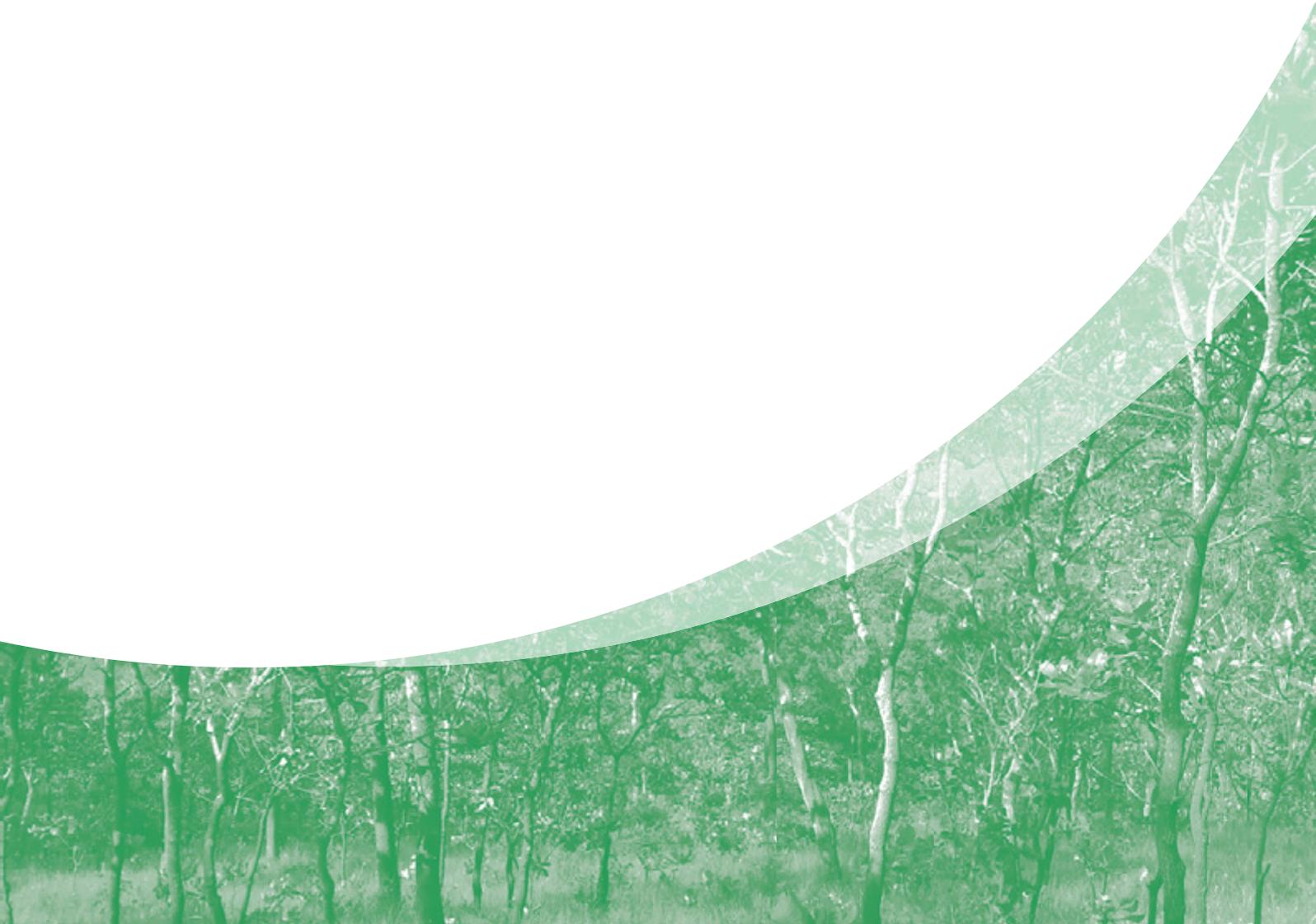
Weak enforcement is also closely tied to low levels of monitoring in forest reserves. This is due in part to a lack of capacity and resources for effective monitoring and enforcement, but also to a pervasive acceptance of corruption as the way of doing business in the sector. The inability or unwillingness to stem illegal

activities is a major obstacle to both the clarification and security of legitimate forest tenure rights in forest reserves. While tenure rights themselves will require more effective enforcement, the ability to exercise such rights will also depend on the capacity to exclude those who would intrude on legitimate resource use and management arrangements.

Conclusion and way forward

A number of recommended options are provided in this assessment, including options for legislative amendments, advocacy, institutional strengthening, capacity building and technical assistance. Many of these recommendations are interconnected and will need to be undertaken in concert. Ongoing dialogues on priority tenure issues – involving government, civil society and traditional authorities – are needed to provide a meaningful mechanism for ensuring that decision-making is representative and transparent and that consensus can be reached on the persistent conflicts that impair the ability to pass the necessary reforms.

At the same time, there are limited resources for implementing the recommended activities. The consultative workshops and stakeholder engagement undertaken as part of this assessment have been a good starting point for prioritizing the various options, but more effort will be required to refine the options and identify resources for their implementation. In particular, ongoing activities under the Protecting Ecosystems and Restoring Forests in Malawi (PERFORM) project, as well as the expected EU-funded tenure project for piloting improved land governance, should be leveraged and coordinated to address the priority issues identified in this assessment.



1 Introduction

Reducing emissions from deforestation and forest degradation, and conserving, sustainably managing and enhancing forest carbon stocks (REDD+) has the potential to yield multiple benefits for Malawi. These benefits include support for more efficient, equitable and sustainable forest management, improved livelihoods for forest-dependent communities, and protection of critical ecosystem services and biological diversity. However, there are also the very real risks that REDD+ could entrench or even exacerbate existing inequalities in access to land and forest resources and the benefits they provide. Clear and secure land and forest tenure will play a critical role in reducing these risks and providing effective and appropriate incentives for sustainable forest stewardship in Malawi.

Malawi's land and resource tenure is defined both by the country's legislative frameworks and by a rich body of customary law and practice. Between 65–75 percent of Malawi's land is customary land and between 51–65 percent of Malawi's forests are located on customary land.⁶ Despite their importance, tenure rights to these customary forests remain ill-defined and lack effective protection in national legislation. A history of inequitable access to land and forest resources, accompanied by a lack of government capacity to enforce existing land and forestry use and management regulations, has led to serious levels of encroachment in government-controlled forest reserves. Together, these factors constitute major underlying drivers of deforestation and forest degradation in Malawi.⁷

The results of deforestation and forest degradation have been devastating. Between 1972 and 1992, Malawi's total forest cover fell from 47 percent of total land cover to 20 percent (see figure 1). A number of studies report varying figures for the current rate of deforestation and translate to an estimated annual average loss of 164,000–460,600 hectares of forest cover – the highest rate of deforestation in the Southern African Development Community.⁸ Taken together, changes in woody biomass stocks account for 69 percent of total carbon emissions in Malawi.⁹ There is an urgent need to halt and reverse deforestation and forest degradation while simultaneously providing alternatives for sustainable economic development for the people of Malawi. REDD+ provides an important mechanism for moving towards such goals.

REDD+ is an international initiative that has emerged in response to the fact that land use change, including deforestation, is currently estimated to generate about 3.3 billion tons of carbon emissions annually.¹⁰ The conversion of forests to other land uses accounts for approximately 10 percent of global carbon emissions.¹¹ REDD+ provides financial incentives to developing countries to reduce emissions associated with conversion of forest resources to alternative land uses. The + sign indicates not only the inclusion of policies and measures that reduce emissions, but also those that promote conservation and enhancement of existing carbon stocks, as well as sustainable forest management.

In recognition of this international initiative, the Government of Malawi (GoM) has clearly stated its commitment to provide the broadest range possible of social and environmental benefits through taking a “no regrets” approach to preparing for and implementing REDD+.¹² In other words, in Malawi REDD+ is seen not only as a mechanism for climate mitigation, but also for promoting poverty alleviation, sustainable livelihoods, conservation of forests and biodiversity, and protecting and enhancing ecosystem services.

6 USAID, 2010 (available here).

7 LTS International, 2015.

8 “Malawi Ranked First in SADC Deforestation Rate,” Malawi News Agency, 12 May 2015 (available here).

9 Gama, 2015.

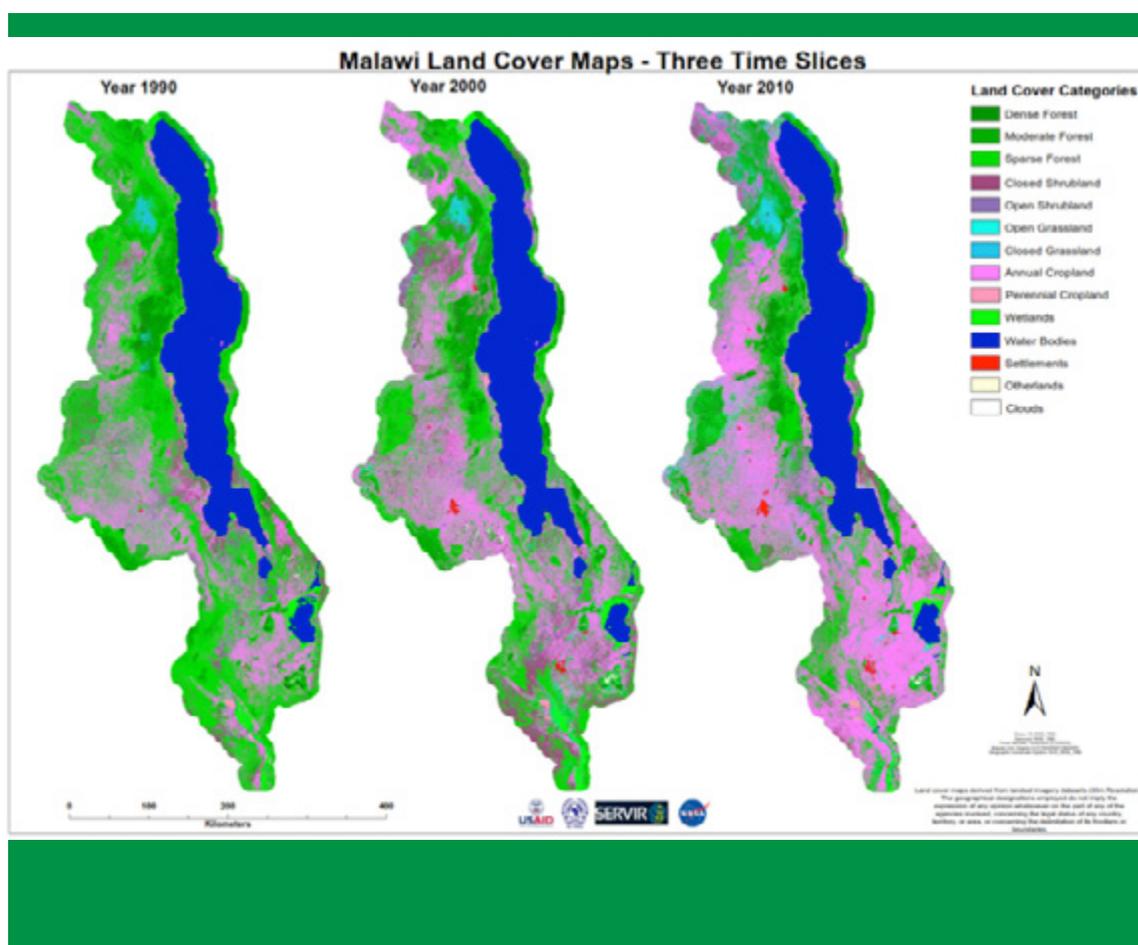
10 Global Canopy Programme, 2014.

11 IPCC, 2014.

12 Gama, 2015.

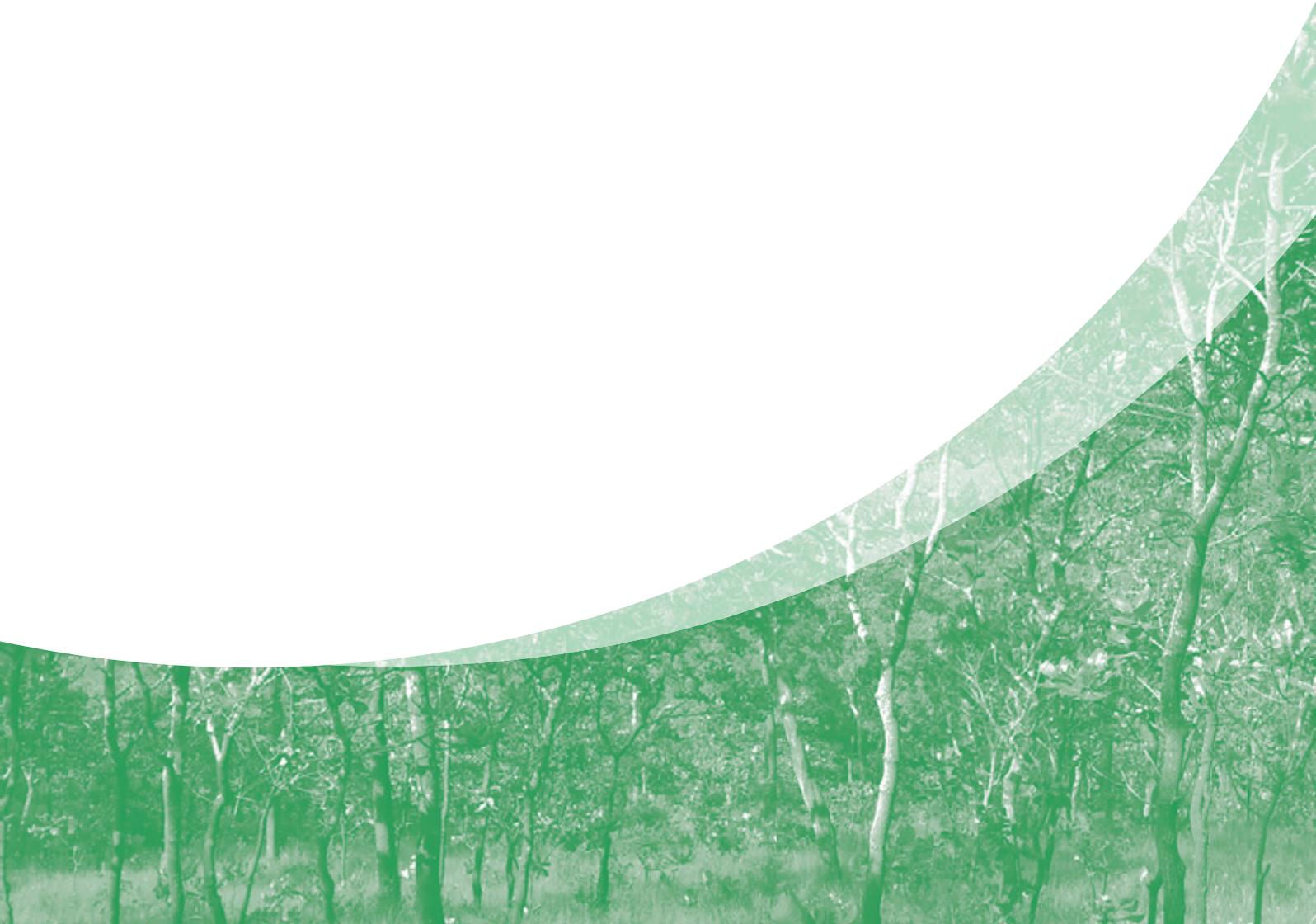
To achieve these goals, and ultimately to qualify for results-based payments under a REDD+ programme, there is an urgent need for Malawi to more clearly define tenure rights to land, forests and other natural resources and to provide meaningful security of these rights. Reforms on tenure and related land issues have been ongoing since 2002 and significant new land legislation was passed in late 2016. The forthcoming implementation of these reforms provides a unique opportunity for Malawi to realize its national policy goals and to come into line with international standards on the responsible governance of land and forest tenure. This tenure assessment provides an overview of the key issues and options for supporting the implementation of these reforms while contributing to an overall enabling environment for more effective forest and REDD+ governance.

Figure 1: USAID commissioned land use/cover maps for 1990, 2000 & 2010 (RCMRD 2012).¹³



¹³ FAO, JICA, USAID/SERVIR and the World Bank have all conducted land use and land cover surveys in Malawi to track land cover changes over the past two to three decades. The resulting land use maps generally show a similar picture of Malawi's landscape, with the largest land cover by area being 'cropland', followed by 'forest areas' and 'wetland', both very similar in area coverage. The JICA and WB area classification shows approximately 10 percent more cropland than the FAO and USAID maps. This difference seems to come from area that was previously designated under grassland, indicating that it can be difficult to distinguish between grassland and some cropland types, particularly as this is dependent on seasonality. See LTS International, 2015.

Section 2 of this report provides an overview of the methodology for this tenure assessment and section 3 presents the background and context. This is followed in section 4 by an exploration of the linkages between tenure and REDD+ and the key questions these linkages raise for REDD+ planning and implementation in Malawi. Section 5 provides an overview of forest tenure and management in Malawi and focuses on the evolution of participatory forest management regimes and the lessons learnt in their implementation. Section 6 provides an overview of land tenure in Malawi and section 7 follows with a description of the land sector reforms currently underway and their implications for tenure. Section 8 presents a deeper analysis of the key issues, drawing on the lessons learnt through key informant interviews and site visits, as well as a literature review of the tenure and REDD+ issues faced by other countries with socio-ecological challenges similar to those of Malawi. Policy options are provided for each area of analysis. Section 9 concludes the assessment and offers a way forward.



2 Methodology

Tenure systems play a critical role in preparing for REDD+ readiness and supporting sustainable and equitable forest management more broadly. Consequently, this tenure assessment was undertaken to: (1) inform the development of a national REDD+ strategy; (2) integrate tenure considerations into ongoing policy and legal reform processes relating to the forest, climate, environment and natural resource sectors; (3) inform developments in land tenure reforms to ensure they account for forest resource sustainability and the needs of forest-dependent communities; and (4) build broader awareness of how Malawi can address its resource tenure issues in a manner that supports REDD+ as well as the sustainable and equitable management and development of forest resources.

A key aspect of this assessment is that the process employed for the assessment reflects a country-led approach. The consultants worked in close partnership with their counterparts at the Department of Forestry who were assigned by the director of forestry to guide and inform the assessment process. The data was collected and analysed through the following four activities: (1) literature review/desk study, (2) key informant interviews, (3) field visits, and (4) stakeholder workshops.

2.1 Literature review

In order to understand the broader context and to be able to draw on the lessons learnt both internationally and in Malawi, the consultants conducted a comprehensive literature review of:

- policies, laws and regulations related to land, forest and natural resource tenure and management in Malawi;
- past and ongoing studies and programme documents related to forestry and tenure in Malawi;
- guidance documents on tenure and REDD+ governance from international organizations such as the UN-REDD Programme, the UNFCCC and others; and
- scholarship on legal and policy aspects of REDD+ and the lessons learnt from REDD+ tenure interventions in countries facing forestry and climate challenges similar to those of Malawi.

2.2 Stakeholder interviews

The literature review was supplemented by a series of key informant interviews and three sets of field visits, which included additional interviews and focus group discussions. Interviewees included government officials from the forestry, land, environment, agriculture, mining, water and finance sectors; staff of NGOs working on natural resource and land-related issues; representatives of donor projects working on relevant issues in Malawi; members of the REDD+ Experts Group and technical working groups; local government officials; community forest organizations (village natural resource management committees and block management committees); and traditional leaders. A list of the stakeholders interviewed is included as Annex C.

2.3 Stakeholder workshops

Once the initial research phase was completed, an inception workshop was held on 28–29 July 2015 for more than 40 participants representing the government sector, traditional leadership, research institutions and civil society. Participants were introduced to REDD+ and provided with an overview of the relevance of tenure to REDD+, as well as the proposed methodology and content of this assessment. Participants

were then divided into discussion groups to elicit feedback on priority issues relating to tenure and REDD+ in Malawi and to offer advice on the methodology for the assessment. The feedback and recommendations generated by this workshop guided the remainder of the research and were incorporated into this assessment report. The report on the inception workshop is attached as Annex E. A validation workshop for the outcomes of this assessment was held on 23 March 2016. The report on the validation workshop is attached as Annex F.

2.4 Field visits/focus groups

The consultants sought advice from their Department of Forestry counterparts and other stakeholders on identifying priority areas for field visits. The consultants developed a set of criteria for the selection of sites that included:

- representation of the different types of forestry management regimes in Malawi, including forest reserves (both with and without co-management schemes), plantations (private concessions), community forests on customary land, natural forests on customary land, and protected areas;
- mix of the matrilineal and patrilineal tenure regimes present in Malawi to uncover the gender dynamics related to land and forest ownership and management;
- representative mix of various levels of decentralized forest management, including some sites where community-based forestry institutions have been legally formed and are functioning versus other sites that are at different stages of decentralization; and
- sites with previous or ongoing projects or research that could inform the assessment.

Based on these criteria, the timing and funding constraints of the assessment project, and the recommendations of individuals consulted through the inception workshop, the final sites selected for the assessment were as follows:

Table 1: Field sites visited during the assessment

Site	Region	Relevant characteristics	Inheritance regime
Ntchisi	central	PERFORM site and a forest reserve with co-management	matrilineal
Dzalanyama	central	forest reserve with high rates of deforestation	matrilineal
Nkhotakota Wildlife Reserve	central	protected area; Kulera REDD+ pilot site	matrilineal
Nyika National Park	northern	protected area; Kulera REDD+ pilot site	patrilineal
Vwaza Wildlife Reserve	northern	protected area; Kulera REDD+ pilot site	mixed
Mulanje	southern	forest reserve with several community-based projects	matrilineal
Mwanza	southern	large community-based forest programme	matrilineal
Zomba	southern	forest reserve with several community-based projects	matrilineal

The assessment was supplemented by an in-depth case study on the Kulera Landscape REDD+ Programme, which is being implemented in three sites in Nkhotakota and Rumphi Districts. Stakeholder meetings and a focus group discussion with each of the community organizations tasked with implementing the Kulera Landscape REDD+ Programme were conducted at each of these sites. The findings of the case study are presented in Annex D of this report.

2.5 Assessment methodology

In 2012, the Committee on World Food Security endorsed the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGTs) as a mechanism for providing guidance to countries on how to improve the governance of tenure of land, fisheries and forests with the overarching goal of achieving food security for all. While not focused specifically on REDD+, the VGGTs are based on an inclusive consultative process conducted over a period of two years and they reflect a global consensus on international best practice on the responsible governance of tenure.¹⁴ Malawi is among several countries undertaking a process to raise awareness of the VGGTs and how the guidelines can be implemented in the national context. In light of this commitment, and the fact that there is ongoing work to align Malawi's land governance systems with the VGGTs¹⁵, this assessment drew on the forest tenure assessment framework currently under development by the Food and Agriculture Organization of the United Nations (FAO) to guide the analysis of how well Malawi's laws, policies and institutions are aligned with the VGGT principles that are relevant to REDD+.

VGGTs: The guiding principles of tenure governance

States should:

- recognize and respect all legitimate tenure rights holders and their rights, taking reasonable measures to identify, measure and respect rights, whether formally recorded or not;
- safeguard legitimate tenure rights against threats and infringements;
- promote and facilitate the enjoyment of tenure rights;
- provide affordable and meaningful access to justice to address infringements of tenure rights; and
- prevent tenure disputes, violent conflict and corruption related to tenure.

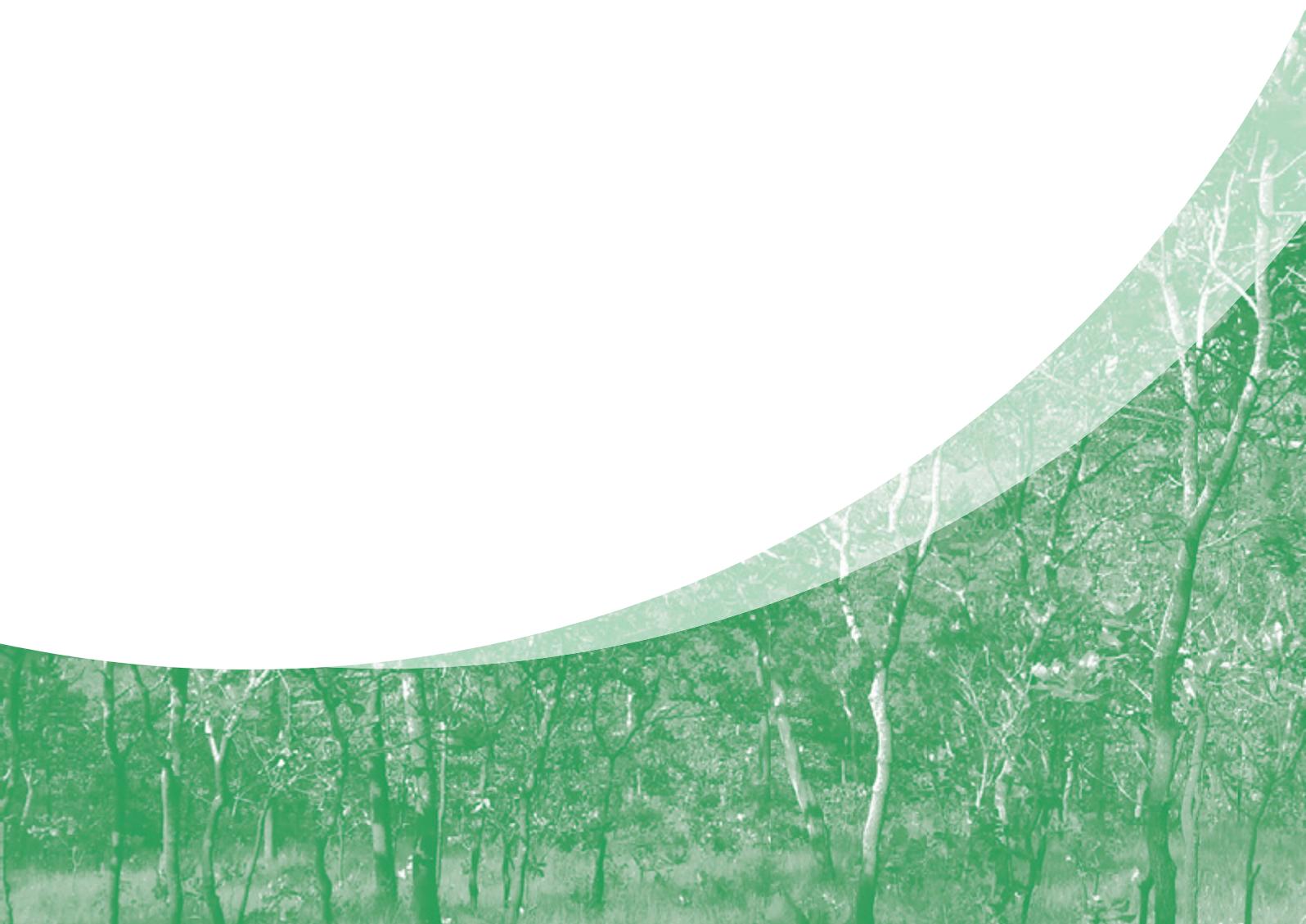
In implementing the responsible governance of land and forest tenure, the following principles apply:

- human dignity;
- non-discrimination;
- equity and justice;
- gender equality;
- holistic and sustainable approach (recognizing the interconnectedness of natural resources and their uses and management);
- consultation and free, effective and meaningful participation of individuals and groups in decision-making;
- rule of law;
- transparency;
- accountability; and
- continuous improvement, including effective mechanisms for monitoring and analysis of tenure governance.

¹⁴ FAO, (draft 2016).

¹⁵ Oxfam, LandNet and CEPA are currently undertaking the Promoting Responsible Land Governance for Sustainable Agriculture in Malawi project. Among other activities, the project will promote awareness of the VGGT principles and facilitate their integration into land governance in Malawi.

Specifically, the consultants undertook a review of the VGGTs and the VGGT-based framework for assessing forest tenure that is currently being developed by FAO with an eye towards identifying which of the principles are most relevant for the Malawian context. As Malawi is in the process of tenure reforms, greater attention was paid to whether the Malawi National Land Policy, the Land Act and the Customary Land Act are all aligned with the VGGTs and whether the legislation is likely to implement the changes that are necessary to achieve equitable and sustainable reforms to land and forest tenure in Malawi. Broadly, Malawi's policies and laws were assessed against the general VGGT principles and the principles of implementation, as all of these apply to the effective governance of REDD+ (see the VGGT text box on page 6). Additionally, the assessment focused on the portions of the VGGTs (e.g. sections 5 and 7) that outline requirements related to the policy, legal and organizational frameworks for tenure and provide guidance on how to administer tenure reforms in ways that protect and respect the customary tenure rights to land and forests. Again, this focus on "what's on paper" is driven by the fact that Malawi's Land Act and Customary Land Act were passed only as this assessment was being concluded, and they have yet to be implemented. To the extent possible, the site visits were also used to inform the framing of the existing challenges, as well as to identify the likely issues related to the implementation of the proposed changes to land and natural resources administration that are set to take place as the Land Act and the Customary Land Act enter into force.



3 Background and context

Malawi is a small, landlocked country in sub-Saharan Africa, home to over 17.2 million people.¹⁶ With approximately 94,000 square kilometres of land area in total, the average land holding in the country is less than one hectare per household.¹⁷ Malawi is also one of the poorest countries in the world. In 2015, Malawi had a per capita gross domestic product (GDP) of US\$255, one of the lowest in the world,¹⁸ and the country ranks 170th out of 188 countries on the Human Development Index.¹⁹

Agriculture remains the foundation of the Malawian economy. It accounts for approximately 30 percent of GDP, employs 65 percent of the Malawian workforce and generates over 80 percent of national export earnings.²⁰ The agricultural economy is divided into smallholder and estate sub-sectors, with more than 70 percent of agricultural GDP coming from smallholders.²¹ The conversion of land from forest to agricultural use has been widely documented, particularly on customary lands.

Malawi's population size and annual growth rate (approximately 2.1 percent) have been increasing pressure on land and driving deforestation.²² Malawi is one of the most densely populated countries in Africa, with an average of 142 people per square kilometre.²³ The population is overwhelmingly rural (~81 percent), with the highest population densities found in the southern and central regions.²⁴ Within the country there is considerable regional variation in population density, urbanization and ethnic composition, all of which are key variables in determining tenure security.²⁵

The people of Malawi rely heavily on forests for livelihoods, fuelwood, traditional medicine and other non-timber forest products (NTFPs), as well as on their ecosystem services.²⁶ As of 2013, between 51-65 percent of Malawi's forests were located on customary land, while approximately 22 percent were found on state land (including forest reserves and other protected areas).²⁷ Of the total land cover, 36 percent is classified as forest, although this figure is likely to be amended based on updates to the legal definition of a "forest" and improved forest cover data.²⁸

While Malawi is technically a "low carbon" society, this status is attributable to a widespread lack of access to modern sources of energy. National studies have estimated that annual charcoal consumption in urban areas exceeds 300,000 metric tons and accounts for a third of the household energy use.²⁹ Poorer households are estimated to account for 35 percent of the total charcoal production, with large-scale producers responsible for 38 percent.³⁰ In addition to charcoal production, the use of fuelwood for cooking and as part of tobacco processing and other cottage industries, especially brickmaking, is also driving

16 World Bank, n.d. (available here).

17 USAID, 2010 (available here).

18 World Bank, 2015 (available here).

19 UNDP, 2016 (available here).

20 GoM. *National Agriculture Policy. Zero Draft.*

21 GoM. *National Agriculture Policy. Zero Draft.*

22 LTS International, 2015.

23 World Bank, n.d. (link above).

24 USAID, 2010 (link above).

25 Holden, Kaarhus & Lunduka, 2006 (available here).

26 The 2009 census found that 95.7 percent of rural and 41.8 percent of urban Malawian households rely on firewood for cooking; 43.4 percent of urban Malawian households rely on charcoal for cooking.

27 USAID, 2010 (link above).

28 UNPEI, 2013; Troell & Banda, 2016.

29 Three national studies have been undertaken, each of which provides a different estimate. The most recent of the studies (2009) requires updating, given the annual urban population growth rate of 4.2 percent. LTS International, 2015.

30 Kambewa, Mataya, Sichinga & Johnson, 2007 (available here).

deforestation and forest degradation in Malawi.³¹ Furthermore, illegal logging in government forest reserves continues to take its toll, both through encroachment by communities and through the illegal expansion of licenced concessions. Forest resources are particularly stressed in the southern and central regions, where population pressures are the greatest.³²

While poverty, population density, and limited alternatives to fuelwood and charcoal are the recognized drivers of deforestation and forest degradation in Malawi, the mining industry is also a growing contributor. Activities associated with mining, such as the use of biomass as a source of energy, infrastructure development (roads, dams, etc.) to support mining, and the clearing of forest land for mining expansion are all contributing to deforestation.³³ In short, the industry, mining and energy sectors all face a great challenge in balancing much needed economic growth with the protection of forests.³⁴

Many of the drivers of deforestation and forest degradation are closely linked to weaknesses in governance, which have prevented the creation of an enabling environment for the effective and equitable management of forest resources. Specific governance issues identified in Malawi include weak institutional and technical capacity, lack of coordination among sectors related to forestry, overlapping and sometimes contradicting policies and laws, low enforcement capacity, poor engagement of communities and the public in decision-making, lack of monitoring and integrated planning, and the broad issues of corruption, lack of transparency and lack of accountability in forestry and relevant sectors.³⁵

Over the past two decades, there have been various attempts to undertake serious reforms in the land and forestry sectors to create new institutional and legal mechanisms for supporting sustainable and equitable access to and use/management of land and forest resources. These attempts have had varying levels of success and provide many lessons learnt, which have been explored in this assessment. It is critical that these lessons inform the development of Malawi's national strategy for REDD+.

3.1 REDD+ in Malawi

REDD+ activities commenced in Malawi in 2006 and involved the Forest Research Institute of Malawi (FRIM) and Leadership for Environment and Development Southern Africa. These initiatives culminated in the designation of the Department of Forestry (DoF) as the official focal agency for REDD+ activities in Malawi. In 2012, the Government of Malawi (GoM) partnered with the United States Agency for International Development (USAID) and the International Program of the United States Forest Service (USFS-IP) to establish the three-year Malawi REDD+ Readiness Programme (MRRP). The programme supported DoF to: (1) secure partnership status with and subsequent financial and technical support from the UN-REDD Programme; (2) develop a draft REDD+ action plan; and (3) develop a national management structure to oversee and coordinate Malawi's pursuit of REDD+ readiness. This management structure, shown in figure 2, has played a major role in furthering REDD+ readiness in Malawi. It comprises the following:

REDD+ Secretariat: The secretariat is based in DoF and was initially comprised of the national REDD+ focal point and two embedded advisors funded by the U.S. government for the duration of MRRP. One embedded advisor is now funded through USAID's Protecting Ecosystems and Restoring Forests in Malawi

31 A recent qualitative study of the drivers of deforestation and forest degradation (D&D) in Malawi by LTS International cited all of these as the proximate drivers of D&D. However, the study noted that the precise impacts of each activity have not been quantified and that some of the causative relationships between economic growth, D&D and the identified activities are quite complex and cannot be assumed without further research. See LTS International, 2015.

32 LTS International, 2015.

33 GoM, Malawi Ministry of Natural Resources, Energy and Environment, 2010 (available here).

34 LTS International, 2015.

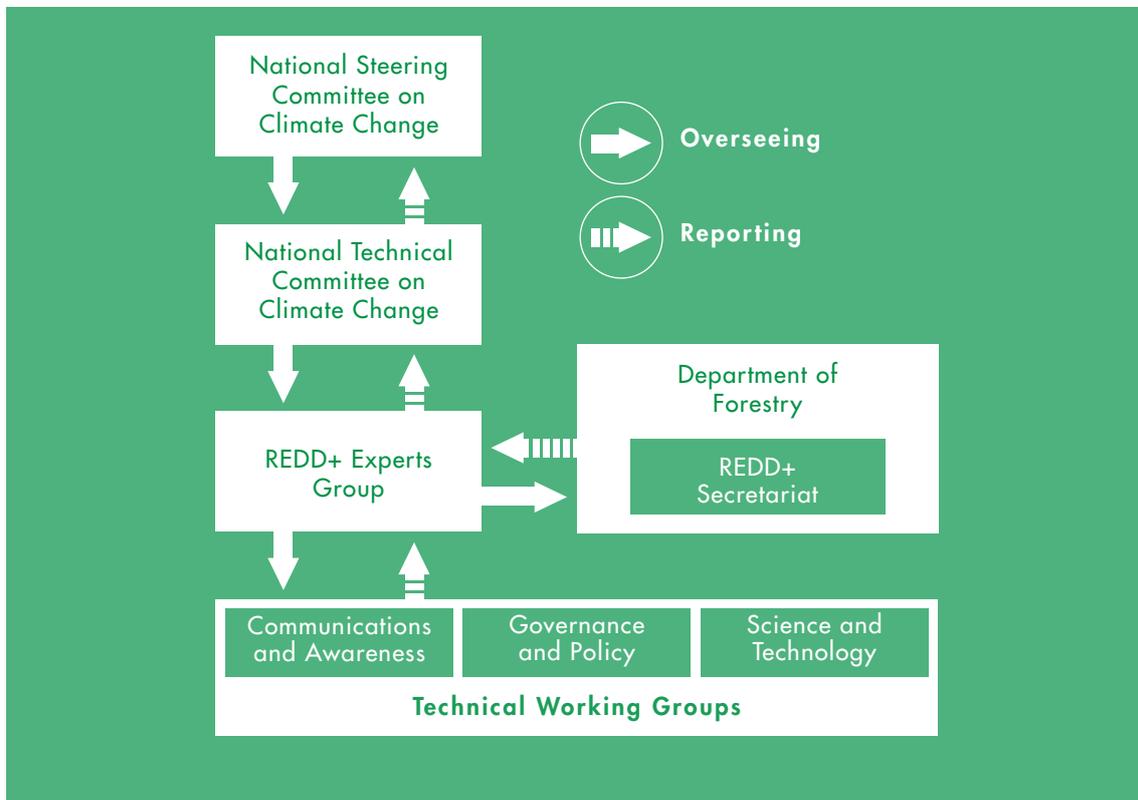
35 For a more detailed analysis of the legal and policy issues related REDD+ in Malawi, see Troell & Banda, 2016.

(PERFORM) project. The REDD+ focal point is appointed by the director of forestry and the position is currently held by the deputy director of forestry for policy. The secretariat reports to the REDD+ Experts Group.

REDD+ Experts Group (RExG): The experts group includes representatives from government, civil society, donors and the private sector. The experts group allocates responsibility and makes requests of the REDD+ Secretariat and the three technical working groups.

Technical working groups: Three technical working groups work on REDD+ issues – the Communications and Awareness Technical Working Group, the Governance and Policy Technical Working Group, and the Science and Technology Technical Working Group. The working groups are responsible for providing technical guidance to the REDD+ Secretariat on the development, implementation and maintenance of all activities related to their area of expertise. The working groups report to RExG.

Figure 2: REDD+ governance structure in Malawi



With the understanding that MRRP was a project-based institutional mechanism, the Malawi REDD+ Programme (MRP) was launched in 2012 with the support of USAID and USFS-IP. The programme is coordinated from within DoF by the REDD+ Secretariat, while development partners, including the UN-REDD Programme, provide technical and financial support. Currently, MRP is supported through USAID's PERFORM project, which runs from 2014 to 2019.

Neither MRP nor the REDD+ Secretariat has official legal status within GoM, although the management arrangements are integrated into the government's National Climate Change Programme (NCCP). Recommendations to strengthen the legal status of MRP are being considered as part of the development of the national REDD+ strategy.

In 2014, Malawi became the 50th partner country to the UN-REDD Programme, a collaborative initiative involving the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP) and the United Nations Environment Programme (UNEP). The UN-REDD Programme supports nationally-led REDD+ processes and is currently supporting Malawi in the development of a country needs assessment, which has two major components: (1) assessment of the relevant legal and policy frameworks; and (2) guidance to design Malawi's national strategy for REDD+, including the design of a participatory process for developing a roadmap for the strategy.

The country needs assessment is being complemented by targeted support from the UN-REDD Programme, which is focusing on institutional and governance issues, work related to monitoring, reporting and verification, and resource and land tenure regimes. This two-pronged approach (country needs assessment and targeted support) is being coordinated to ensure that synergies are developed as appropriate. The targeted support aims to assist with a variety of governance and monitoring elements of REDD+ readiness and has the following four core elements: (1) institutional and context analysis, which will provide the basis for multi-stakeholder engagement towards the design of the national strategy, policies and safeguard systems for REDD+; (2) corruption risk assessment to support an understanding of the forest governance challenges that impact the drivers of deforestation and degradation and barriers to “+” activities,³⁶ and to inform the design of elements of REDD+ readiness; (3) analysis of Malawi's resource/land tenure regimes as they relate to REDD+ (this assessment); and (4) development of a roadmap for the design of a national forest monitoring system.

This tenure assessment is thus part of a larger, integrated package of support to facilitate the creation of Malawi's national REDD+ strategy. The tenure assessment builds on and feeds into the other aspects of the integrated package of support through both formal and informal consultation mechanisms between the consultants, staff of the UN-REDD Programme, key personnel at DoF and the consultants engaged to assist with the other components of the support package.

³⁶ “+ activities” refers to activities that contribute to the conservation and sustainable management of forests and the enhancement of forest carbon stocks.

4 REDD+ and tenure: Linkages and key issues

For the purposes of this assessment, tenure is defined as the relationships, systems and rules that determine the specific rights to land and forest resources.³⁷ Land and resource tenure systems determine who can use what resources, for how long and under what conditions.³⁸ Thus, tenure is not only defined by the relationship between the rights holder and the resource itself; its definition also rests in the relationship between people and communities with respect to the various economic and non-economic benefits generated by the resource in question.³⁹ The ability of rights holders to enforce their rights, whether through legal or social mechanisms, and to successfully exclude others from the associated benefits is a key element of a tenure system.⁴⁰

It is also important to recognize that different rights to land and natural resources can be held by different individuals or collectives at different times.⁴¹ To capture these various aspects of tenure conceptually, property rights are often described as a “bundle of rights”. This “bundle” includes the rights of accessing land or resources, withdrawal or abstraction of resources, management of access and use, exclusion (preventing others from accessing, using or benefitting from the resources), and alienation (the right to sell or transfer ownership) of the land and resources. Forest tenure is thus a broad concept that includes ownership, tenancy and other arrangements.⁴² Poorly defined or insecure forest tenure can undermine the incentives for the protection of forest resources and drive their over-exploitation.⁴³ Moreover, the quality of the various rights – whether they are contested, enforceable and long lasting – has a great deal of influence on forest landscapes and on determining the beneficiaries of these resources.⁴⁴ Insecure land tenure in forest areas can act as a driver of land use changes leading to deforestation and forest degradation.⁴⁵

Tenure rights arise from a range of sources, including both statutory and customary law. Customary tenure systems are derived from traditional or ancestral occupancy or use. The norms of customary tenure derive from and are sustained by the community itself, rather than by legislation, and they are rarely codified. It is as much a social system as a legal one, and it is often characterized by resilience, continuity and flexibility – a “living law” that is shaped by the interaction with other norms, statutory requirements and social and environmental changes.⁴⁶ In Malawi, where between 65-75 percent of land falls under customary jurisdiction, the clarity and security of customary tenure systems – and the way in which they relate to statutory provisions regulating tenure – are key issues that will shape the implementation of REDD+ activities. In particular, there is a need to focus on the various ways in which participatory forest management (PFM) practices have emerged in Malawi, how they have interacted with the customary practices of forest tenure and management, and how they continue to shape and inform forest and tree tenure (see section 5.3).

REDD+ is premised on providing benefits to those who maintain or enhance forest carbon stocks in order to compensate for the lost opportunities and to incentivize forest stewardship. This requires a clear understanding of who has the rights to own, manage and use the land and resources in question, and the ability

37 UN-REDD Programme, 2013b.

38 FAO, 2002 (available here).

39 Naughton-Treves & Day, eds., 2012 (available here).

40 Naughton-Treves & Day, eds., 2012.

41 Naughton-Treves & Day, eds., 2012.

42 FAO, 2014.

43 Bolin, Lawrence & Leggett, 2013 (available here).

44 Naughton-Treves & Day, eds., 2012 (link above).

45 Hatcher, 2009.

46 Alden Wiley, 2011.

of the rights holders to exclude others from accessing and changing the land cover.⁴⁷ Rights holders must also be held accountable when they fail to fulfil the obligations under the REDD+ results-based payment system. From a REDD+ perspective, a clear understanding of who holds what rights is the only way to ensure that all legitimate rights holders are included in the REDD+ decision-making processes. If tenure is insecure, unclear or in conflict, there is a risk that powerful actors will take over the rights and reap the resulting benefits. Such elite capture is of particular concern on customary land, where informal and often vulnerable rights holders can be accidentally overlooked – or deliberately convinced to cede their rights – without a full understanding of the consequences.

Conversely, where the REDD+ policies clarify, promote and support improvements in forest tenure and forest management institutions, they can complement and enforce the ongoing national reform processes for more sustainable and equitable outcomes for REDD+. Particularly with respect to community, or customary tenure, research in a number of countries has demonstrated that community ownership correlates with higher levels of biodiversity protection, improved community livelihoods and higher carbon sequestration levels.⁴⁸ It is important to note, however, that clear and secure tenure rights do not *per se* lead to such improvements, and much depends on the reform process itself.⁴⁹ In particular, the processes of demarcation and formalization of tenure pose risks of elite capture. As Malawi embarks on land tenure and forest management reforms – and if these reforms are to provide equitable benefits and support broader development goals – it will be critically important to clearly define who the “legitimate” rights holders are and what is needed to clarify and strengthen both land and forest tenure. This, in turn, will need to be supported by transparent and participatory processes for determining and allocating tenure rights.

Beyond REDD+, the question of who controls and manages Malawi’s land and forest resources has broader implications for economic development and for the empowerment of forest-dependent communities. Providing more secure rights through tenure reforms and through the devolution of forest governance enables communities to have greater control over the resources from which they derive their livelihoods. Given Malawi’s extremely high level of poverty, it is strategically important to enhance sustainable forest management, improve forest governance, facilitate cross-sector coordination and promote green growth.⁵⁰ A “no regrets” REDD+ approach should therefore be seen as a mechanism for delivering multiple ecosystem and social benefits in addition to the potential financial benefits to be derived from reduced or avoided carbon emissions.

Tenure security, or the certainty that tenure rights will be respected or protected when challenged, is often associated with lower rates of deforestation. It is important to recognize, however, that the opposite can be true when privileged commercial access is granted to forests, particularly in the context of weak enforcement of forest regulations. It is therefore crucial to understand the specific context in which REDD+ will be implemented in Malawi and the political, economic and social drivers that shape the incentives of various rights holders. In particular, Malawi faces severe constraints in relation to the implementation and enforcement of forest regulations. Past and ongoing attempts at fostering PFM as a mechanism for strengthening community “ownership” of forest resources, and thus alleviating the enforcement burden on government, have had varying levels of success.

47 Larson *et al.*, 2013.

48 Agrawal, 2008.

49 Bluffstone & Robinson, eds., 2015.

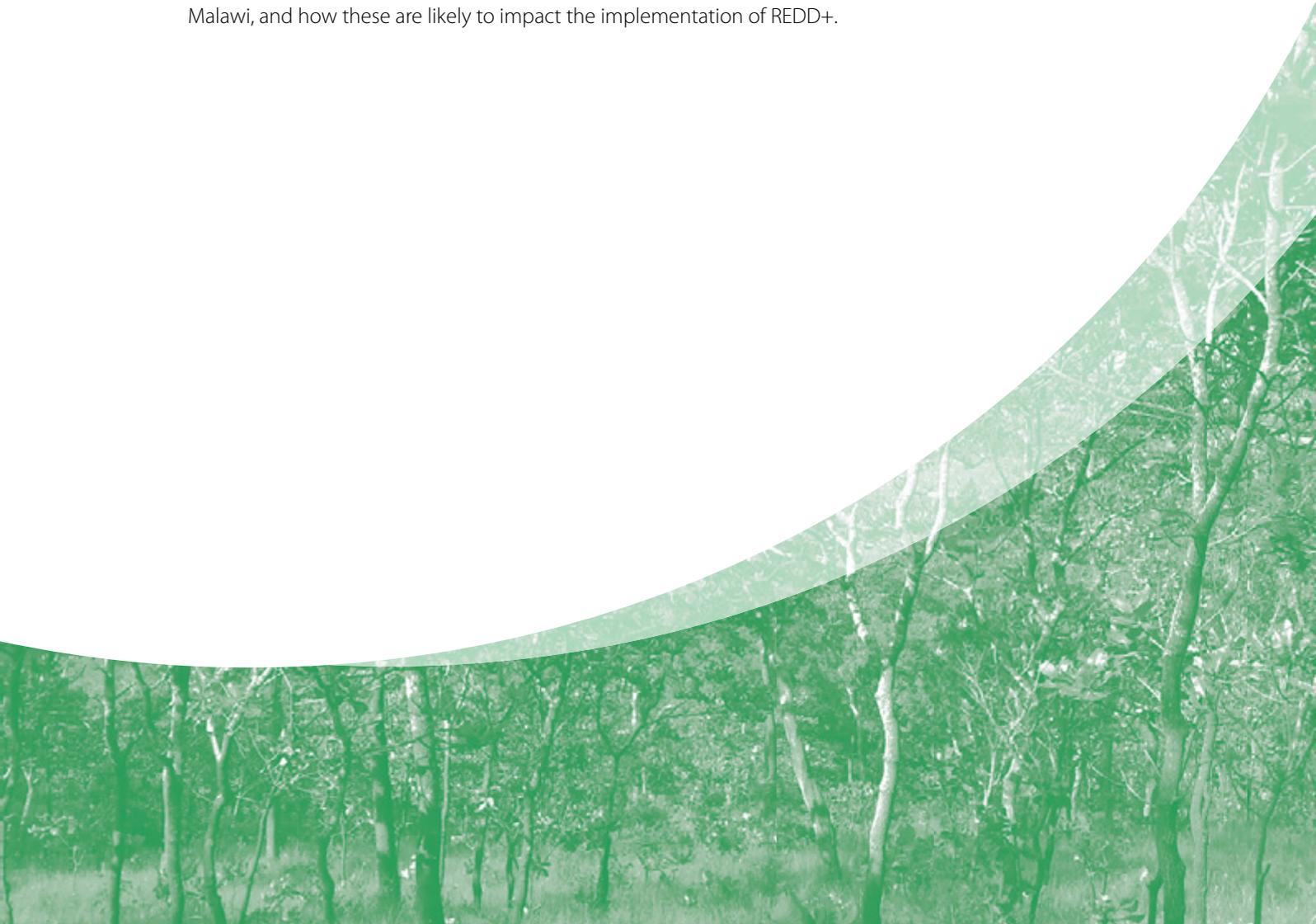
50 Gama, 2015.

The tenure-related challenges described above raise a number of important questions for REDD+ planning and implementation in Malawi:

- Who are the legitimate tenure rights holders and how can they be empowered to participate meaningfully in REDD+ decision-making and benefit sharing?
- What is the role of tenure as a driver of deforestation and forest degradation and how can legitimate rights holders be incentivized to improve forest management practices?
- What are the broader governance challenges that need to be addressed in order to support tenure reforms and to ensure that REDD+ is both effective and equitable?
- What specific measures for addressing tenure should be supported as part of REDD+ and what can be done to ensure that the measures: (1) are aligned with the internationally accepted standards and practices as articulated in the Voluntary Guidelines on the Responsible Governance of Tenure (VGGTs); (2) support the national land policy and tenure reform agenda; and (3) are realistic and sustainable?

This assessment attempts to answer these questions by analysing both the extant tenure systems in Malawi as well as the evolving land and forest sector reforms that have proposed fundamental changes to tenure in Malawi. As noted in section 2.5 on the methodology, the VGGTs have been used to assess the alignment of Malawi's tenure frameworks and practices with internationally accepted standards and practices and to guide this analysis.

The following section of this assessment report provides an overview of forest tenure and management in Malawi, with a focus on the evolution of participatory forest management regimes and the lessons learnt in their implementation. This is followed by an overview of the history of land tenure and the reforms to land administration emerging from new land legislation. Taken together, the developments in the forestry and land sectors form the basis for this assessment of the critical issues surrounding resource tenure in Malawi, and how these are likely to impact the implementation of REDD+.



5 Forest management and tenure in Malawi

5.1 Historical context

Prior to the colonial period (1891–1963), the control and use of Malawi’s natural resources – including forests – was vested in traditional authorities who governed the resources according to customary law.⁵¹ In some parts of Malawi customary law has evolved over several centuries.⁵² With the advent of colonialism, the British administration appropriated large tracts of customary land for agricultural development and set aside most of Malawi’s forests as protected areas pursuant to the 1911 Forest Ordinance.⁵³ Regulations restricting the cutting or harvesting of indigenous trees on customary or public land were put into place, significantly limiting public access to forest resources. People encroached into the protected areas despite the restrictions, however, as they had a need for timber and other forest products. This led the colonial government to pass another ordinance in 1926, establishing the Communal Forest Scheme under the management of the central government.⁵⁴ Under this scheme, 2.7 million hectares of forest land were allocated to communities as village forest areas (VFAs). These were to be managed by newly established village forest committees (VFCs) – community institutions that were overseen by village headpersons (the most local position in the customary hierarchy of chiefs). Policy shifts in later phases of the colonial administration began to support commercial forest exploitation through the establishment of plantations, and these continued to operate after independence.⁵⁵

In 1964, the newly independent Malawian government adopted the colonial model of forest management by continuing a “command and control” approach and emphasizing strict forest protection.⁵⁶ At first VFCs were mandated with overseeing the use, management and control of forests on customary land, but by 1985 this responsibility was shifted back to the central government under the Department of Forestry (DoF). Over time the gains that had been made with the VFA scheme were lost as VFAs were cleared for agriculture and settlements due to population pressures.⁵⁷ Indeed, between 1963 and 1994 the number of VFAs dropped from 5,108 to only 1,182.⁵⁸ In the interest of maintaining economic growth, the post-independence government focused on expanding commercial agricultural estates for export commodities and restricted smallholder farmers to producing crops for local consumption, much to the detriment of the forest cover.⁵⁹ This included a diversion of extension resources to the agricultural sector and placing forest extension work under the agricultural sector’s purview, thus undermining the focus on forestry assistance. Furthermore, the newly established tobacco and tea estates required substantial amounts of wood for fuel and construction materials, driving considerable deforestation.⁶⁰

In many places, the centralization of forest management eroded the traditional authority and diminished community capacity to monitor, manage and control forest resources on customary land.⁶¹ With respect to public land, including forest reserves, all rights to forest produce were held by the state. This was contested

51 Jumbe & Angelsen, 2006.

52 Between the 13th and 16th centuries, Bantu speakers known as Maravi settled in central and southern Malawi. Those who settled the south are today the Nyanja people and those in the central area are the Chewa people. The Tumbuka, Tonga, Ngonde and Lambya settled in Malawi later, followed by the Ngoni, Lao, Lomwe and Sena in the late 19th century.

53 Kamoto, Dorward & Shepherd, 2008 (available here).

54 Kamoto, Dorward & Shepherd, 2008.

55 Jumbe & Angelsen, 2006.

56 Jumbe & Angelsen, 2006.

57 Kamoto, Dorward & Shepherd, 2008 (link above).

58 Kamoto, Dorward & Shepherd, 2008.

59 Kamoto, Dorward & Shepherd, 2008.

60 Kambewa, Mataya, Sickinga & Johnson, 2007 (available here).

61 Kambewa, Mataya, Sickinga & Johnson, 2007.

by many communities that lived adjacent to these areas, who claimed the right to use the resources by virtue of proximity and historical ownership.⁶² Such claims are still cited by many stakeholders as the reason for encroachment into forest reserves and underlie, at least in part, the move towards co-management of protected forests. For example, community members consulted in Mulanje District justified their encroachment into the forest reserve partly on the basis that they had historical claims over the land in question. Interestingly, while communities also had claims over adjacent freehold land owned by tea estates, there were no encroachments onto private land. It appears that communities find it easier to encroach on public land than on private land, as enforcement on public land is not effective.

Partly due to a lack of community compliance and partly to failures in enforcement, deforestation in Malawi has continued at a rapid rate. Before the 1960s, more than 59 percent of Malawi's total land area was forested,⁶³ and this had diminished to 38 percent by the 1980s.⁶⁴ Recent estimates suggest that only 20-35 percent of Malawi's total land area was forested in the period 2010–2012 (~28,000km²).⁶⁵

The 1990s were a time of great transition in natural resource management, both internationally and domestically. The 1992 Earth Summit agreements (the Rio Declaration on Environment and Development, Agenda 21, and the Statement on Forest Principles), coupled with multilateral environmental agreements on biodiversity and climate change, represented a sea change in the way that forest resource management was conducted across the globe. An emphasis on participatory forest management (PFM) as well as on balancing resource sustainability with economic growth objectives led to major policy and legal changes in many countries. In Malawi, international donor support ultimately led to a policy review process that resulted in the adoption of the National Forest Policy (1996), the Forestry Act (1997) and the National Forestry Programme (2001). The policies and the act recognized the need for effective PFM and created institutional mechanisms for devolving management and use rights onto forest-dependent communities.

The stated goal of the National Forest Policy⁶⁶ is to “sustain the contribution of the national forest resources to the quality of life in the country by conserving the resources for the benefit of the nation.”⁶⁷ The general objectives are not focused on a narrow protection of forest ecosystems, but rather on striking a balance between conservation and meeting the diverse needs of Malawian people in relation to forests and their products while contributing to poverty alleviation. Specifically, the policy states that the enabling framework for promoting the participation of communities and the private sector in forest conservation and management should be accomplished through co-management of forest reserves, establishment of village natural resource management committees (VNRMCs) for community-based management on customary land, and capacity building to support effective community forestry activities.⁶⁸

The policy recognizes the need to create incentives to enable the sustainable use of forest resources for poverty alleviation while balancing these needs with the effective protection of catchments and biodiversity.⁶⁹ Specifically, the policy calls for the promotion of “local community participation in forest protection and management through education, equitable sharing of benefits, *provision of adequate tenure rights and security*, rural infrastructure, and ensuring that their [community] requirements are considered (emphasis added).”⁷⁰

62 Kambewa, Mataya, Sichinga & Johnson, 2007 (available here).

63 Jumbe & Angelsen, 2006.

64 Jumbe & Angelsen, 2006.

65 LTS International, 2015.

66 While this report was being written, the Cabinet was considering a new National Forestry Policy (2015 draft).

67 GoM, 1996. *National Forest Policy* (hereinafter GoM, 1996. NFP).

68 GoM, 1996. NFP §§2.3.1-2.

69 GoM, 1996. NFP §2.2.3.

70 GoM, 1996. NFP §2.3.5.1.

Importantly, the policy also recognizes the cross-sectoral nature of forest management and prioritizes efforts to address the fragmentation, overlaps and gaps among relevant sectors.⁷¹ Specifically, the policy calls for joint development of natural resource management plans with other agencies in the land and natural resource sectors, as well as policy harmonization with continuous review to ensure harmonized approaches among sectoral policies.⁷² In sum, the policy promotes a landscape – or an ecosystem-based – approach to management and envisions ecosystem services as critical benefits from effective forest stewardship.

The Forestry Act (1997) is the legislative framework for forest management in Malawi. In line with the National Forest Policy, the objectives of the act balance conservation and the protection of forest resources with the sustainable and productive use of forests and their products for the purposes of economic growth and development. The act emphasizes the role of communities, through the establishment of VNRMCs, in the conservation and management of forests on customary land and in forest reserves.

One critical gap in the Forestry Act is a missing clear statement on how PFM mechanisms impact forest tenure. Section 34 of the Forestry Act states that “any person or community” who “protects a tree or forest, whether planted or naturally growing in any land which that person or community is entitled to use, shall acquire and retain ownership of the forest and the right to sustainable harvest and disposal of the produce.” Thus, a usufruct right to tree tenure accompanies land tenure (whether freehold or usufruct), subject to the requirement that the person or community “protects” the tree or trees and that harvesting of any forest produce is “sustainable.” What constitutes protection or sustainable harvest is not defined in the act.

This provision for tree tenure appears to conflict with the Forestry Act’s provisions and regulations that require that community-based management agreements (on customary lands) and co-management agreements (in forest reserves) be concluded with DoF in order to gain the specific rights to use, manage and control the resources in question pursuant to such agreements.⁷³ Section 34 appears to confer such rights on anyone who “protects” or manages the resource without needing to establish the formal structures for PFM as envisioned in sections 30-31 of the same act (see more detail on PFM requirements in section 5.3).

While the National Forest Policy states that clear and adequate tenure rights are envisioned as a necessary aspect of providing effective incentives for the protection and management of forests, the Forestry Act fails to address this issue beyond a vague assignation of tree tenure to “any person or community” who protects a tree or a forest on land they are entitled to use.⁷⁴ The act further fails to specify what tenure rights can accrue when communities succeed in concluding forest management agreements (FMAs) approved by DoF. This lack of clarity on tenure has not only hindered effective implementation of co-management in forest reserves and community-based forestry on customary land, but in many cases it has also given the impression of continued open access to forests on customary land. In order for a national REDD+ programme to succeed, there is a vital need to clarify how forest tenure is assigned on customary land, how this is impacted by various PFM agreements, and how forest tenure rights are linked to the proposed changes to land rights on customary land under the new land legislation. These issues are explored in greater detail below.

71 GoM, 1996. NFP §2.4.1.

72 GoM, 1996. NFP §§2.3.4; 2.8.1.1.

73 The Forestry Act provides for participatory forestry on customary land through the demarcation and management of village forest areas, which are demarcated and managed by VNRMCs pursuant to the conclusion of a forest management agreement with DoF (see GoM, 1997. *Forestry Act*, part V). Similar provisions for co-management of forest reserves are contained in the supplementary policy document *Community Based Forestry: A Supplement to the National Forest Policy*, which was concluded in 2001 to provide clarity on PFM requirements. No attempt to provide a legal or a regulatory basis for this provision has yet been made.

74 GoM, 1996. NFP §2.3.5.

5.2 Forest administration under the current legislation

5.2.1 Forest administration in central and local government

Subject to the provisions of Malawi's Constitution, all land and territories, including forest land, are vested in the republic.⁷⁵ The Forestry Act established the office of the director of forestry and granted it the authority to control, protect and manage forest reserves and protected forest areas. The Forestry Act provides the director with a mandate to, *inter alia*: (1) oversee the planning, implementation and oversight of activities to conduct and maintain forest inventories; (2) promote participatory forestry; (3) coordinate forestry-related activities; and (4) manage and control forest reserves and forest protected areas.

Malawi's National Decentralization Policy (1998) devolved administrative and political authority to the district government level, integrated government agencies at the district and local levels into one administrative unit, and promoted popular participation in governance and decision-making. The overall goal of the National Decentralization Policy was to create a "democratic environment and institutions in Malawi for governance and development at the local level which will facilitate the participation of the grassroots in decision-making", eliminate dual administrations, improve public service efficacy and efficiency, and promote accountability and good governance at the local level.⁷⁶

The Local Government Act (1998) created 28 districts, each governed by a district council headed by a district commissioner. A district council is comprised of elected ward councillors, traditional authorities and sub-traditional authorities from the local government area, members of Parliament from constituencies in the district, and five non-voting members who are appointed by the elected members to represent special interests from within the district.⁷⁷ District councils are charged with making policies, promoting economic development through the creation and implementation of district development plans, mobilizing resources for the development of the district, and making by-laws for good governance at the district level.⁷⁸

District commissioners are guided on technical matters by district executive committees (DECs), which are comprised of technical representatives from the district councils, sectoral district-level departments and civil society organizations. The district environment subcommittees (DESCs), which include representatives from district forestry offices, are charged with creating district environmental action plans, providing technical advice to the relevant district council, raising awareness on environmental issues, and building community capacity to effectively integrate natural resource issues in local development planning.

Malawi is also home to a system of customary/traditional authorities who are integrated into local resource governance through their role on area and village development committees. Area development committees (ADCs) are comprised of the traditional authority (chief), village headpersons, sub-traditional authorities, members of Parliament, councillors and district council representatives. At the level of a group village headperson, village development committees (VDCs) are responsible for organizing meetings to address village-level resource issues and for leading environmental action planning. They coordinate resource management projects with the relevant ADC and liaise with the community. They are nominally charged with facilitating projects at the village level and are meant to mobilize community resources for such projects.

As outlined above, integrated development planning and oversight, including natural resource management, is meant to happen at the district level and below, at least on paper. However, consultations with

⁷⁵ GoM. 2006. *Constitution of the Republic of Malawi*, art. 207.

⁷⁶ GoM. 1998. *National Decentralization Policy*.

⁷⁷ GoM. 1998. *Local Government Act*, part II (5).

⁷⁸ GoM. 1998. *Local Government Act*, part II (6).

district commissioners in Mwanza and Mulanje Districts revealed that the integration of forestry management into district administration has been very minimal in practice. The reasons cited included the fact that while forestry staff members at the district level are supposed to report to the district councils, in practice they still report to the director of forestry. In addition, multiple stakeholders at the district level cited the limited resources and capacity of forest officers, stating that much of the real decision-making and oversight for forest management has remained at the central level. This schism between what is on paper and what is happening in practice has implications for forest tenure, as the local priorities for the development and conservation of forest land are not always reflected in centralized decision-making. While customary land allocation remains the remit of traditional authorities, forest use and management is still very much a centralized system. As discussed below, this has contributed to challenges in implementing PFM schemes at the community level, undermined effective enforcement of the forest tenure and protection requirements, created confusion with respect to the legal mandate of traditional authorities over forest management, and generally resulted in a disjointed approach, one that is not able to integrate forestry, land use management and development planning.

5.2.2 Traditional authorities

The office of a traditional authority, or a chief, has its source in and derives its authority from customary law, under which the office is inheritable. The Chiefs Act (1967) gives the president the authority to appoint chiefs, but it is silent on the specific powers and functions of the chiefs, referring in broad language to their authority over customary law, the preservation of peace and the promotion of development and welfare in their communities. The Chiefs Act established that chieftaincies are hereditary and hierarchical. The highest level is either the paramount chief or, for groups without a paramount chief, the traditional authority.⁷⁹ There are many traditional authorities within each ethno-linguistic group and they cover all parts of the country. Below each traditional authority are sub-traditional authorities, group village headpersons and village headpersons. All villages have a village headperson who takes the name of his/her village on assuming the chieftaincy, and several villages are grouped under one group village headperson. The Chiefs Act recognized group village headpersons and village headpersons, but only paramount chiefs, traditional authorities and sub-traditional authorities were given the title of chief under the legislation.⁸⁰ Colloquially, Malawians refer to all of these traditional leaders as “chiefs.”⁸¹ Although chiefs are hereditary, with senior members of the leading lineage choosing new chiefs, the Chiefs Act gives the Office of the President the authority to approve (or decline) new chiefs and to create new chieftaincies and senior traditional authorities.

Traditional authorities perform important functions relating to land and forest resources. Pursuant to the Land Act (1965), traditional authorities are responsible for allocating customary land. Under the Forestry Act (1997), they are responsible for working with DoF to set aside VFAs for management and use by VNRMCs. Traditional authorities have historically been the decision-making authorities at the local level with respect to land and natural resources and they are responsible for dispute resolution on such matters. Where this authority is exercised in the interest of the community, it has often resulted in the effective protection of forest resources.⁸² In other cases, however, there have been allegations that traditional authorities have been profiting from renting or selling customary forest land without consulting or sharing the benefits with their communities.

⁷⁹ Cammack, Kanyongolo & O’Neil, 2009 (available here).

⁸⁰ Cammack, Kanyongolo & O’Neil, 2009.

⁸¹ Cammack, Kanyongolo & O’Neil, 2009.

⁸² A number of interviewees and participants in the inception workshop confirmed this and provided specific examples of communities where successful VFAs were attributable at least in part to the traditional authority’s involvement in the protection and management of the VFA.

It should also be noted that traditional leaders, mainly comprising village headpersons, are often well placed to ensure that effective community-based forest management takes place. During our consultations, many stakeholders noted that if the relevant traditional authority is empowered and respected, s/he can use the authority to convene community members, foster active participation in forest management and ensure compliance with forest management and other resource-related rules. This includes VNRMC-formulated rules. However, in some areas where projects have used village headpersons as the intermediaries between the project and the people, experience has shown that village headpersons do not always pass information to the community. There were also cases noted of village headpersons accepting bribes and participating in or consenting to illegal activities such as encroachment, timber sawing and charcoal production. It is therefore important to ensure that a balance is struck between promoting increased accountability and transparency of the activities and decision-making of traditional authorities on the one hand, and leveraging the legitimate authority they yield on the other. Some increased accountability for land transactions is embedded in the Customary Land Act (2016), including the creation of customary land committees with elected community members to oversee land allocation, delineation and recording. To strike a balance, group village headpersons will act as chairs of these committees. It remains to be seen whether this will unduly influence the decision-making of the committees or, as hoped, provide the necessary legitimacy for the committees to succeed. Additional accountability measures include reporting requirements and a nested system of land courts for appealing land allocation decisions.

5.3 Participatory forest management and forest tenure

More than three decades of implementing PFM approaches worldwide have shown that, on balance, forests under community ownership and management have better ecological outcomes than state-managed forests.⁸³ Livelihood outcomes are also generally more positive under community ownership, but the correlation is less definitive.⁸⁴

Despite the clear policy to decentralize and engage communities in forest management, the majority of forest communities in Malawi still lack formal ownership rights or even secure use and access rights to their forest land.⁸⁵ The demonstrated positive correlation between the successful decentralization of forest management and sustainable ecological outcomes implies that REDD+ initiatives in Malawi would benefit from continued efforts to elucidate how the local institutional and management architecture for community-based forest management can be improved and nested in national REDD+ governance structures. Moreover, for effective and equitable implementation of REDD+ at the local level, it will be important to understand where and how PFM has succeeded and what challenges need to be addressed.

While REDD+ may present a potential incentive for governments to recentralize forest management to control and maintain access to results-based payments, this would require a major reversal of national policy in Malawi. Conversely, REDD+ could provide Malawi with the financial and political resources necessary to support appropriate tenure and institutional/decentralization reforms.⁸⁶

Participatory forest management arrangements will likely form the basis for many project-level REDD+ initiatives in Malawi, as has been the case with the one active REDD+ initiative in Malawi – the Kulera Landscape REDD+ Programme. Communities will also be integrated into national REDD+ activities where they will be actively engaged in forest management on customary land and in co-management on forest reserves. As noted earlier, between 65–75 percent of land in Malawi is classified as customary land. Thus,

83 Cotula & Mayers, 2009.

84 Cotula & Mayers, 2009.

85 Cotula & Mayers, 2009.

86 Cotula & Mayers, 2009.

outside of forest reserves, most remaining intact forests are on customary land. Tenure over these forests will therefore dictate who will be involved in and who should benefit from REDD+ activities.

It has been increasingly recognized that communities surrounding forest reserves must be able to share in the management and use of the forest resources on which they depend. This is not just a question of having historical rights to the forests and their resources, but also a practical matter of preventing the continuation of illegal encroachment into reserves both by the communities participating in the co-management scheme and by “outsiders”.⁸⁷ In December 2015, the assessment team visited two sites of the Kulera Landscape REDD+ Programme to learn about the programme’s PFM experience and whether the benefits that have accrued to the local communities have resulted in improved forest and wildlife management. The assessment team found that illegal activities, particularly poaching, timber sawing and bamboo harvesting, have decreased in all three Kulera project areas as a result of community involvement in forest management. The team also found that the natural resource committees established under the project continue to be involved in patrolling the five-kilometre boundary radius around the protected areas and reporting offenses to law enforcement personnel. The overall findings of the assessment visit to the Kulera Landscape REDD+ Programme resulted in a comprehensive case study, which is found in Annex D to this report.

Lessons from other REDD+ countries – Leveraging REDD+ to formalize customary forest tenure in Cambodia

Similarly to Malawi, customary forest regimes are widespread in Cambodia. In order to create effective incentives for the long-term protection of forest resources, a pilot REDD+ project in the Seima Protection Forest leveraged its resources to stimulate improvements in tenure and forest access rights by formalizing access and use rights and demarcating use zones within the project area. The project built on existing management structures and concluded “community agreements” with each participating community. The agreements clarified carbon ownership rights and committed the communities to respect and implement the relevant legislation, cooperate with the relevant government agencies to develop resource management plans, work with the forest authority to identify livelihood options that reduce deforestation, and assist in protecting against increased deforestation outside the project area. Extensive consultations were undertaken in the development of the community agreements, and these raised awareness of both the responsibilities and the benefits entailed in engaging in the project. Despite the lack of formal legal mechanisms for strengthening forest tenure, this process has built confidence among the participating communities. Critically, the benefits so far have been focused on the protection of livelihood assets rather than on monetary payments.

In Malawi, where land legislation has been stalled for over a decade, undertaking a similar, consultative process to develop PFM agreements that assign clear tenure rights in REDD+ projects could simultaneously incentivize more sustainable forest use and management while helping to clarify the use and management rights. This could, in turn, facilitate more effective implementation of the land and forest legislative reforms.

5.3.1 Participatory forest management structures under the Forestry Act

At the community or village level, the Forestry Act (1997) designated VNRMCS as the institutional mechanism for managing village forest areas (VFAs) – areas of customary land delineated by a village headperson in consultation with the director of forestry (or a district forestry officer) for the purposes of “managing and utilizing” a forested area in a village.⁸⁸ There is no further clarification in the act on the specific aspects of forest tenure that accompany the conclusion of a forest management agreement (FMA), which has led to a wide variety of tenure arrangements across different FMAs. This lack of clarity and consistency could

⁸⁷ Instances of non-compliance by block management committee members as well as encroachment by “outsiders” were noted by the individuals interviewed for this assessment, and they were also documented by the USAID-supported PERFORM project. See PERFORM, 2016.

⁸⁸ GoM. 1997. *Forestry Act*, §31.

undermine REDD+ efforts on customary forest land, making it difficult to determine who is ultimately responsible for maintaining carbon stocks and who is eligible to participate in the benefit sharing schemes.

As noted in section 5.1, VFAs were introduced following independence as a way of enabling communities to establish and maintain their own supplies of fuelwood and timber. Over time, the move towards a more centralized approach to forest management has resulted in a significant decrease of these areas.⁸⁹ The provision for VNRMCs in the Forestry Act was meant to promote the expansion of VFAs as the main source of fuel and timber for communities, and thus prevent further encroachment into government forest reserves. Despite this provision, tenure over such forest areas has remained in the hands of the state but under the supervision of traditional authorities.

A community elects a VNRMC for the purpose of managing and utilizing a VFA pursuant to the terms of an FMA, which is concluded between the relevant VNRMC and DoF. There are no limitations to the duration of such agreements. Under the Forestry Act, the director of forestry “may” enter into such management agreements to specify: (1) the nature of forestry practices to be followed; (2) the type and manner of assistance to be provided by DoF; (3) the provision for the use and disposition of revenues; (4) the allocation of land to individuals and families for afforestation; and (5) the formation of a VNRMC for the purpose of managing and utilizing the relevant VFA. There is a lack of legal clarity on whether a VNRMC can exist without a VFA, as well as whether VNRMCs can be formed without the conclusion of a management agreement. As noted above, there are no specific provisions defining the tenure rights to be devolved onto a VNRMC (if any), nor the role and the rights of the relevant traditional authority once a VNRMC is established. Any VFA without a management agreement falls under the authority of DoF.

Most VFAs and VNRMCs in the districts visited for this assessment have not completed forest management plans nor concluded negotiations on their forest management agreements. Stakeholders stressed that the process of formulating forest management plans is too complex for the local communities to navigate. In most instances, where plans or agreements were concluded, it was done through external support – mainly under the EU-funded Improved Forest Management for Sustainable Livelihoods Programme (IFMSLP), which ran in two phases from 2005–2015. Since the end of IFMSLP, many of the institutions established with the support of this programme have been languishing for a lack of capacity and funding. The result has been a resurgence of illegal activities.

A forest management agreement can be terminated by either party for failure to perform the obligations set out in the agreement. While there has not been sufficient experience with implementation to be able to say this definitively, this provision appears to undermine the security of the management or the use rights granted under a management agreement, as the Forestry Act provides no criteria or procedural guidance on how to make a decision to revoke an agreement. This lack of detail also makes it extremely difficult to hold officials accountable for their termination decisions. While the Forestry Act provides the right to appeal a decision to cancel a management agreement to the High Court, access to courts is prohibitively expensive for most Malawians. Consequently, the act does not provide a meaningful recourse for upholding forest tenure rights.

The other type of PFM envisaged in the Forestry Act is co-management of forest reserves. The act envisions co-management as a sharing of the rights and responsibilities between the government and “other parties”, in most cases the communities adjacent to forest reserves. Forest reserve management plans are prepared by DoF technical staff and include the identification and mapping of zones that would be suitable for the productive management of indigenous forests or the establishment of plantations under a co-management regime. Community-based committees are elected by the stakeholders of each

⁸⁹ Kamoto, Dorward & Shepherd, 2008 (available here).

management “block” within a reserve. Similarly to VNRMCs, these block management committees (BMCs) represent the interests of the community – they are meant to be accountable to the community and take the lead in forest planning, management and administration. A block management committee functions as a subcommittee to a village development committee and works on the basis of a constitution that outlines the committee’s objectives and responsibilities. A local forest management board (LFMB) is elected to monitor, coordinate and manage conflicts among blocks throughout a reserve. The local boards are composed of elected reserve-wide community representatives, appointed government agency representatives and private citizens, and they operate at the district level. These co-management institutions qualify as “communities” for the purpose of concluding a management plan with DoF, but they have no further basis in legislation. The details of their formation and their management procedures are found only in government-endorsed guidelines that are not legally enforceable.

During the implementation of IFMSLP, a slightly different institutional structure was introduced for PFM. Instead of VNRMCs, in some areas IFMSLP constituted more targeted local forestry organizations (LFOs) that were focused solely on forestry issues. The DoF staff consulted for this assessment indicated that the establishment of LFOs was based on section 5 of the Forestry (Community Participation) Rules (2001),⁹⁰ which states that communities may “establish such committees as the community may deem appropriate.” Section 7 of the forestry rules further allows that communities may work with the director of forestry to establish a management plan for the purpose of ensuring the sustainable management, conservation and utilization of a forest. The local forest organizations are thus treated as having the same legal status as VNRMCs once a management plan has been completed and signed. However, as already noted, the stakeholders consulted for this assessment have indicated that some of these institutions have failed to maintain their momentum after the end of IFMSLP support.

Similarly, a tenure assessment in the Perekezi Forest Reserve undertaken by the USAID-supported PERFORM project has found that many stakeholders believe that co-management is failing, citing the absence of DoF staff to assist in implementation and enforcement as one of the primary causes of forest degradation. The communities have expressed concerns that the responsibility for managing community forests and forest reserves was assigned to them without effective capacity building and role definition. Indeed, the introduction of co-management to the communities neighbouring the Perekezi Forest Reserve was perceived as a “hurried, incomplete process largely imposed on communities by the Department of Forestry.”⁹¹ Staff at DoF agreed that the process for developing management plans was rushed and often not completely understood even by the staff members themselves. More critically, DoF staff members have expressed the feeling that it was a donor-driven process and that ongoing capacity building for the communities in question has largely been absent. In the Perekezi Forest Reserve this was highlighted by the fact that most BMCs did not have copies of their co-management plans and that the broader community had a low level of understanding of the expectations of the committees. Consequently, community members were not well equipped to hold the committees accountable to the fulfilment of their duties.

Improved implementation and sustainability of PFM could be a key mechanism for supporting REDD+ activities at the local level. A critical aspect of this must be a clear statement of how forest tenure can be devolved to the communities that enter into management agreements, whether for co-management around forest reserves or community-based management in village forest areas. This is particularly important in light of the new land legislation, which proposes to restructure the management of customary lands but makes no provisions for the management of community resources during or following these reforms.

90 GoM. 2001. *Forestry (Community Participation) Rules*.

91 PERFORM, 2016.

5.3.2 Participatory forest management: Guidance and standards

Broadly speaking, there is a lack of legal clarity related to: (1) when and how PFM (both co-management and community-based management) institutions should be created; (2) how these institutions must be constituted; (3) what procedural mechanisms and criteria should guide their formation; (4) the process and criteria for completing (or revoking) forest management plans and the required contents; (5) the duration of an agreement; and (6) what forest or tree tenure rights (if any) are devolved to individuals or communities through this process.

The Government of Malawi has recognized that these gaps have been a serious impediment to the implementation of effective participatory forest management and in 2001 it published a supplementary policy document called *Community Based Forestry: A Supplement to the National Forest Policy (1996)*.⁹² The supplementary policy document aims to clarify the roles and responsibilities related to PFM in Malawi, and to this end it states that “the shift of forest tenure from the government to the rural population is the core of the forestry policy,” and that this should happen through the establishment of community-based management institutions and through “sharing management and utilisation rights” with boundary communities in the case of forest reserves.⁹³ The supplementary policy document states clearly that it is government policy to have the transfer of tenure rights be the basis of PFM in Malawi. The supplement refers to the National Forestry Programme, which was designed to implement the Forestry Act, and its commitment to develop “clear mechanisms of ownership and control” of forests on customary land.⁹⁴ It further states that successful implementation of PFM will require “precise and unambiguous allocation of rights and responsibilities between the parties involved.”⁹⁵

The supplementary policy document envisions that on customary land communities will “achieve a full take-over of forest ownership and control, subject to the conclusion of legally binding agreements with the government.”⁹⁶ This will require a strategy of “clearly assigning forest ownership or user rights to the (customary) landholders, and...giving them the legal power to protect and sustain them.”⁹⁷ This transfer of ownership is conditional, however, and based on a legal agreement with the government that would enumerate the rights and responsibilities of both parties. According to Nyuma Mghogho, Deputy Director of Forestry, DoF would like to have VFAs cover as much unallocated customary land as possible and also to expand VFAs to include new areas for afforestation. Such allocation requires a clear legal statement, whether through an amendment to the Forestry Act or by drafting a new regulation, to ensure that tenure rights under PFM are clear and secure. Additionally, since the new land legislation lacks provisions for how customary forest resources should be governed as communities delineate and record land rights, a specific statement is needed in the Forestry Act or in a new regulation to provide clear guidance on how to address the governance of customary forests under a changing land tenure regime.

The supplementary policy document includes further details that could inform the drafting of an amendment or a regulation to clarify forest tenure under PFM. For example, the supplement states that communities are able to determine whether to maintain VFAs as communal resources or to allocate portions thereof for private/family use and management. It recommends a repeal of the existing requirement that management plans be approved by the minister, and that the “formal transfer of forest tenure and management

92 GoM. 2001. *Community Based Forestry: A Supplement to the National Forest Policy (1996)* (hereinafter GoM, 2001. CBF: Supplement).

93 GoM, 2001. CBF: Supplement §1.2.

94 GoM. 2001. *National Forestry Programme*, pg. 32.

95 GoM, 2001. CBF: Supplement §1.7.

96 GoM, 2001. CBF: Supplement §2.2.2.

97 GoM, 2001. CBF: Supplement §3.2.2.

responsibility” from the government to the community should be effected instead by the conclusion of an FMA.⁹⁸ Pursuant to FMAs, communities should be empowered to issue licences, including licences for commercial activities, and to retain revenues for as long as the activities are in line with their management plans. Ownership, as described in the supplement, “really means usufructuary (sic) right, or the right to use, because it is conditional on the community’s adherence to the terms of the agreement.”⁹⁹ To avoid confusion and to ensure that this process is seen as a prerequisite to the benefits of forest tenure rights, the supplement recommends amending section 34 of the Forestry Act, which provides broad tenure rights to trees. For customary forests that have not yet been designated as VFAs, or those for which FMAs have not been concluded, the government would maintain management authority. However, the government should be guided by the goal of eventually transferring management authority to the communities in order to ensure sustainable forest use and access by the communities in question.

For co-management of forest reserves, the policy supplement envisions a sharing of rights and responsibilities rather than a full transfer of tenure. As the overriding policy objective for these areas is to maintain and enhance forest cover, co-management arrangements are seen as a strategy for increasing forest productivity while reducing unsanctioned pressure from boundary communities. Currently, encroachment on reserves for fuelwood and charcoal is a major driver of deforestation and forest degradation. Co-management applies to specific “blocks” within a forest reserve, and is meant to be a freely negotiated partnership, not a mechanism for securing labour that is necessary for management. As forest reserve co-management plans need to be aligned with the overall management priorities and requirements of the relevant reserves, they are to be prepared by technical staff in consultation with the relevant communities. The policy supplement provides detailed guidance on what provisions should be included in co-management plans. When the policy supplement was released in 2001, it was envisioned that field guidelines would be developed from its recommendations and that capacity building and training initiatives would disseminate the practice and the requirements throughout Malawi.

While the policy supplement goes a long way towards clarifying the goals and, in particular, the tenure rights that should be devolved in PFM, it remains a policy document with no legal enforceability. Indeed, further efforts to provide guidance for effective PFM were concluded in 2005 under IFMSLP with the issuance of the Standards and Guidelines for Participatory Forestry Management in Malawi. Although the standards and guidelines document is an official DoF publication, few stakeholders interviewed for this assessment were aware of it. The failure to implement these existing standards and guidelines underscores the need to both streamline the PFM requirements (to make them more accessible) and to give the PFM requirements legal force by either amending the Forestry Act or drafting a new regulation.

5.3.3 Participatory forest management and tenure in practice: Lessons learnt and recommendations

A recent review of IFMSLP-supported participatory forest management concluded that “most of the areas visited show satisfactory levels of forest management and reasonably performing BMCs and VNRMCs, even though they usually do not follow their forest management plans to the letter.”¹⁰⁰ Despite this generally positive review, a number of challenges were identified with these PFM efforts, including: the complexity of the PFM model; inadequate training; inadequate partnership arrangements between state and non-state actors; doubtful sustainability given available resources; the need for capacity development; and the need for a greater role of women in decision-making structures.¹⁰¹ Indeed, other sources have indicated

98 GoM, 2001. CBF: Supplement §3.11.

99 GoM, 2001. CBF: Supplement §3.12.

100 Remme, Muyambi, Kamoto & Dengu, 2015.

101 PERFORM, 2016.

a much less positive assessment of how well PFM – both on customary lands and in co-management approaches – has fared. In interviews for this assessment, most government officials felt that the PFM process had stalled because it lacked technical and financial support and that the existing institutions were not functioning as expected.

5.3.3.1 Lack of a legal basis for participatory forest management

The senior DoF officials who were interviewed for this assessment emphasized that the lack of legal clarity and enforceability for implementing PFM is a critical barrier to ensuring that co-management and community-based management is undertaken effectively, consistently and accountably. Despite the existence of policy statements and the guidance developed under IFMSLP, most interviewees expressed concerns that these materials were not broadly disseminated or used to implement PFM. The failure to use these resources effectively was attributed to the overly complex nature of the guidance and the standards, the resources required to achieve the standards, and the lack of a legal basis for implementing them. Most stakeholders agreed that a streamlined version of the existing guidance is required and that it must be incorporated into the legislative framework.

With respect to tenure arrangements, the lack of a legal clarity for the transfer of use and management rights under PFM has led to contradictory practices in how these rights are allocated. An example is the Perekezi Forest Reserve, where co-management plans contain different versions of the nature of the rights conferred upon BMCs, even when BMCs are adjacent to each other. In one agreement, the government commits to the “transfer of management authority and ownership of forest resources”, while another agreement (in the same reserve) stipulates that the local forest organization is to engage in “co-management, in partnership with the Department of Forestry, of the forest resources.”¹⁰²

5.3.3.2 Lack of prioritization of resources and capacity building for participatory forest management

Multiple stakeholders raised the issue of the pervasive lack of financial and technical resources. Currently, most resources at DoF are being focused on improving enforcement in forest reserves and not on improving co-management, despite the fact that improvements in co-management would ultimately reduce the overall need for enforcement. The officials who were consulted for this assessment felt that the current priorities were not taking into account the need for a comprehensive approach to managing the issues of illegal encroachment, and that ultimately this will undermine the trust between the public and DoF.

Officials interviewed at both the central and district levels also pointed to the lack of capacity, both technical and financial – and particularly at the district level – to plan and implement PFM. One source from civil society indicated that the efforts to establish co-management in forest reserves have been rushed and not sufficiently participatory. It appeared that the district forestry officers involved in creating management plans perceived their jobs as ending once the agreements were drafted, often with little community input. This has undermined the implementation of the management agreements. Communities continue to perceive PFM as a government-driven process, and they have shown mixed levels of understanding of the process or of the contents of their agreements.

102 PERFORM, 2016.

These issues were highlighted in a recent study carried out for PERFORM, which assessed participatory forest governance in Malawi with a focus on the Perekezi and Liwonde Forest Reserves and the surrounding customary forest areas.¹⁰³ In particular, most of the stakeholders interviewed indicated that PFM is a resource intensive process requiring significant capacity building, and that this is not feasible outside of donor-supported initiatives like IFMSLP. This observation is illustrated by the fact that districts that received no support under IFMSLP have made little to no progress in establishing co-management agreements.

In communities that had received support, there appeared to be a low level of understanding of what the management plans contained beyond the basic restrictions. Many of the plans were highly technical and few efforts had been made to simplify technical language and to ensure that the communities were aware of the content, much less understood their role in supporting the implementation and enforcement of the plans. Most of the plans were not available in the local languages and several communities did not have a copy of their plans. This indicates the need for more effective stakeholder engagement in the overall process, as well as for simplified and streamlined requirements to make the process and the documents more accessible. The lack of legal provisions for such engagement is a major challenge, along with the need to train district forestry officers and district management staff in stakeholder engagement.

5.3.3.3 Poorly defined and inequitable benefit sharing

Even where the stakeholders felt that they understood the role and responsibilities embedded in their forest management plans, there were still many instances of non-compliance. This is closely tied to the fact that many community members viewed the benefits as an insufficient motivator for participating in and/or enforcing their agreements. There is currently no legislative requirement for benefit sharing arrangements, which has resulted in a variety of arrangements for community-based and co-management agreements. Many of the stakeholders consulted were dissatisfied with the level of benefits being generated and were unclear on how the arrangements had been concluded.

Another challenge was the lack of accountability of the PFM institutions. In some places the communities felt that they understood what was happening with their BMC or VNRMC, but in other areas these institutions were failing to report back to their communities about co-management activities and the revenues obtained. There was a perception in some communities that BMC or VNRMC members viewed themselves as being “in charge” and not necessarily accountable to the broader community. In one case there were reports that the committee members had not been elected but rather chosen by the village headperson from among the local elite.

A related issue is the question of which communities can benefit from co-management (and eventually from REDD+). With the historical pattern of people’s dispossession from their land, there are a number of communities that contest their exclusion based on their distance from a nearby forest reserve. This also presents issues for the communities that are involved, as they are called upon to exclude people with whom they may have kinship ties.

5.3.3.4 Enforcement

The community members and traditional leaders who were consulted for this assessment felt that they were not well equipped to undertake monitoring and enforcement activities, nor were they receiving sufficient support for enforcement from DoF. In many instances, enforcement activities require the communities to either enforce against their own neighbours or to face threats from powerful outside interests. In either case, it is very difficult for community members to proceed without more effective training and

103 PERFORM, 2016.

support, and without the involvement of the surrounding communities that are impacted by resource use restrictions. Other enforcement challenges are related to the lack of coordination among sectors and the failure to involve PFM institutions in the decision-making process. For example, the central government has issued licences in many forest reserves, but BMCs were unlikely to be consulted or even made aware of the licences. As one academic reported to the assessment team, “tenure involves the right to use as well as the right to exclude. In this case, block committees are not able to exclude in the face of powerful actors. What powers do they really have?”

Enforcement is a critical underpinning of REDD+ activities – a key mechanism for ensuring that emission reductions are sustained and leakages avoided. Consequently, building capacity in compliance assurance and enforcement for communities involved in PFM and for the relevant DoF staff will be a necessary prerequisite for successful REDD+ implementation.

5.3.3.5 Lack of clarity of the roles and responsibilities of traditional authorities

The role of traditional authorities in co-management and community-based management was raised as a critical issue by the stakeholders interviewed for this assessment. Under customary law, traditional leaders have the authority to allocate and oversee land and resource use, but the Forestry Act states that VFAs are to be managed by VNRMCs. The stakeholders indicated that where traditional authorities are involved in the VNRMC process (or even chair the committee), the process has been facilitated by customary authority. However, several examples of conflict were noted where traditional authorities felt that their authority had been undermined by VNRMCs or that the benefits accruing to VNRMCs were not legitimate.¹⁰⁴ The same appears to be true of co-management arrangements. In the Perekezi Forest Reserve, exclusion of the traditional authorities from BMCs and other co-management structures was noted as a significant challenge. A clearer definition of the role of traditional authorities in PFM processes and in the preparation and implementation of management plans is therefore required.

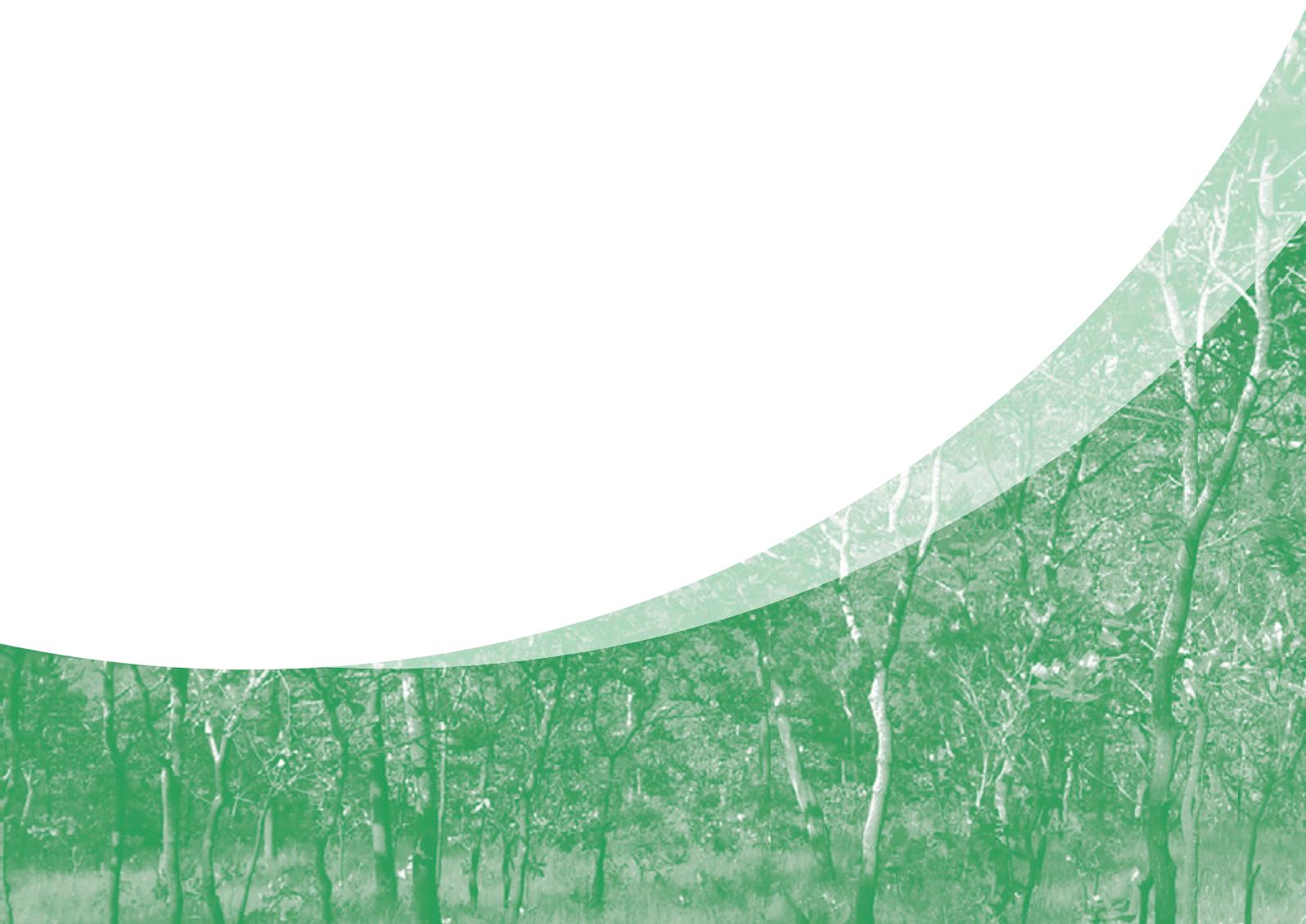
Broadly speaking, with respect to tenure security under PFM arrangements, communities feel that long-term resource rights do not exist under co-management schemes. Ownership is felt more strongly over VFAs, but this is dependent on the level of organization and the social capital within the community in question, and the role played by the relevant traditional authority. Clarification of the role of traditional authorities with respect to VNRMCs and BMCs, as well as under the new land legislation with respect to both land and natural resources (including forests), will be necessary to avoid conflicting claims of rights under REDD+.

5.3.3.6 Participatory forest management and land tenure

A key issue within the current legislative framework is the failure to connect forest tenure with land tenure and to clarify the relationship between the two. As noted earlier, section 34 of the Forestry Act states that “any person or community” who “protects a tree or forest, whether planted or naturally growing in any land which that person or community is entitled to use, shall acquire and retain ownership of the forest and the right to sustainable harvest and disposal of the produce.” Thus a usufruct right to tree tenure accompanies land tenure (whether freehold or usufruct), subject to the requirement that the person or community “protects” the tree or trees and that harvesting of any forest produce is “sustainable.” What constitutes protection or sustainable harvest is not defined in the Forestry Act.

104 PERFORM, 2016.

This vague definition appears to be in conflict with the provisions for PFM, which require that a management agreement form the basis of the transfer of forest tenure to a community, whether on customary land or in relation to co-management of a forest reserve. This lack of clarity is exacerbated by the failure to address resource rights in the new land legislation that governs property rights in Malawi.¹⁰⁵ If rights to access and use of trees are based on property rights (if not in PFM, then on private and allocated customary land), then it is critical to understand how the history of land administration in Malawi has contributed to the existing tenure insecurity and inequity. These issues are explored in the next section of this assessment report, and are followed by a discussion of the current reforms to land administration and how these may impact land and resource tenure clarity and security under REDD+.



6 Land policy and tenure in Malawi

6.1 Historical context

At independence in 1964, Malawi inherited a colonial system of land administration that divided land into three categories: (1) private freehold,¹⁰⁶ (2) public land, and (3) customary land. This system was upheld by the passage of the Land Act in 1965. Private land, often acquired in the colonial era through alienation or expropriation of customary land, was used to establish “estates” for large-scale production of export crops, including tea, sugar and tobacco. Given the importance of these crops for national trade revenue, estates continued to be favoured in agricultural policy, while Malawi’s smallholder farmers were restricted to producing crops for local consumption.¹⁰⁷ In addition to the large tracts of land that were set aside for estate plantations (including land held fallow for speculation), rapid population growth and the subsequent subdivision of cultivable plots within families has resulted in growing land pressure; estimates suggest that by the year 2000 more than 55 percent of smallholder farming families had less than one cultivable hectare.¹⁰⁸ Other estimates suggest that in 2012 over 2 million smallholder farmers were cultivating less than one hectare, while approximately 30,000 estates had an average holding of between 100-500 hectares.¹⁰⁹

The 1965 Land Act defined customary land as land that was held or occupied in accordance with the customary law prevalent in the area concerned. However, the Land Act gave powers over customary land to the minister responsible for land administration, thus bringing customary land under government control. In many cases, this led to the expropriation of customary land without compensation and created a great deal of mistrust of the government with respect to land transactions.¹¹⁰ Furthermore, instead of granting enforceable land rights to the majority of the country’s citizens, the Land Act granted only rights of use and occupancy over customary land.¹¹¹ This led to the creation of several forest reserves on customary land, the removal of people’s access rights to the forest resources on those reserves, and the placement of these resources under strict government control. By 1997, an estimated 1.2 million hectares of customary land had been transferred to leasehold tenure and had thus been permanently removed from the customary domain.¹¹²

An attempt at reform was made in 1967 with the passage of the Registered Land Act and the Customary Land (Development) Act, which attempted to secure customary land rights through a registration and titling process. However, the Customary Land (Development) Act specifically stated that it should be applied at the discretion of the minister responsible for land matters in situations where it was necessary to do so for better agricultural development. In practice, the implementation of the act (supported by the World Bank) was limited to Lilongwe West, and ultimately failed as a national reform process. Peters and Kambewa have noted that several factors contributed to the failure of this initiative, including: (1) the time it took to delineate and register titles, (2) issues with identifying legitimate owners, and (3) tendencies of chiefs and family heads to direct the process so that equitable allocation among claimants (especially

106 A freehold estate is an interest in real property (immovable or fixed) that grants ownership for an uncertain or unlimited duration (having no stated end) or for the life of the owner (estate for life). This is distinguished from leasehold, which reverts to the owner after the term of the lease.

107 USAID, 2010 (available here).

108 USAID, 2010.

109 Chinsinga, Chasukwa & Naess, 2012 (available here); Silungwe, 2009 (available here).

110 GoM. 2002. *Malawi National Land Policy*.

111 Holden, Kaarhus & Lunduka, 2006 (available here).

112 The 1965 Land Act states that upon the termination of a lease the land in question reverts not to customary land but becomes public land under the control of the government.

women) became difficult.¹¹³ The assumption that customary rights could be easily aligned with English legal concepts of property was fundamentally flawed and registration officials often proceeded with prejudice, which prevented the recognition of certain customary land rights and interests.¹¹⁴

Some of the key land challenges Malawi will face as it implements new land legislation include:

- **Residual effects of colonial land policies.** Land distribution remains skewed, with much of the most fertile land held by estates.
- **High population to land ratio.** Extremely high population density (although distributed unevenly across the country) has led to the fragmentation of land holdings; the average land holding is less than one hectare per household, which leads to food insecurity.
- **Ineffective use of leasehold estates.** Many of the estates contain unutilized land and were granted without verification of their suitability for the purposes for which they were granted.
- **Encroachment.** Leasehold estates, private land and government protected areas (including forest reserves) face high levels of encroachment. Many stakeholders believe that the communities that were dispossessed of their land and resources unfairly in the past have the right to encroach on these areas.
- **Corruption.** Instances were reported of some traditional authorities and government officials fraudulently transferring customary land and receiving illegal compensation, despite the growing number of near landless and landless families.
- **Tenure insecurity.** Increased pressure on land resources, gender-based inheritance systems and the lack of a legal basis for securing tenure on customary land have led to increasing insecurity of customary tenure.
- **Informal land markets.** Unregulated transactions leave people with no official means of protecting their investments in land, and enable powerful individuals to accumulate land.
- **Land degradation.** Poor agricultural practices, deforestation, catchment degradation and other unsustainable land use practices have resulted in severe soil deterioration.
- **Policy incoherence.** The lack of integration across sectors that affect land use (including agriculture, forestry and mining) has led to unsustainable practices and conflicts among users.

Following the democratic elections of 1994, the Government of Malawi (GoM) took the first steps toward addressing the increasingly inequitable land situation. The 1994 Constitution vested all land in Malawi in the state and granted all citizens the right to obtain property and to engage in economic activity. In order to create a more effective land administration and to address the broad range of issues related to land inequity, the Presidential Commission of Inquiry on Land Reform was formed to establish the principles for a new land policy. The commission's findings were used as the basis for the first Malawi National Land Policy, which was adopted in 2002.

In 2003, a special law commission was formed to draft a new land law to facilitate the implementation of the new land policy. A draft land bill was presented to the National Assembly but was withdrawn in 2007. Subsequent efforts to amend the draft legislation and to create an enabling land administration have finally culminated in the recent passage of three pieces of legislation: the Land Act (2016), the Land Survey Act (2016) and the Customary Land Act (2016).¹¹⁵

113 Peters & Kambewa, 2007 (available here).

114 Holden, Kaarhus & Lunduka, 2006 (available here).

115 Act No. 16 of 2016 (The Land Act); Act No. 18 of 2016 (The Land Survey Act); and Act No. 19 of 2016 (The Customary Land Act).

6.2 Land and tenure classification

As described in the previous section, the 1965 Land Act divided land into three categories: public, private and customary.

Public land is all land that is occupied, used or acquired by the government, including any land reverting from freehold or leasehold estates. This is an important point, as leasehold estates created from customary land do not revert to customary land at the end of the lease term, but become public land. Thus, all of the land historically expropriated for leasehold estates has now been permanently removed from customary ownership. Public land includes forest reserves, national parks and conservation and historical areas. Public land is vested in perpetuity in the president as the trustee for the people of Malawi. Between 15–20 percent of land in Malawi is classified as public land.¹¹⁶

Private land is land owned, held or occupied under a freehold title, a leasehold or a certificate of claim, or land registered as private land under the Registered Land Act of 1967. According to the Malawi National Land Policy, land registered as private land under the Registered Land Act includes privately owned freehold land and customary land registered by communities or individuals. Under the current legislation, the process of land registration converts customary land to private land. Between 10–15 percent of land in Malawi is classified as private land.¹¹⁷

Customary land is all land held, occupied or used by community members under customary law. As all land in Malawi, customary land is ultimately vested in the president in trust for the people of Malawi. Customary land is administered under the jurisdiction of customary traditional authorities. It may be held communally, or plots of land may be granted to individuals or families. Between 65–75 percent of land in Malawi is customary land.¹¹⁸

Currently, the share of forest land under each of the above categories is unknown. However, a forest inventory methodology is currently being piloted under the USAID-supported PERFORM project, and this should be scaled up to create a set of land use and land cover maps that would form the basis for setting the forest reference level for Malawi's REDD+ programme. These maps should be able to inform policymakers on the concentration of forests in each type of land holding, and this will be important for determining how to integrate forest tenure into the new Land Acts.

Tenure types in Malawi include freehold, leasehold and customary tenure. Private land can be held in freehold tenure, which carries rights of exclusivity, use and alienation. The 1965 Land Act and the 1967 Registered Land Act regulate the use and management of freehold land, most of which is held in the form of commercial agricultural plantations or estates.

Private, public and customary land can be leased and approximately 8 percent of Malawi's land is under leaseholds governed by the Land Act. Lease terms vary by use. For example, agricultural land can be held under 21-year leases, while leases for property and infrastructure can be on 22–99 year terms. The state has the authority to lease both customary and public land. As noted above, formal leases of customary land result in the conversion of customary land to public land at the conclusion of a lease. Under customary law, landholders may lease their land without causing the land to lose its character as customary land. An estimated 28 percent of the rural population is engaged in the land rental market as landlords or tenants; the majority of the rural population leases land under customary law.¹¹⁹

116 USAID, 2010 (available here).

117 USAID, 2010.

118 Chirwa, 2008 (available here); USAID, 2010 (link above).

119 Lunduka, Holden & Oygard, 2009; USAID, 2010 (link above).

Land held under customary tenure is land held in trust and administered by the relevant traditional authorities on behalf of their communities. Tenure on customary land may be held communally (unallocated customary land or land set aside for a specific communal purpose, including forestry) or it can be allocated to families or individuals. Once land is allocated, there is a presumption of the exclusive use in perpetuity, and the family or individual can lease the land or bequeath it, usually according to customary inheritance rules. The Malawi National Land Policy provides that the community retains a residual interest in the land, suggesting that the land cannot be sold outside the community. However, an informal land market has emerged (discussed below) that has resulted in such sales. Traditional leaders may reclaim and reallocate land if it is abandoned. Land that is not individualized (e.g. village forest areas or grazing land) is considered communal land, with customary law dictating rights of access.¹²⁰

Under the 1965 Land Act, forest tenure could be separated into five categories according to the forest area type and the legal status of the land on which the forest was found (see table 2 below). These categories continue to govern forest tenure, but they are likely to come under scrutiny pursuant to the new land legislation and the proposed process to amend the 1997 Forestry Act.

Table 2: Forest tenure

Forest area type	Legal status	Tenure rights
forest reserves / protected areas	public land	rights held by the state; co-management enables usufruct under management agreement; concessions to private entities under contract
village forest areas	customary land	customary tenure under control of traditional authority / oversight by Minister of Lands managed by VNRMC under management plan with DoF oversight
woodlots / trees on allocated customary land	customary land	allocated by traditional authority / inheritable
forests on unallocated customary land	customary land	held by traditional authority in trust
private woodlots	private land	landowner

6.3 Land rights and inheritance

Kinship has historically been the primary determinant of access to customary land in Malawi,¹²¹ where both matrilineal and patrilineal systems of inheritance prevail. The three largest ethnic groups – Chewa, Lomwe and Yao – are matrilineal and comprise approximately 64 percent of the population.¹²² These and other matrilineal groups are concentrated in the central and southern regions of the country, while in the northern region more than 90 percent of the villages are patrilineal.¹²³

120 Takane, 2007 (available here); Matchaya, 2009 (available here); Chirwa, 2008 (available here).

121 Kishindo, 2004.

122 Berge, Kambewa, Munthali & Wiig, 2014.

123 Berge, Kambewa, Munthali & Wiig, 2014.

Both traditional systems of inheritance have the potential to impact REDD+ implementation and, more specifically, the degree to which engagement in decision-making will be effective and lead to equitable sharing of benefits. Women have no land rights in patrilineal systems and will thus be legally subordinated to their male relatives in their ability to participate in decision-making related to REDD+, and potentially in receiving or controlling access to benefits from REDD+. While a similar situation would appear to prevail for men in matrilineal systems, the underlying culture in Malawi is one of male-dominated decision-making, particularly over issues involving finances. Thus, while in matrilineal areas there may be more of a legal basis for women's engagement in REDD+ decision-making and implementation, men still dominate local resource institutions and management processes.¹²⁴ Broadly speaking, REDD+ programmes will need to be structured to incentivize and support gender equity and inclusivity to avoid the further marginalization of women.

6.4 Sources of land tenure insecurity

6.4.1 Lack of transparency and accountability in land transactions

Customary land practices are well entrenched in Malawi, but they are quite varied by geography and many transactions are not formalized or recorded. While many stakeholders consulted for this assessment claimed that tenure on allocated customary land was generally secure, there were many cases cited where the lack of transparency and accountability in land transactions had resulted in rent seeking on the part of traditional authorities and local government officials. The Ministry of Local Government and Development has reported on the corruption of chiefs and on favouritism in land transactions, stating that “indigenous Malawians find difficulties to acquire land even in rural areas, while rich foreigners easily acquire land anywhere in the country because of corrupt local government officials and traditional leaders who accept bribes”.¹²⁵ Such corruption can take the form of petty bribery to settle intercommunal land disputes, or chiefs selling the same piece of land to more than one buyer.¹²⁶ There have also been cases reported of local authorities favouring relatives and accepting bribes for grants of land under large-scale, donor sponsored land reform projects.¹²⁷

The literature review carried out for this assessment found cases that involved traditional authorities “selling” customary land outside the community, allowing it to be converted to private land in the process.¹²⁸ Chinsinga and Chasukwa report that “there has been a rising incidence of ‘land grabs’ fostered by local elites through lease arrangements with multinationals”.¹²⁹ LandNet, a national NGO focused on land and tenure advocacy, highlighted a number of cases in which “non-consultative and non-participatory processes” were used to allocate land for sugarcane outgrower schemes.¹³⁰ Consultations with community members in two districts revealed that chiefs were consenting to land use changes without consulting with the customary land users or without first obtaining the consent of the community.¹³¹

While the literature points to many cases of corruption involving traditional authorities, there are many traditional authorities who have upheld their role as the custodians of customary land and who have opposed corruption schemes. The stakeholders interviewed for this assessment have emphasized that

124 Lunduka, Holden & Oygard, 2009.

125 Hussein, 2005 (available here).

126 Chinsinga & Wren-Lewis, 2013 (available here).

127 Chinsinga, 2011.

128 Chinsinga, 2011; Chiwanda, 2016.

129 Chinsinga & Chasukwa, 2016.

130 Gausi & Mlaka, 2015 (available here).

131 Gausi & Mlaka, 2015.

traditional authorities are the critical stakeholders in land transactions. Indeed, as Peters and Kambewa point out, the role of traditional authorities in settling social conflicts among competing claims is quite complex and made more so by the increasing scarcity of available land.¹³² The Malawi National Land Policy (2002) acknowledges these issues openly and calls for improved mechanisms for accountability and transparency to ensure equitable and representative decision-making in relation to land allocation and management. The new provisions for increased accountability in customary land transactions through the land policy and the new land legislation are discussed in detail in section 7 of this report.

6.4.2 Gender and tenure insecurity

Tenure security in Malawi is impacted by gender dynamics at both the intra-household and community levels. As a result of the existing gender-based inheritance system, men experience tenure insecurity in matrilineal cultures and women in patrilineal cultures.¹³³ In particular, following the death of a spouse or a divorce, there are essentially no secure land rights for the non-lineage spouse.

Broadly speaking, however, women face much greater levels of discrimination and disempowerment in tenure security than men, because even in matrilineal cultures men are regarded as the decision-makers in matters involving the use of/investment in land.¹³⁴ As an example, in national surveys only one out of five married women reported having control over household purchasing decisions for larger purchases, and only one in three for daily purchases.¹³⁵ This carries over into land transactions, where men conduct the majority of rentals and sales of land and crops and often register land in their name, even where women have custodial ownership under customary law.¹³⁶

Despite GoM's adoption of constitutional and legal reforms addressing gender-based discrimination, gender equity in Malawi faces numerous challenges. With respect to land rights, in 2011 the Parliament passed the Deceased Estates (Wills, Inheritance and Protection) Act, which provides widows and daughters equal inheritance rights and addresses the issue of widows being denied their inheritance upon the death of a spouse. However, implementation of this law has been difficult in the face of contradicting and long-standing cultural inheritance practices,¹³⁷ as customary law maintains many patriarchal cultural values. In addition, many women – particularly rural women – do not know their legal rights, nor do they have the capacity or resources to access the legal services that would enable them to uphold their rights.¹³⁸

The situation is exacerbated by the vast inequalities in education, literacy and access to wealth between men and women. While attendance in the first few years of schooling is high for both sexes, only 16 percent of girls complete primary school and just 7 percent complete secondary education.¹³⁹ Women also face many challenges in accessing financial services, including the need for collateral and the high interest rates charged by microfinance institutions.¹⁴⁰ In 2010, the government reported a gender gap in access to credit, with only 11 percent of women having access to credit in comparison to 14 percent of men.¹⁴¹

132 Peters & Kambewa, 2007 (available here).

133 Holden, Kaarhus & Lunduka, 2006 (available here).

134 OECD, 2014 (available here).

135 Mathiassen *et al.*, 2007 (available here).

136 Ngwira, 2003 (available here); Holden, Kaarhus & Lunduka, 2006 (link above).

137 FAO, 2011.

138 FAO, 2011.

139 UNICEF, n.d. (available here).

140 OECD, 2014 (link above).

141 OECD, 2014.

Taken together, these factors place Malawian women in a tenuous position when it comes to securing tenure rights over land and natural resources. With the proposed formalization of customary tenure under the new Customary Land Act, there is an urgent need to raise awareness of the implications for gender-based inheritance and the potential risks this may pose for women's access to land. It will be equally important to focus on increasing women's capacity to realize their rights and to negotiate the complexities of formalizing their claims to land and resources. This should include specific mechanisms to increase women's involvement in participatory forest management (PFM) and in REDD+ decision-making and implementation.

6.4.3 Non-lineage residents

Population growth and increasing land scarcity have led to severe fragmentation of land in Malawi. This has resulted in a decreasing authority of traditional authorities over land allocation and an increasing role of family heads in managing the growing number of land disputes among family members.¹⁴² This has had particularly severe consequences for tenure security of non-lineage members of the community, who are known as the *obwera*. These are individuals who married into a village and whose spouse has died or divorced them, or individuals or families who have moved into a village for other reasons. Such non-lineage residents – even those who have lived in the village for several years before their spouse's death or divorce – are increasingly targeted for eviction, as it is culturally more acceptable to evict an *obwera* than to create conflict with lineage family members.¹⁴³ Consequently, the *obwera* are often left landless and are forced to move to informal settlements, where they must rely on unsustainably harvested wood for fuel or to encroach onto forest reserves and/or estates to meet their energy and food security needs.

It is important to note, however, that while most land disputes rely on inheritance rules for their resolution, customary tenure systems are also strongly influenced by social relationships and social capital. With increasing land scarcity and conflicts among smallholders attempting to obtain and maintain land, a number of land dispute cases have been reported where social relationships outside the kinship structure have prevailed over kinship ties.¹⁴⁴ This nuance is important to note, as it points to the complexity and adaptability of the customary tenure system in Malawi. This has real implications for both the policy that promotes the formalization of tenure rights and for determining the "legitimate" rights holders for the purposes of REDD+. The process of formalizing customary rights will need to include mechanisms for determining legitimacy in an inclusive and transparent manner in order to prevent the exclusion of traditionally marginalized individuals and groups, particularly women.

6.4.4 Land markets

As land has become increasingly scarce, an informal, unregulated market for both rentals and sales of land has emerged.¹⁴⁵ In a study of six districts, 28 percent of households were found to be involved in the land rental market.¹⁴⁶ While to some extent the land rental market is enabling land-poor residents to acquire plots for farming, the lack of regulation leaves them open to unfair pricing and dispossession. This appears to be the situation in the majority of cases where tenure insecurity has led to rentals.¹⁴⁷ In other cases "landlords" are cash poor individuals who use the rental market to supplement their income and to build up a safety net for an emergency. There is evidence that in matrilineal areas men use the rental market to

142 Kishindo, 2010.

143 Kishindo, 2010.

144 Takane, 2007 (available here).

145 Peters & Kambewa, 2007 (available here).

146 Holden, Kaarhus & Lunduka, 2006 (available here).

147 Holden, Kaarhus & Lunduka, 2006.

gain land to cultivate and control, a practice that is likely to continue as land scarcity prevents them from holding onto plots in their natal villages.¹⁴⁸ Households in patrilineal areas are more likely than households in matrilineal areas to rent out land as well as rent land. In some instances, traditional authorities have nullified these arrangements on customary land, while in others they have taken compensation to sign off on transactions.¹⁴⁹ One study has also found that Malawian families that perceived their tenure to be secure, or perceived that they could strengthen their tenure through investment in land (such as the *obwera*), were more likely to plant and maintain trees.¹⁵⁰ This would suggest a low likelihood that people who rent land would invest in planting and/or maintaining trees on such land unless they believe that this would provide them some form of tenure security.

Both the Malawi National Land Policy (2002) and the Land Act (2016) propose the formalization of the land market. This is likely to lead to greater tenure security for individuals participating in the land market, particularly for sales of customary land that are currently illegal. However, if the reforms are to promote equitable and efficient land allocation, they will need to address the existing inequities in access to the land market, particularly for women. It will also be critical to understand how the land market will influence investments in land-based resources as well as participation in community-based forest management on customary land.

6.4.5 Cross-cutting governance issues

The tenure rights that relate to REDD+ depend not only on the specific policy, legal and institutional frameworks governing land and forests, but also on the broader governance frameworks that support transparent, legitimate and accountable decision-making, and provide accessible mechanisms for upholding and protecting such rights. Despite a supportive policy framework that is based on a broad consensus about the need for reforms, severe challenges remain for making the existing policies effective. Before the Land Act (2016) and the Customary Land Act (2016) were adopted, traditional authorities objected to the then draft legislation as they felt that the acts would weaken their administrative powers over customary land allocation and use. Additionally, civil society organizations raised objections to the acts on the basis that they: (1) did not protect the rights of women and other vulnerable groups, (2) continued to categorize unallocated customary land as “public”, and (3) failed to democratize land administration institutions.¹⁵¹ These objections were taken into account in the final drafting of the legislation, but they will continue to provide points of contention as the legislation is implemented and enforced.

The intractability of these issues is a symptom of the broader governance challenges facing the land and forestry sectors. The Democratic Governance Sector Strategy highlights the challenging governance context Malawi currently faces: the limited technical and financial capacity of government institutions; the weak stakeholder engagement in policy development and implementation; the overall weaknesses in policy coherence and implementation; and the need to strengthen the rule of law throughout the government sector.¹⁵² A targeted corruption risk assessment was recently completed in order to identify the specific risks that could present major governance obstacles to the effective implementation of REDD+ initiatives. Notably, land tenure insecurity was cited as a major underlying driver of illegal practices by communities. Furthermore, historical alienation from areas that communities perceive to be theirs acts as an incentive to encroach on forest reserve land. Co-management practices are beginning to address this issue, but even where these are in place, illegal deforestation activities are very entrenched. Poor

148 Holden, Kaarhus and Lunduka, 2006 (available here).

149 Holden, Kaarhus and Lunduka, 2006.

150 Matchaya, 2009 (available here).

151 Matchaya, 2009 (link above); CEPA, 2013.

152 GoM. 2012. *Democratic Governance Sector Strategy 2013-2017*.

boundary demarcation and the lack of knowledge of reserve boundaries on the part of forestry officers have also contributed to this problem, as has the pervasive lack of functional management plans for forest reserves.

The remaining findings of the corruption risk assessment focus on the drivers of deforestation and forest degradation, and they are informative of the broader governance environment in which tenure reforms for REDD+ will be taking place. Many of the ensuing illegal activities are major obstacles for tenure security, in particular for communities that are governed by co-management arrangements. The challenges identified include bribery of officials, weak enforcement capacity, lack of effective legal provisions for enforcement and political interference.

A critical enabling factor for corruption in the forest sector and beyond is the failure of the existing legislation to provide criteria for official decision-making, stakeholder engagement and other procedural mechanisms that would ensure transparency and accountability in forest and land governance. Section 7 of this report highlights where this is specifically applicable in the new Land Acts. Within the forestry sector there are many examples of the lack of stakeholder engagement and the lack of public scrutiny in critical decision-making, including when licenses are issued or revoked, when concessions are issued or revoked, or when village forest areas (VFAs) and forest management agreements (FMAs) are established or revoked. The lack of specific procedural requirements and criteria for decision-making, along with the failure to make any of this information public, creates an environment in which officials can act without accountability. There is an urgent need to elaborate on the procedural mechanisms for decision-making on key issues (e.g. permitting, rulemaking, creation of management agreements) either at the statutory or the regulatory level. Moreover, to ensure that officials are held accountable to the criteria for decision-making established in the legal frameworks, information about procedural mechanisms should be made public and the decision-making processes should be subject to specific stakeholder and public engagement requirements.

6.4.6 Ineffective and inequitable dispute resolution

The enforcement of tenure rights requires dispute resolution mechanisms that are accessible, fair and accountable. The Malawian legal system currently provides two avenues for seeking redress on land-related claims: the formal court system and the customary dispute resolution system. Traditional courts were formally abolished in 1994, but the constitution made a provision for the Parliament to create “traditional or local courts”, provided that their jurisdiction was limited to civil cases in customary law and minor common law and statutory offenses. The abolishment of the traditional courts has made it extremely difficult for the majority of Malawians to access the legal system, as the formal judicial system is costly and often a long distance away. As a response, the Local Courts Act (2011) provided for the creation of local courts, but excluded from their jurisdiction cases related to title and ownership of customary land as well as cases related to property inheritance.¹⁵³ This was largely due to the expectation that the new land legislation would be passed soon and that it would provide for a separate dispute resolution structure that would integrate customary and statutory courts. In the interim, traditional authorities have continued to play an important role in managing land disputes through the application of customary law.

The 2016 Customary Land Act, in line with the Malawi National Land Policy, stipulates the creation of customary land tribunals to be chaired by the traditional authority responsible for the relevant traditional land management area,¹⁵⁴ which will adjudicate disputes concerning customary land. The traditional

¹⁵³ Ubink, 2016.

¹⁵⁴ Traditional land management area is the area to be delimited under each traditional authority pursuant to the Customary Land Act. Customary administrative structures will be established within each traditional land management area to allocate and manage land, including customary estates.

authority will nominate six community members (including three women), who must be approved by the land commissioner (at the central government level) and appointed on the basis of their knowledge of customary land law and boundaries, their standing in the community, and their experience in handling social issues. Local government officials will not be eligible to participate. Decisions of the customary land tribunal will be appealable to the district land tribunal, which will also be established pursuant to the Customary Land Act. District land tribunals will be chaired by the district commissioner and their members will be appointed from among traditional authorities, citizens from the district with the relevant knowledge and expertise, and the district land registrar (another newly-created position). Appeals from the district level are to be made to the Central Land Settlement Board (see section 7.1), which shall be comprised of a presiding resident magistrate, three traditional authorities (one from each region of Malawi) and two other members with good standing in society, one of whom shall be a woman. Members of the Central Land Settlement Board are to be appointed by the land commissioner and approved by the minister in charge of lands.

In making decisions on land disputes, the tribunals are to apply the principles of objectivity, fairness and justice, and to give due consideration to, *inter alia*, the rights and obligations of the parties and the customary and statutory laws and traditional practices of the area. Notably, tribunal members must recuse themselves from any dispute in which they have a material interest.

At any point in the process, appeals can also be made directly to the High Court. This provides an interesting parallel avenue for conflict resolution and presents the potential for forum shopping. It will be important to keep careful records so that cases that pass between the land tribunals and the regular courts are in line with the new land legislation and respect and protect the rights of all parties. In particular, it will be important to further define the customary laws and practices being applied by the customary land tribunals, in order to ensure that they are applied consistently and to facilitate better accountability.

6.4.7 Lack of intersectoral coherence

The lack of coherence among the policies, planning requirements and decision-making processes in the sectors that have an impact on land is another factor that could undermine tenure clarity and security. Even where there is a broad commitment to align the sectors through existing policies, there are few concrete mechanisms for coordinating or requiring cross-sectoral consultation on planning and decision-making.

Additionally, the failure to enforce the existing provisions for consultation on critical decisions, such as decisions on awarding mining licenses in forest reserves, has negative impacts on the viability of co-management arrangements that were structured to transfer forest resource access and use rights to the relevant communities. For example, the Forestry Act stipulates that licenses are required for mining within forest reserves and protected areas, and there are intersectoral agreements between the commissioner for mines and minerals and the director of forestry that govern exploitation in reserves by private mining interests. Yet there is a proliferation of illegal mining in some forest reserves with little evidence of monitoring or enforcement of the applicable regulations. There is no joint monitoring between the Department of Forestry and the Department of Mining once a licence has been issued, and licences are issued centrally, often from Lilongwe. Block management committees (BMCs) and even the district forestry offices are often unaware of which mining operations are licenced and which are not.

While fees are added to large-scale mining operation licences to ensure reforestation once mines are closed, there is little enforcement of this provision, resulting in a pervasive lack of compliance. This pres-

ents a great challenge for potential REDD+ commitments, as communities (or even the government) are unable to effectively regulate mining and reforestation activities. Village natural resource management committees (VNRMCs) and BMCs are often not informed or consulted about mining activities within VFAs or on forest reserves, making it difficult for them to assert their management authority. In VFAs arrangements often appear to be made directly between the mining operator and the village headperson, bypassing the authority of the local VNRMC.¹⁵⁵ Once a mining company has been awarded a concession, VNRMCs view the land and its management as no longer under their purview, and they are thus challenged to hold mining companies accountable for environmental compliance. If not properly managed, this could be a source of a major conflict over resource tenure rights.

Another key issue is the lack of effective coordination measures for sectoral planning. The Environmental Management Act (1996) requires both national and district level environmental planning to ensure “integration of strategies and measures for the protection and management of the environment into plans and programmes for the social and economic development of Malawi.” Coordination across relevant sectors was envisioned under the act through the National Council for the Environment (NCE), which is comprised of all principal secretaries of the relevant government institutions as well as representatives of other public agencies and NGOs whose functions are related to the environment and natural resources management.¹⁵⁶ The council is meant to act as an advisory body to the minister responsible for the environment on the integration of environmental considerations into economic planning and development, as well as the harmonization of activities, plans and policies of all lead agencies.¹⁵⁷ Unfortunately, the stakeholders consulted for this assessment have consistently raised concerns that NCE has not performed as expected. Many feel that the main reason has been a lack of participation by senior officials in NCE proceedings. Junior officials have been sent to stand in for their senior counterparts, and the lack of consistency coupled with the inability of junior staff to make commitments or binding decisions has hampered the council’s effectiveness.

In response to this, the draft Environmental Management Bill (2016) has proposed to raise the political level of the coordination mechanism by establishing an independent environmental authority that would report directly to the Office of the President. There are specific articles in the proposed legislation requiring this new authority to draft guidance for line ministries and other “lead agencies” on how to align their policies, laws, regulations and decision-making processes. These new requirements could provide an opportunity for the Department of Forestry (DoF) to mainstream REDD+ into this new high-level forum and to raise the cross-sectoral implications and needs for coordination related to REDD+.

Even if the proposed environmental authority is successful in creating a coordination platform, there is still a major concern that neither of the two new Land Acts nor the Forestry Act provide any meaningful platform for integrating land-use and forestry planning and decision-making. The lack of legal clarity on customary forest tenure leaves open a space in which both illegal activities as well as legal but inequitable or unsustainable practices are allowed to continue. It will be critically important to REDD+ initiatives that the legal status of forest and tree tenure on various types of land is clarified and aligned with the existing and proposed legal requirements for land administration, physical planning and environmental (and other natural resource) planning and decision-making. This would need to take place through an amendment to the Forestry Act, or through enacting a new regulation to the existing act.

155 PERFORM, 2016.

156 GoM. 1996. *Environmental Management Act*, sec. 10.

157 GoM. 1996. *Environmental Management Act*, part III, sec. 12.

6.4.8 Poor enforcement

REDD+ payments will be conditional on the ability to avoid leakage (displacement of deforestation and forest degradation to areas outside of REDD+ project jurisdiction) and to ensure the permanence of emission reductions. This, in turn, will depend on Malawi's capacity to stem illegal encroachment and harvesting of government forests, monitor and enforce the terms of concession agreements, and ensure compliance with the provisions set up under FMAs on customary forest land and in forest reserves. Illegal encroachment and harvesting are also major obstacles to both the clarification and the security of legitimate forest tenure rights on customary forest land and in forest reserves, as communities are unable to exclude people who intrude on legitimate resource use and management arrangements.

From a legal perspective, there is a need to clarify the mandate and the process for enforcement and to identify a mechanism for setting penalties that are capable of deterring violations. Under the Forestry Act, forestry officers have a broad mandate and authority to inspect, seize and detain any forest products if they reasonably suspect that the products have been obtained or removed illegally.¹⁵⁸ However, there is a notable lack of procedural guidance on how to conduct inspections, how to properly file complaints against violators, and how to support prosecutors in developing the necessary evidentiary basis for winning forest cases in court. This not only makes the process vulnerable to corruption, but also undermines the effectiveness of the forestry officials who are trying to do their job. There is an urgent need to elaborate on the processes, to build the capacity of the relevant officials to effectively undertake the processes, and to make the information about violations and violators publicly available.

A persistent lack of resources, including both personnel and equipment, was cited by stakeholders as a major impediment to effective enforcement. Budgets at the district level were quoted as MK60-80,000 per month, which would barely cover fuel costs. This severe lack of resources hinders effective monitoring to detect violations and undermines deterrence, as most violators have little fear of being caught.

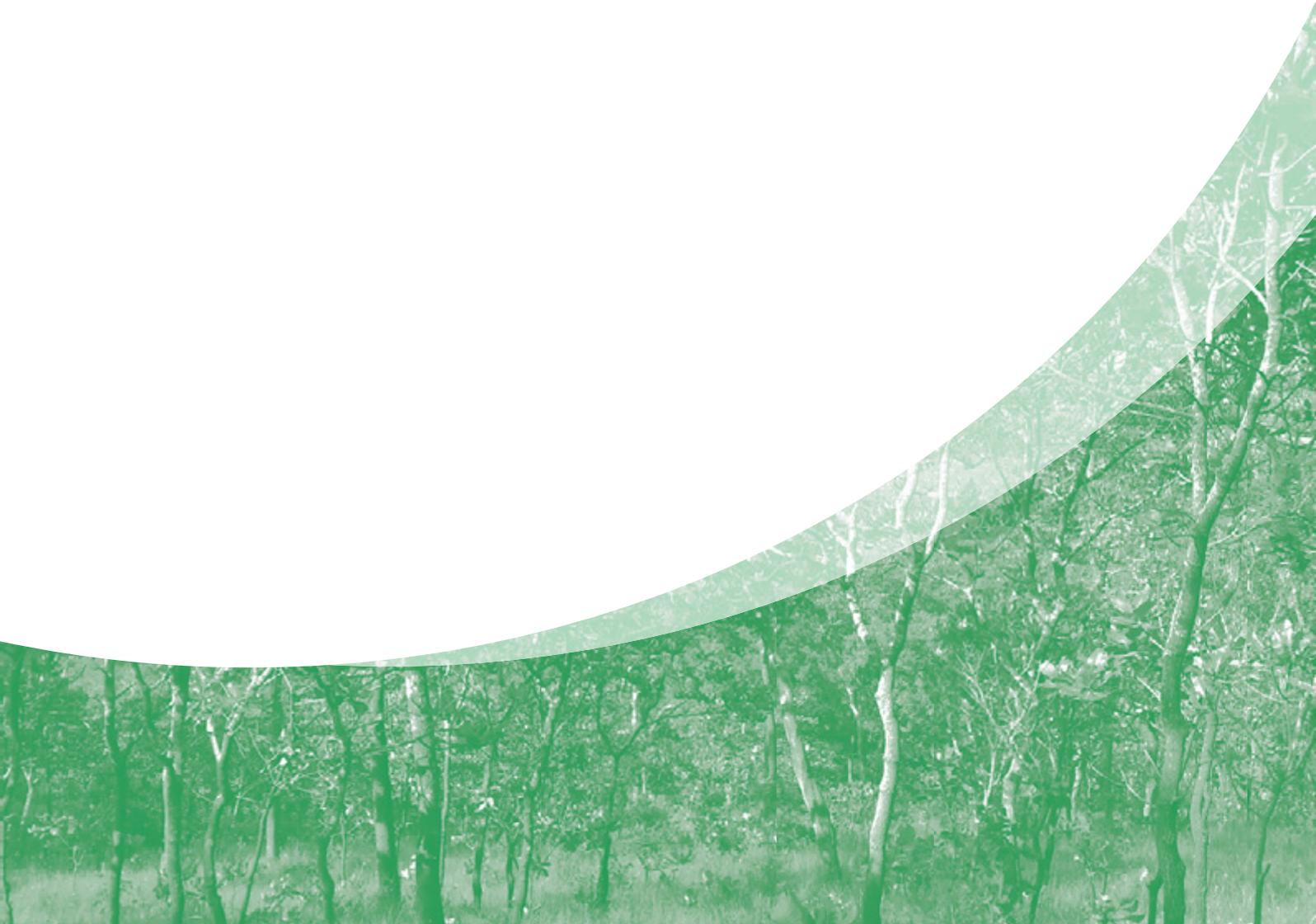
Another factor that both facilitates corruption and undermines effective enforcement is the lack of transparency. For example, the Forestry Act identifies no specific process for the issuance of permits, licences or concessions. The process is left to the discretion of the director of forestry, with no requirements for public scrutiny of the decisions made and no provisions for interested stakeholders (including tenure rights holders) to be consulted along the way. Under such circumstances it is extremely difficult to identify the criteria that were used for making permitting decisions, much less to hold the director accountable. These processes should be specifically elaborated either in the legislation or via a regulation, along with any relevant criteria on which officials should be basing their decisions. The processes should be made public and there should be required mechanisms for stakeholder consultation early enough in the decision-making process to enable the relevant stakeholders to make a meaningful impact. Finally, information on past decisions and all comments received should be publicly available. This would close the space in which officials are able to manipulate the system, and make them accountable to specific standards.

This same lack of transparency and accountability is cited in the Malawi National Land Policy as a critical impediment to equitable land transactions. As Malawi moves towards the delineation and registration of tenure under the new Land Acts, it will be critical that the procedural aspects of this process become open, accountable and subject to public scrutiny. The recent issues with "land grabbing" and other instances of closed-door transactions between traditional authorities and companies and/or donors highlight the need for effective oversight of the delineation and registration process, to ensure that it does not succumb to elite capture.

¹⁵⁸ GoM. 1997. *National Forestry Act*, art. 9.

Many of the community members interviewed for this assessment stated that the reason for their non-compliance with FMAs was their lack of understanding of their rights and duties under the agreements. None of the relevant agreements were available in local languages, and community participation in setting up and implementing the agreements varied greatly from one location to the next. This issue could be alleviated through a legal formalization of the process for setting up local forest organizations and concluding FMAs (or co-management agreements), so that both the communities and the forestry staff could come to the process on equal footing, make informed decisions about FMAs and their commitments, and be held accountable to those decisions.

Finally, it was noted that stakeholders had a generally low level of understanding of the law and the enforcement process. This impacts not only on forestry officers, but also on prosecutors, magistrates and High Court judges. Once the new provisions are in place, enforcement training and capacity building on forestry legislation and REDD+ issues will be necessary to ensure that the provisions can be implemented effectively.



7 Land sector reforms and tenure

7.1 Malawi National Land Policy

The Malawi National Land Policy (2002) recognizes the need to promote tenure reforms that: (1) guarantee security and instil confidence in land transactions without gender bias; (2) promote a decentralized and transparent land administration that can guarantee that existing rights to land (particularly customary land) are recognized, clarified and ultimately protected by law; and (3) enhance conservation and community management of local resources, and promote participatory management to enhance stewardship.¹⁵⁹ To achieve this, the policy sets as an overarching goal to “ensure tenure security and equitable access to land [and] facilitate the attainment of social harmony and broad based social and economic development through optimum and ecologically balanced use of land and land based resources.”

The policy highlights the need for clarity, security and equity of tenure, as well as the need for synergies in and integration of land use management and other natural resource management policies and practices, including forestry. It specifically sets out to develop coordination mechanisms among agencies working with land-based resources, requiring them to “perform their statutory duties in consonant (sic) with the policy objectives of the Ministry responsible for lands.”¹⁶⁰

The specific provisions in the Malawi National Land Policy that are relevant to REDD + and tenure include:

- recognition of customary rights in land through the creation of a new form of land holding called a “customary estate” that is registered and treated as a private right in land and enjoys equal protection under the law with other private land rights;
- delineation of traditional land management areas (TLMAs) within which traditional authorities have specific duties and obligations related to land allocation and management in concert with the proposed land administration at the local and district levels;
- legally enabling children to inherit land equally from their parents, regardless of whether the land is located in a traditionally matrilineal or patrilineal area;
- preventing abuses of the exercise of eminent domain by incorporating specific procedures and transparency requirements, as well as ensuring that compensation is based on the market value of the land and any improvements thereon;
- creation of a multitier land dispute resolution mechanism beginning in the traditional governance structure and ultimately appealable to the Central Land Settlement Board;
- mandatory urban and rural land use planning that addresses the use and management of natural resources and community land resources and is based on “agro-ecological” zoning to balance agricultural use with ecological needs for sustainability; and
- specifically encouraging the use of community forests and woodlots, the promotion of alternative energy sources to reduce dependence on fuelwood, and the support for participatory forest management (PFM) on customary and government land.

It has taken 15 years since the adoption of the Malawi National Land Policy to develop the necessary legislation and land administration. The Land Act (2016) and the Customary Land Act (2016) were recently enacted, but they have yet to be implemented. Their implementation will require significant resources and is likely to take place over a long period of time.

159 GoM. 2002. *Malawi National Land Policy*.

160 GoM. 2002. *Malawi National Land Policy*, sec. 5.2.1(b).

Learning from neighbours: Implementing tenure reforms in Zambia

Malawi and Zambia share both ecological and cultural attributes. As Zambia has progressed towards developing a national REDD+ programme, many of the same tenure challenges that Malawi faces have asserted themselves as obstacles to effective REDD+ implementation. In particular, there is a lack of legal recognition and definition of customary land and forest rights, and very little documentation available to mitigate the increasing conflicts arising over land.

There is land reform legislation under development in Zambia, but it remains in draft form. In the meantime, there is increasing pressure to commercialize land in Zambia and an accompanying desire to clarify and protect customary land rights. In response, USAID is piloting a systematic process to identify customary landholdings in four chiefdoms in the Eastern Province in the hope of creating a low-cost and scalable approach to the delineation and documentation of customary land rights as a necessary precursor to REDD+, among other things. The approach was tailored to the existing legislation, but it is flexible and allows for adaptation as new legal requirements and institutional frameworks evolve. The lessons learnt can be easily tailored to the Malawian context as Malawi begins to pilot a similar process through the EU-supported “Strengthening Land Governance Systems for Smallholder Farmers in Malawi” project, which had been postponed until the recent passage of the new land legislation.

Key lessons include:

- The process must work closely with communities and especially traditional leaders to define the scales at which rights should be delineated and registered (i.e. village level, household level).
- Mechanisms should be created for integrating data collected at the local and national levels (e.g. written records entered into national databases).
- The engagement of traditional leadership is critical, but it must be balanced with a broad engagement of community members and neighbouring communities to ensure a clear understanding of de facto and perceived boundaries and rights.
- Local stakeholders should be trained as surveyors, and there should be a focus on developing land administration capacity at the local level. Capacity building efforts should incorporate mentor-mentee relationships that can enable transfer of responsibilities over time.
- While iterative approaches to participatory mapping and documentation allow for conflict resolution and clarity on behalf of all stakeholders, there is a need to balance the benefits of an iterative approach with the costs of multiple visits to each site.
- It is critically important to support local institutions working on land governance, and to build on existing institutions where possible.
- Extensive outreach and education are critical as tools for informing communities, engaging them in the process, and managing their expectations.
- Certificates and local registries, while not legal documents, enable an understanding of the critical aspects of the process, including who is registered as the “owner”. They also enable the subsequent development of mechanisms to avoid exclusion of the rightful rights holders.
- The use of low-cost and open source technology enables consistent data collection formats. However, connectivity and cost remain a challenge to data collection.
- There is a need for the strategic involvement of civil society organizations to facilitate training, capacity building and engagement processes over the long-term.

Source: Somerville, M. *et al.*, “Documenting Customary Land Rights in Zambia: A Low-Cost Open Source Approach.”

7.2 Land Act

The Land Act (2016) and the Customary Land Act (2016) outline broad changes to the existing land administration that, if implemented, will have a number of impacts on forest tenure. The Land Act focuses on the establishment of new categories of land and on setting up a new Land Commission to oversee their administration.

Under the new Land Act, all land is vested in the Republic of Malawi as the trustee for the people of Malawi. The three categories of land set forth in the 1965 Land Act have been reduced to two: public and private. Public land is classified as either government land or unallocated customary land, and private land is freehold, leasehold or land held as a “customary estate”. As envisioned in the Malawi National Land Policy, customary estates are established under the act as new forms of tenure that consist of customary land that is owned, held or occupied as private land within a traditional land management area and is registered under the Registered Land Act as private land. The development of any land requires permission from a planning committee from the relevant jurisdiction.

The new Land Act notably lacks any principles to guide the allocation or reallocation of land and to prevent the concentration of land in any one sector or by specific stakeholders. The act focuses instead on the re-classification of land and the creation and operationalization of a revised land administration. There are no substantive provisions for land management, outside of the requirement to align planning with the relevant planning committee in order to effectuate the Malawi National Land Policy’s stipulation of the need to balance different land uses and to promote equitable access to land and land-based resources.

As noted above, customary land can fall under either of two categories of land. Unallocated, it is a subcategory of public land, which is defined as “land held in trust for the people of Malawi and managed by the government, a local government authority or a traditional authority.” This fails to clarify whether the government could reallocate land – or whether the land would maintain a different status – once delineated as a “traditional land management area.” If allocated as a customary estate, the land is granted all the attributes of private land, although radical title remains vested in the community as represented by the relevant traditional authority.

7.3 Customary Land Act

As noted in the introduction to section 7.2, the Customary Land Act (2016) includes broad changes to the existing land administration. Sections 7.3.1–7.3.5 highlight where the Customary Land Act provides specifically for achieving better equity and security of tenure, and where there are gaps that will need to be addressed in the implementation of the new legislation.

7.3.1 Delineation and administration of customary land

The Customary Land Act sets up a decentralized, nested institutional system for customary land administration. Traditional land management areas (TLMAs) are to be demarcated by the Land Commission in cooperation with traditional authorities and registered as falling within the jurisdiction of the relevant traditional authority.¹⁶¹ For each TLMA a customary land committee (CLC) is to be established at the level of the group village headperson, with the headperson acting as its chairperson and the rest of the members elected by the community. This is significant, as land allocation and management decisions have previously been solely the remit of traditional authorities, which has limited the accountability of

¹⁶¹ TLMA is defined under the Land Act (2016).

the process. Customary land committees, on the other hand, are legally required to act as trustees of customary land and must have regard to “the principle of sustainable development in the management of customary land and the relationship between land use, natural resources and the environment contiguous to the customary land.”¹⁶² In order to do this, committee members are meant to “consult with and take into account the views and, where it is so provided, comply with any decisions or orders of any public authority having jurisdiction over any matter in the area where the customary land is situated.” This should include the Department of Forestry (DoF) and the Environmental Affairs Department (EAD), as well as local government authorities.

Additionally, within each TLMA a land clerk is to be appointed to survey, map and carry out local land use planning in accordance with the Physical Planning Bill (2012), as well as to record and maintain a register of all land transactions within the TLMA and to provide technical advice to the relevant CLC.¹⁶³ It is thus envisioned that a national process of demarcation and planning will take place on all customary land when the Customary Land Act is implemented. Once this is completed, it will be possible to establish allocated customary land as a customary estate, providing more tenure security to the holders of the relevant rights pursuant to the law.

7.3.2 Individualization of tenure and community resources

Perhaps the most significant innovation of the Customary Land Act is the creation of a new form of tenure known as the customary estate, which can be granted to an individual, a family member or a partnership or a corporation, where the majority of shareholders must be Malawian citizens. Once granted, a customary estate is classified as private land under the Land Act, is of infinite duration and is inheritable and transmissible by will. If the state takes land under a customary estate for public purposes in accordance with the Lands Acquisition Act, compensation must be paid to the holder(s) of the estate. However, the Customary Land Act still provides that the minister in charge of land can, “on his own volition, or on the recommendation of the Land Commission, revoke a customary estate granted to an organization or body,” and no criteria are specified for this revocation, potentially undermining the security of this new form of tenure.¹⁶⁴

Any individual, family or corporation/association can apply for a customary estate to the CLC responsible for the TLMA within which the land in question is held. In determining whether to grant a customary estate, the land committee must “have special regard in respect of equality of all persons,” including “treating an application from a woman, or a group of women, a person with a disability, or a group of persons with disability, no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women.”¹⁶⁵

The committee must also consider whether the applicant for an estate already occupies land under a customary estate and whether the allocation of additional land would cause the applicant to exceed the prescribed amount of land that a person or a group of persons may occupy in the village. Moreover, the committee must consider whether the applicant has, or is likely to be able to obtain, the necessary skills and knowledge to be able to use the land productively and in accordance with the terms and conditions subject to which the customary estate will be granted. While such considerations could prevent the concentration of land in the hands of a few, it also has the potential to run contrary to the interests of women and other marginalized groups, who may have limited resources to invest in the productive use of the land. Additional considerations for applications from corporations include: (1) any advice which has

162 GoM. 2016. *Customary Land Act*, art. 6(2).

163 GoM. 2016. *Customary Land Act*, art. 8(3).

164 GoM. 2016. *Customary Land Act*, art. 22(i).

165 GoM. 2016. *Customary Land Act*, art. 22.

been given by a local government authority with respect to the application; (2) the contribution that the organization or body has made or has undertaken to make to the community; (3) the contribution to the national economy and well-being that the customary estate is likely to make; and (4) whether the amount of the land applied for is so extensive or is located in such an area that it will, or is likely to, impede the present or future occupation and use of the customary land by persons ordinarily resident in the area.

Once granted, customary estates are subject to any by-laws applicable to the land, which may include by-laws relating to a village forest area or access to a forest reserve. The CLC may also choose to place additional and more specific, forestry-related restrictions within the grant of the estate, given the requirement of the Customary Land Act to consider sustainable development principles in allocating and overseeing customary land transactions. As it stands, no specific mention is made of the relationship between land tenure and tenure of the forest (or other natural resources) located thereon, only the broader reference to consider the development and well-being of the community and the country in the granting of the estate.

Customary land committees have the authority to determine “the portions of customary land to be set aside as communal customary land and the intended uses of any such portion.”¹⁶⁶ This appears to overlap with the authority granted under the Forestry Act to traditional authorities to set aside customary land as village forest areas (VFAs) in cooperation with the director of forestry. The contradiction is somewhat mitigated by the fact that traditional authorities are to act as chairs of CLCs. Moreover, under the Customary Land Act, local government authorities are to provide advice and guidance on the exercise of this authority, which could provide a venue for involving the relevant district forestry officers. However, without more specific requirements or clear guidance, there is little likelihood that these provisions will be used to coordinate with the forestry sector.

No customary estate land can be legally sold or leased for five years following the completion of the titling process. Pursuant to the new Land Act, freehold tenure is abolished, so any disposition of a customary estate would also technically be a leasehold (of no specified duration), with rights of reversion back to the CLC responsible for the TLMA on which the land is located.

How the creation of customary estates will impact the implementation of REDD+ on these lands will depend on how forest use and management rights are interpreted in relation to this new form of tenure. It is possible that community forest areas will remain under the general authority of VNRMCs or local forest organizations, and it is also possible that these areas will come under pressure to be allocated as estate land. If forest land is subdivided among estates as private land, it may become more difficult to implement REDD+ initiatives, unless effective incentives are put in place to ensure the sustainable management of forest resources. This would require a clear legal statement of who owns the forest land on customary estates and the development of new mechanisms for benefit sharing among the individuals and groups that hold the estates. While the clarity and security of tenure provided by the registration of estates could in itself be an incentive for more sustainable forest management, the regulatory role of DoF under the current legal framework would be significantly reduced. REDD+ projects and the national REDD+ strategy would need to be structured so as to provide sufficient incentives to estate holders not to convert forest land to more profitable uses.

7.3.3 Role of traditional authorities in dispute resolution

Customary land committees are mandated with adjudicating disputes in their respective TLMA. Additionally, each TLMA is required to establish a customary land tribunal chaired by the relevant traditional authority, which will hear appeals from the CLC on land disputes. Decisions from the customary tribunals

¹⁶⁶ GoM. 2016. *Customary Land Act*, art. 14.

will be appealable to newly established district land tribunals. From there, all appeals are to be heard by the Central Land Settlement Board. All institutions are required to be gender-balanced, or, in the case of the Central Land Settlement Board, to have women represent at least one of the three traditional authorities and at least one of the two members of society representing civil interests.¹⁶⁷

One of the main sticking points that delayed the enactment of the Customary Land Act was the concern expressed by traditional authorities about their continued role in land allocation and management of customary lands. Specifically, once customary land is registered, it becomes private land (although with a revisionary right to the community) and is no longer subject to the authority of traditional leaders. Traditional authorities have expressed fears that the registration process itself will facilitate corruption and land grabbing, as the capacity necessary to undertake such a process is currently not in place. The TLMA is a new idea and is allocated pursuant to the act as falling under the jurisdiction of traditional authorities. The act does not define traditional authority, however, nor does it define the specific level within the hierarchy of chiefs at which the demarcation will take place. This lack of clarity could open the door to major land disputes among traditional authorities. Furthermore, the Customary Land Act relies heavily on “customary law” for the implementation of this process, but there is no definition of customary law that would provide the criteria or the process for managing its interpretation in the case of a land dispute.

These concerns may be mitigated by the fact that CLCs will be chaired by group village headpersons, thus integrating traditional leadership into the new, democratically elected body. In practice, however, power dynamics at the local level and cultural adherence to hierarchical power structures present a real challenge to balancing these authorities. This is further confused by the failure to define the community that is charged with the election of a customary land committee. It is assumed that this would include all the people living in a traditional land management area, but that itself is open to interpretation.

The stakeholders consulted for this assessment expressed varying views on the appropriate role of traditional authorities moving forward. It was generally agreed that greater oversight and accountability mechanisms are required to ensure the legitimacy of decision-making surrounding land allocation and resource management. However, many stakeholders also asserted that there is a positive correlation between a strong traditional authority and the sustainable management of land and land-based resources, including forests. An honest dialogue between traditional authorities, community-based organizations, NGOs and government stakeholders could be an important basis for clarifying the expectations and fears relating to the changes outlined in the Land Act and the Customary Land Act, and finding compromises to move forward with the implementation of these two pieces of legislation.

7.3.4 Gender

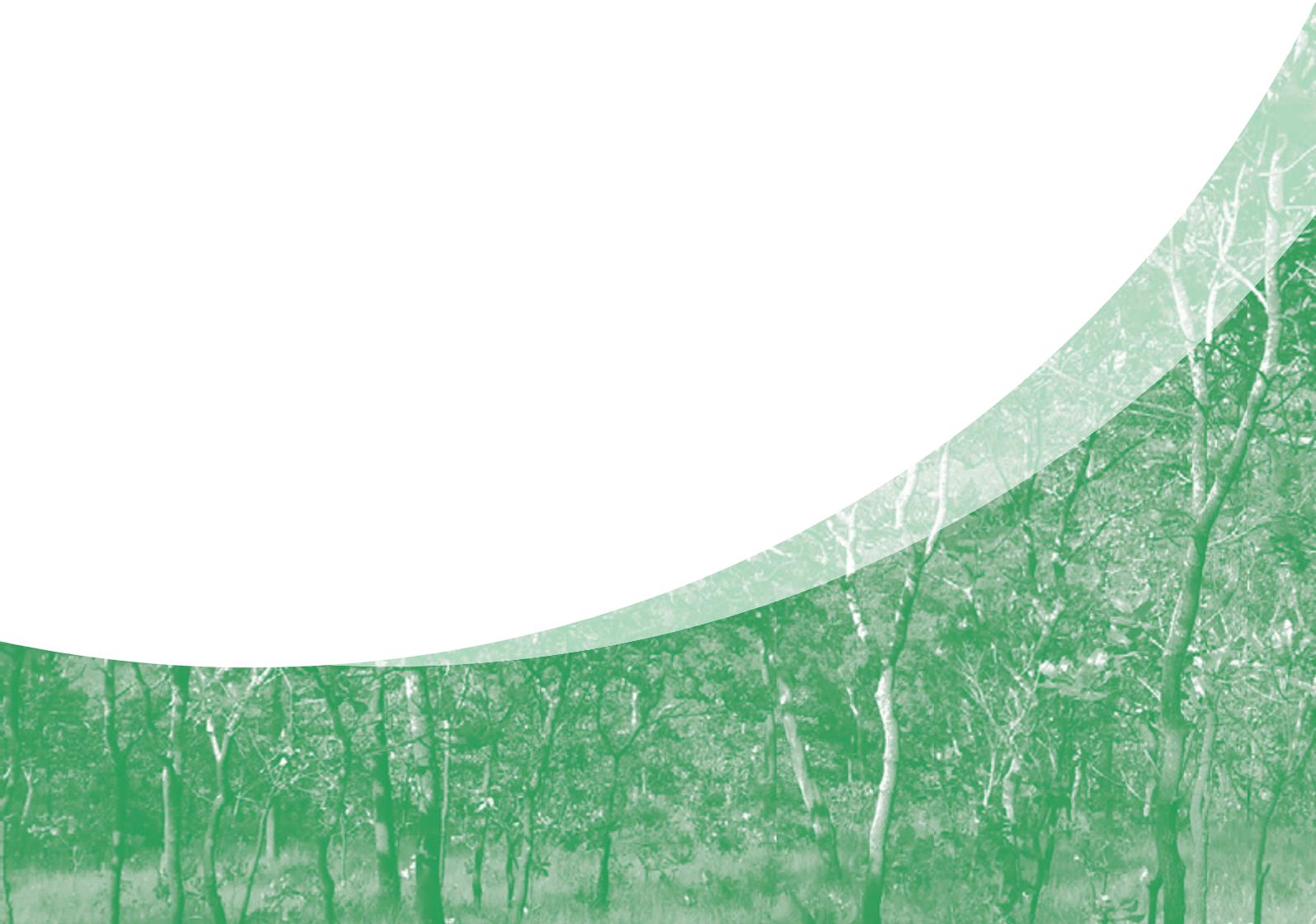
The Customary Land Act includes specific requirements for non-discrimination and representation of women in decision-making. For example, as already mentioned in section 7.3.2, in the granting of a customary estate the relevant CLC must “have special regard in respect of equality of all persons,” including “treating an application from a woman, or a group of women, a person with a disability, or a group of persons with a disability, no less favourably than an equivalent application from a man, a group of men or a mixed group of men and women.”¹⁶⁸ Discrimination is therefore not permitted. Further, when an estate is surrendered and the committee finds that it is reasonable to deduce that the reason or effect would be to deprive a woman of her customary land rights, the surrender shall not be permitted. Women are also required to occupy half or one-third of the positions on the key land administration institutions, including land tribunals and customary land committees.

167 GoM. 2016. *Customary Land Act*, art. 48.

168 GoM. 2016. *Customary Land Act*, art. 22.

7.3.5 Other provisions relevant to REDD+

One other provision that may be of importance to REDD+ implementation is the ability of the minister responsible for land to transfer (unallocated) customary land to government or reserve land for a public interest, which could be understood to include a REDD+ project or an activity under a national REDD+ programme. Notice must be provided to the relevant CLC and, through them, to the community, and the community must have a chance to make representations to the minister in writing or through a public meeting. Compensation must also be determined in cooperation with the relevant CLC. Transfers of unallocated customary land to forest reserve status occur when notice is given in the *Malawi Government Gazette* with no further procedural requirements. The latter is a potential issue of concern for traditional authorities and local communities, who have expressed mistrust of the government based on a history of government alienation of customary land.



8 Analysis and options

The tenure reform process currently underway in Malawi is reflective of a broader global trend of forest tenure transition, one that is moving away from centralized management towards community-based control. The form and the extent of rights recognition over forest tenure has varied widely across the globe, and lessons can be drawn from the obstacles other countries have faced in implementing land and forest tenure reforms. These include: (1) the political and economic interests that compete for land and forest resources; (2) the limited technical, human and financial capacity to carry out accurate delineation and titling/formalization of tenure rights; and (3) the reluctance on behalf of state actors to cede the authority and control over resources to communities.¹⁶⁹ As Malawi moves forward with land and forest tenure reforms, it will be important to recognize these challenges and to create realistic institutional responses. This will include specific legal protections as well as capacity building support to implement and enforce such protections.

A central governance challenge that could impact the potential for effective REDD+ implementation is the need to clarify the relationship between the new land legislation and the process for supporting and strengthening participatory forest management (PFM) on forest land. While the mandates for decentralized and community-based resource management are in place, there have been a number of challenges in the implementation and enforcement of these mandates. These challenges must inform further clarification of what the process means for the tenure of forest land and resources and, in turn, for the implementation of REDD+ initiatives.

In analysing how well the current and evolving tenure regimes will support effective and equitable implementation of REDD+, this assessment drew upon the internationally accepted Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGTs), which outline the principles and practices that governments can refer to when making laws and administering land and forest tenure rights. The guidelines are based on an inclusive consultation process started by FAO in 2009 and finalized in 2012 through intergovernmental negotiations that included participants from government agencies, civil society organizations, private sector organizations, international organizations and academia. Thus, the principles and the guidance provided by the voluntary guidelines represent a broad international consensus on best practices in the governance of tenure.

To support the implementation of the VGGTs, FAO is developing a framework to help countries evaluate their policies, laws, institutions and administration systems related to forest tenure in order to: (1) identify gaps with respect to the VGGT good governance principles, (2) clarify actions for strengthening the governance of tenure, and (3) prioritize areas for improvement in forest tenure. While the framework is still in draft form, this assessment has distilled the review criteria that are relevant to Malawi to guide the analysis and to ground it in a broadly accepted framework of principles and practice. Sections 8.1–8.5 of this assessment report are structured around these review criteria, as adapted to the Malawian context.

The main principles of the VGGTs include:

- recognition and respect of all legitimate tenure rights;
- protection of tenure rights against threats and infringements;
- promotion and facilitation of the realization of tenure rights;
- access to justice for the infringement of tenure rights; and
- prevention of disputes and corruption in relation to tenure.

¹⁶⁹ Larson *et al.*, 2013.

In implementing these principles, countries are to ensure that the processes for defining and protecting the rights are transparent, participatory and accountable, and to take active measures to prevent discrimination on the basis of gender or the exclusion of traditionally marginalized people.

National and community awareness of the voluntary guidelines has played a key role in an FAO/UN Women project aimed to promote secure land rights for women and other vulnerable groups, implemented in Malawi by LandNet in partnership with the Ministry of Lands, Housing and Urban Development and UNDP. The project titled Promotion of Secure Land Rights for Women and Other Vulnerable Groups has trained over 90 government officials and representatives of 120 civil society organizations in six districts on the topics of the voluntary guidelines, land rights in Malawi and the role that women can play in protecting their land rights. Over 20 specific cases of land rights infringement have been identified through the project, and these are now being pursued by relevant stakeholders.

Among the lessons learnt from this VGGT-promotion project was the important role that the voluntary guidelines can play as a “stopgap” measure in the absence of new, progressive land legislation. In other words, the VGGT principles and processes have enabled Malawians to begin to identify the critical tenure-related issues that can facilitate a rights-based approach in the ongoing advocacy for, and ultimately in the implementation of, the new land legislation. Thus, in order to identify where there are gaps and what the realistic solutions are for filling the gaps, the analysis that follows focuses not only on what is in the existing and proposed legislation and policies, but also on the broader enabling governance environment for realizing and protecting tenure rights.

Each of the issues highlighted below was distilled on the basis of desk research and interviews with a diverse cross-section of stakeholders (see Annex C). Additionally, the findings were validated with the DoF counterparts and with a broader set of stakeholders at a workshop in March 2016. The findings were used as the basis for a policy brief, which was also validated by stakeholders from government agencies representing various sectors – including forestry, land, mining, environment and climate change – as well as stakeholders from civil society organizations, academia, the USAID-funded PERFORM project, FAO and UNDP.

8.1 Clarity and alignment of forest and land tenure

Malawi is in a process of transition with respect to the legal basis for both land and forest tenure rights. Under the National Forest Policy and the Forestry Act (and its subsidiary regulations), there is broad support for the devolution of use and management rights through community-based forest management on customary forest land and through co-management in forest reserves. However, the implementation of this devolution has been hindered by a number of factors, including the lack of a clear legal basis for defining forest tenure rights under various forms of management. As described earlier, section 34 of the Forestry Act grants usufruct rights to trees on any land to which a person or a community has legal rights (whether freehold or usufruct), subject to the requirement that the person or community “protects” the tree or trees and that harvesting of any forest produce is “sustainable.” This provision for tree tenure appears to conflict with the provisions in the Forestry Act for securing community tenure of forests pursuant to either community-based management (on customary lands) or co-management (in forest reserves). Section 34 appears to confer such rights on anyone who protects or manages the resource without needing to establish a formal structure for PFM as envisioned in sections 30-31 of the same act. This lack of clarity on tenure has not only hindered effective implementation of both co-management in forest reserves and community-based forestry on customary lands, but in many cases it has also given the impression of open access to forests on customary land.

Similarly, under the new land legislation (Land Act 2016 and Customary Land Act 2016) there is no clear statement of how forest resource rights relate to different categories of land tenure and how that might impact their use and management. Indeed, pursuant to article 14 of the Customary Land Act, the customary land committee (CLC) is charged with determining “which portions of customary land are to be set aside as communal customary land, and the intended uses of any such portion.” This appears to grant CLC the right to declare community forestry areas and oversee their intended uses. No reference is made to a consultation with the Department of Forestry (DoF) or a village natural resource management committee (VNRMC); there is only the provision that the “local government authority shall provide advice and guidance to a land committee, through a land clerk, on the exercise of its functions under this section.” The lack of a clear statement on community forest land begs the question of how pre-existing village forest areas (VFAs) and forest management agreements (FMAs) will be incorporated into the traditional land management areas (TLMAs) and whether they will continue to be managed by the community institutions formed for such purpose, or whether the land committee will have the authority over “communal customary land.” Clarifying this potential overlap and providing a forum for consultation to ensure that forest and land tenure rights are being coordinated effectively is in line with the VGGT recommendation to provide an integrated approach to land and forest tenure administration.¹⁷⁰

Options and next steps:

The government should clarify forest and tree tenure under both the land and the forestry legislation. Clarification within the Forestry Act could take the form of amendments during the planned revision of the act or through new regulations under the existing legislation. In the new land legislation, regulations could be concluded to clarify certain provisions. Specific Forestry Act amendments/regulations should include a clear statement regarding forest and tree tenure for each type of forest land, including what tenure rights are transferable to communities under PFM and the conditions for transferring such rights. This will require an amendment to section 34 of the act, as well as new provisions to formalize the process for concluding co-management and community-based management agreements by elaborating the ways in which tenure can be devolved through these agreements. Additionally, the role of traditional authorities with respect to the formation and oversight of VNRMCs/local forestry organizations (LFOs) and block management committees (BMCs) should be clarified.

In addition, a regulation should be developed to clarify the provisions in the new land legislation relating to the impact that the establishment of a customary estate will have on community forest tenure rights. Such regulation should clarify the role of traditional authorities and the newly established CLCs with respect to the allocation and oversight of forest tenure on customary estates, linking article 14 of the Customary Land Act at the minimum to a mandated consultation process between the Ministry of Lands, local forestry organizations and the Department of Forestry.

In each case where tenure rights are defined, the amendment or regulation should also address:

- how the rights can be verified and what specific measures can be taken (and by whom) to enforce the rights and to exclude others from infringing on such rights;
- what evidence is necessary to support such rights; and
- what dispute resolution mechanism can be used to uphold forest tenure rights.

Clarity on the measures for protecting and enforcing forest tenure rights is supported by the VGGT recommendation to “facilitate, promote and protect the exercise of tenure rights,” *inter alia* by providing access to justice.¹⁷¹

170 FAO. 2012. *Voluntary Guidelines on the Responsible Governance of Tenure*, art. 5.3.

171 FAO. 2012. *Voluntary Guidelines on the Responsible Governance of Tenure*, art. 5.3 and 7.3.

Collaboration and coordination between the Ministry of Lands and the Department of Forestry should also be improved to support the effective implementation of the Land Act, the Customary Land Act and the necessary amendments to forestry legislation. Existing consultative platforms should be leveraged to facilitate more effective coordination between the forestry and land sectors, including the Governance and Policy Technical Working Group of the REDD+ Experts Group and the Land Governance Task Force hosted by the Ministry of Lands. Participation in these coordination mechanisms must include those representatives from both sectors who are able to make policy decisions. In addition, a clear mandate should be provided to the coordination platforms to identify specific mechanisms for clarifying forest tenure in light of the new land legislation and in preparation for a REDD+ programme.

Key stakeholders, including traditional authorities, community representatives and representatives of marginalized groups, should be actively engaged in an ongoing dialogue to ensure that decisions impacting forest tenure rights are inclusive and accountable. Specific outcomes of these deliberations should include recommendations for how to implement the new land legislation and how to amend the Forestry Act in order to ensure a legal basis for the recognition and the protection of forest tenure rights.

8.2 Harmonization of customary and legislative rights

It is a clear goal of the Malawi National Land Policy (2002) to recognize, demarcate and register customary tenure rights, and to integrate them into the legislative framework for land administration in order to ensure that they have a legal basis and are subject to requirements for transparency and accountability that go beyond what has been provided under customary practices.¹⁷² In order to address the historical issue of appropriations of customary land without proper compensation, the land policy proposes the creation of TLMAs, which are to be delineated and formally registered areas administered by traditional authorities on behalf of the communities living in these areas. This formalizes the role of the traditional authority as the trustee of TLMA.¹⁷³ The land policy also proposes the creation of customary estates, which are meant to create land tenure rights “that preserve the advantages of customary ownership but also ensure security of tenure.” Such estates are to be held in the name of a “clearly defined community, corporation, institution, clan, family or individual” and cannot be acquired by the government for public purpose without just compensation at fair market value.¹⁷⁴

The Malawi National Land Policy recognizes that many of the existing tenure rights have been allocated and are protected under customary law, which is defined in the land policy as “rules grounded in prevailing customs that are applicable to particular communities ... recognized as legitimate by the community, enforced in the customary courts, or even merely by social pressure and normally not recorded in writing.” The Customary Land Act refers to the application of customary law in making allocation and dispute resolution decisions, but neither the Land Act nor the Customary Land Act provide a clear definition of customary law or how it should be elucidated for the purposes of land administration. While the fact that customary law is not written can be a strength in terms of the flexibility it offers to communities, it also provides a space for elite capture. Currently, there are no procedural safeguards to ensure that the determination of what constitutes customary tenure is undertaken in a transparent and accountable manner. Furthermore, where customary law includes discriminatory practices, there are no provisions specifying how to reconcile such discriminatory practices with the land policy’s objective of securing tenure without gender bias or discrimination against any citizen of Malawi. These concerns are supported by the VGGT recommendation to provide legal recognition to tenure in a gender-sensitive manner.¹⁷⁵

172 GoM. 2002. *Malawi National Land Policy*, sec. 4.6.

173 GoM. 2002. *Malawi National Land Policy*, sec. 4.3.

174 GoM. 2002. *Malawi National Land Policy*, sec. 4.2(b).

175 FAO. 2012. *Voluntary Guidelines on the Responsible Governance of Tenure*, art. 10.3.

Options and next steps:

The government should clarify the statutory recognition of customary land and resource rights to ensure equity, transparency and accountability in customary land administration. The Forestry Act should be amended to provide legal clarity on the precise tenure rights that accrue under various forms of PFM and how these relate to the proposed land tenure changes (i.e. the establishment of customary estates). Under the new land legislation, the legal relationship between traditional authorities and CLCs must be clarified to ensure transparency and accountability of land allocation and management decisions, as must be the mechanisms for the protection/enforcement of customary forest tenure rights and how they relate to the dispute resolution mechanisms over land tenure. This could take the form of regulations or guidance under the Customary Land Act.

The government and its partners should pilot methods for inclusive and gender-sensitive customary land governance. The EU-funded project Strengthening Land Governance Systems for Smallholder Farmers in Malawi has been developed to pilot the customary tenure registration process, to identify gender sensitive guidelines for the inclusive implementation of land governance, and to develop a monitoring system for customary land governance systems. Implementing institutions should ensure that issues relating to natural resource tenure are integrated into the project in order to develop locally appropriate approaches for delineating and formalizing both land and forest tenure rights. The project should be closely aligned with the coordination platform between the land and forestry sectors to ensure that implementation lessons inform policy recommendations. Additionally, DoF should leverage lessons from other REDD+ countries, particularly Zambia and Uganda, in structuring project activities.

8.3 Legal protection of all legitimate tenure rights: Women and other vulnerable groups

Central to the voluntary guidelines and to any equitable tenure framework is the equal protection of all legitimate tenure rights. This requires proactive approaches to ensure that vulnerable individuals and groups are aware of their rights and have the necessary capacity and resources to exercise and protect them. The Malawi National Land Policy recognizes that many existing land administration customs foster prejudice and fail to represent vulnerable populations, including women. Unfortunately, the new Land Act fails to provide any principles to guide the implementation of its provisions, including any statements on the need for non-discrimination in land administration. However, in line with the land policy, the Customary Land Act aims to address the challenges of tenure security with regard to customary land, including for the most vulnerable members of the community, such as women and people with disabilities. With respect to gender, the act requires that each of the land administration institutions developed pursuant to its application have equal representation of women and men to afford women a strong voice in decision-making on land tenure matters. Further, the act requires that decisions regarding applications for customary estates must have “special regard in respect of equality of all persons,” including treating applications from women and people with disabilities on equal footing with other applications, and ensuring that no adverse or discriminatory practices are adopted or applied towards any person applying for a customary estate.¹⁷⁶

Despite these promising provisions in the Customary Land Act, it is notable that neither the Land Act nor the Customary Land Act contain any principles to guide their implementation, and that there are no proactive mechanisms within either of the acts to ensure priority access to land by vulnerable groups, including

¹⁷⁶ GoM. 2016. *Customary Land Act*, art. 22.

women. Given the discrepancies in literacy and access to resources, ensuring real equity in tenure will require significant investment in awareness raising and capacity building for vulnerable populations, so they can both understand and have the capacity to exercise their rights. Without such an approach, registration is likely to be granted to powerful individuals and further marginalize landless families, preventing them from benefitting from REDD+ arrangements.

Broadly, the Malawi National Land Policy and the two new Land Acts address the issues of equity and representation through the creation of a representative institutional system for land administration. This includes the democratically elected CLCs to oversee all disposition of customary land and to ensure that the abuses of the past – where such transactions were not necessarily transparent or accountable – are rectified. The Customary Land Act follows the land policy in requiring that CLC members be elected by the relevant community and chaired by the group village headperson. However, the act also provides that any decision regarding the granting of a customary estate is subject to prior approval of the relevant traditional authority, thus providing the traditional authority with potential veto power. It will also be important to recognize the authority that traditional authorities will continue to hold over land tenure decisions, as well as to ensure that the mechanisms put in place to ensure accountability and transparency in decision-making (including within the CLCs) are functioning effectively and democratically. Clearer, more specific criteria for decision-making on the allocation of customary land will be important to ensure accountability. For example, the Customary Land Act requires that CLCs ensure that allocation of land does not “cause the applicant to exceed the prescribed amount of land which a person or group of persons may occupy in the village.”¹⁷⁷ However, nowhere in the Land Act or the Customary Land Act are there precise limits set on allocations of land, either to types of applicants or for specific purposes. Another concern is the broad discretion given to the government under both acts to revoke customary estates granted to “an organization or body.” Whether this will include VNRMCs or other forest organizations will need to be clarified.

As described in section 5 of this assessment report, there also remains the lack of legal clarity regarding the tenure of trees and forests on customary lands. While policy and government guidance clearly state that the intention of establishing PFM systems for customary forest areas is to grant more secure tenure over customary forests, this intention has no legal backing. Neither the Forestry Act nor the two Land Acts address the status of forest resource tenure and how this will be impacted by the proposed innovations in customary land tenure. It will be critical to clarify these connections and how the proposed changes are likely to impact the incentives for individuals and families to continue to support sustainable forest management on VFAs. The continued uncertainty around forest and tree tenure provides a space for the elites to capture resources under the proposed REDD+ arrangements.

It is clear that forest reserves will continue to be under government ownership. However, questions remain regarding the precise contours of the tenure rights of access, use and management to be granted to the communities that are governed by co-management arrangements, as well as the extent to which geographical proximity should continue to be the defining factor in determining such rights. With respect to REDD+, it will be critical to ensure that these are clearly defined so that individuals with legitimate rights are effectively involved in the decision-making and can also share equitably in any benefits accrued under a REDD+ arrangement. As described in section 5, the failure to effectively implement co-management – driven in part by the lack of clear requirements and standards in the existing legislation – has undermined transparency and accountability, and it has enabled powerful individuals to gain control of the process and the benefits derived from it.

177 GoM. 2016. *Customary Land Act*, art. 22(2)(d).

Options and next steps:

The Ministry of Lands, the Department of Forestry and the Environmental Affairs Department should develop and agree upon principles of non-discrimination and equality to guide the implementation of the two Land Acts and the amendments to the Forestry Act. The procedural rights of access to information, participation in decision-making and access to justice should be legally mandated through an amendment to the Forestry Act, or through the creation of a new regulation (see details in the section on procedural rights below).

Specific opportunities should be identified for scaling up the work undertaken by the Promotion of Secure Land Rights for Women and Other Vulnerable Groups project. This should include raising awareness among women and other marginalized groups of the VGGTs, the evolving land rights in Malawi, and the potential issues emerging from the evolving land legislation. Importantly, this work should include raising awareness of the implications of moving away from gender-based inheritance. Efforts should also continue to identify specific cases where rights are being infringed and to provide support in bringing such cases to the relevant traditional authorities/courts for resolution.

Training programmes should be implemented to raise awareness of these issues on the part of the traditional authorities, prosecutors, judges and rights-focused NGOs and CBOs, so they may advocate more effectively for land and forest tenure rights of women and other marginalized groups. This should include training on the VGGTs, on the evolving land legislation, and on the cases identified in the Promotion of Secure Land Rights for Women and Other Vulnerable Groups project.

Finally, the Ministry of Lands should work with the relevant stakeholders (including traditional authorities and community representatives) to clarify the legal relationship between the traditional authorities and the CLCs established under the Customary Land Act in order to ensure the transparency and accountability of land allocation and land management decisions.

8.4 Institutional frameworks

An effective tenure system requires the existence of institutions that can ensure that tenure rights are allocated and protected in an equitable and accountable manner and that rights holders have meaningful avenues for addressing challenges to their rights through formal and/or informal dispute resolution mechanisms.

8.4.1 Local forest management institutions

One of the greatest challenges to the institutional frameworks governing forest tenure in Malawi is the uncertainty resulting from the lack of a legal framework to implement effective PFM. The failure of PFM arrangements to make a real impact on forestry management practices is often attributed to the lack of community capacity to understand and implement management agreements, but also to the fact that the agreements are not based on a clear delineation of tenure arrangements that would ensure that the potential benefits from PFM are allocated to the communities involved. The community and government stakeholders interviewed for this assessment all stated that communities often feel that the incentives for participation in PFM arrangements are not sufficient to prevent non-compliance with their management plans.

Related to this issue is the need to more clearly define the process through which local forestry management institutions are created and managed. While there are government-endorsed guidelines to support

this process, they have been applied only intermittently, and they are often cited to be overly complex and costly. There is a real need to streamline this guidance and to ensure that it has a legal basis, either through an amendment to the existing Forestry Act or through a new regulation.

8.4.2 Traditional leadership

The role of traditional authorities in co-management and community-based management has also been raised as a critical institutional issue for the effective governance of land and forest tenure. Under customary law, traditional authorities have the right to allocate and oversee land and resource use. However, the Forestry Act provides that VFAs are to be managed by VNRMCs. The stakeholders who were interviewed for this assessment noted several examples of conflict that arose where traditional authorities felt that their authority had been undermined by VNRMCs or that benefits accruing to VNRMCs were not legitimate. The same appears to be true of co-management arrangements, as demonstrated in the Perekezi Forest Reserve, where according to the community members and government officials the exclusion of traditional authorities from BMCs and other co-management structures was a significant challenge. A clearer definition of the role of traditional authorities in PFM processes and in the preparation and implementation of management plans is therefore required.

This is closely tied to the role of traditional authorities as envisioned under the Malawi National Land Policy, and how that vision will be implemented under the two new Land Acts. The land policy calls for realistic mechanisms to ensure that the land management responsibilities of traditional leaders are made more transparent and compatible with the new land administration. Specifically, it requires that the power of traditional leaders to control the allocation of customary land among members of their respective communities, including granting access rights to outsiders, be democratized and protected by statute. As described earlier, the Customary Land Act establishes CLCs, which will be charged with the administration of transactions on customary land, including the adjudication of the scope of TLMAs and the granting of customary estates. The Customary Land Act provides some implementation guidance, requiring that CLC members be democratically elected by the community. There are no procedural requirements provided for this election, however, nor is “community” defined. The relevant traditional authority (village headperson) is to act as the chair of a CLC. If the elections are conducted fairly and openly, this new institution could go a long way towards achieving a balance between respecting the customary role of traditional authorities and ensuring that decisions are made in a more accountable and transparent manner. However, the Customary Land Act also provides that the certificate of title for a TLMA is to be in the name of the traditional authority (albeit to be managed by the committee) and that “a land committee shall not allocate land or grant a customary estate without prior approval of the relevant traditional authority.”¹⁷⁸ Essentially, this vests radical tenure in traditional authorities and provides them with veto power over their CLCs, ultimately undermining the democratic representation that could have been achieved with this new institution.

Another potential area of confusion is the dual role of traditional authorities in land administration and in land dispute adjudication. Pursuant to the Customary Land Act, dispute resolution is to be overseen by a land tribunal system. At the local level, the relevant traditional authority will chair the tribunal and nominate the additional members, to be approved by the land commissioner. At the district level, the tribunal will be chaired by the district commissioner, but also have representation from at least three traditional authorities. There is thus a potential for conflict of interest when a traditional authority makes a decision in the capacity of a CLC chair and then acts as the chair of the dispute resolution mechanism that is looking into that decision. It is possible that the Customary Land Act intends to have different levels of representation from traditional leadership, but this remains to be clarified.

¹⁷⁸ GoM. 2016. *Customary Land Act*, art. 6(3).

8.4.3 Intersectoral coordination

A related issue is the lack of mechanisms for coordinating among sectoral institutions that have an impact on tenure at the local, district and national levels. In recognition of the need for more effective coordination among natural resource and development sectors, the Environment Management Act (1996) established the National Council for the Environment (NCE), which is comprised of all principal secretaries of the relevant government institutions and representatives of public agencies and NGOs whose functions are related to the environment and natural resources management.¹⁷⁹ The council is meant to act as an advisory body to the minister in charge of the environment on the integration of environmental considerations into economic planning and development, as well as the harmonization of activities, plans and policies of all lead agencies.¹⁸⁰ Unfortunately, stakeholders have consistently raised concerns that NCE has not performed as expected, mainly due to the lack of participation in NCE proceedings by senior officials. Junior officials have been sent to stand in and the resulting lack of consistency, coupled with the inability of junior staff to make commitments or binding decisions, has hampered the council's effectiveness. From a legal standpoint, there is a critical issue with the fact that NCE has been expected to oversee coordination across sectoral ministries, yet it has no independent authority outside the Ministry of Natural Resources, Energy and Mining. This has hindered the council's ability to allocate resources to intersectoral coordination activities. Lack of funding has underscored the legal issue and further hampered NCE's ability to effectively achieve its mandate.

In response to this situation, the draft Environmental Management Bill (2016) proposes to raise the political level of the coordination mechanism and to establish an independent environmental authority that would report directly to the Office of the President. There are specific articles in the draft legislation requiring this new authority to prepare guidance for line ministries and other lead agencies on how to align their policies, laws, regulations and decision-making processes. This is an opportunity for DoF to mainstream REDD+ into a higher-level forum and to raise the cross-sectoral implications and needs for coordination related to REDD+. It is also an opportunity for the land and forestry sectors to coordinate more effectively.

The proposed integration of resource-related institutions into a nested hierarchy that would ultimately report to an independent environmental authority could go a long way towards addressing some of the fragmentation that is currently hindering the effective realization of forest policy goals. However, it will be critical that this process learns from – and builds on – the successes of past and ongoing efforts in various sectors to create institutional mechanisms and to build capacity at the local level. The Department of Forestry and the Ministry of Lands need to play a key role in this process, and to align it with their own efforts to achieve the policy goals of clarifying land and resource tenure and how it relates to other policy priorities.

The Land Governance Working Group led by the Ministry of Lands could provide a forum for coordination on resource tenure issues. Thus far, there has been little focus on land and resource tenure issues within this working group, but the group was only recently formalized as a subgroup to the Land Sector Working Group, which includes representatives from the land, natural resource and environment sectors. Whichever mechanism is found to be best suited for coordination on resource tenure issues, it will be critical that it has a workable and realistic process for vetting and coordinating decision-making on policies, legal provisions and institutional mechanisms for managing land and forest tenure.

A final issue facing the institutional frameworks for tenure is the lack of available resources and capacity to effect the broad changes envisioned in the Malawi National Land Policy and the two Land Acts. If Malawi

¹⁷⁹ GoM. 1996. *Environment Management Act*, sec. 10.

¹⁸⁰ GoM. 1996. *Environment Management Act*, part III, sec. 12.

proposes to delineate and record all customary land and create new institutions for land administration at all levels, there is a pressing need to consider how this will be funded and how the necessary technical capacity will be built. The planned EU-funded pilot project Strengthening Land Governance Systems for Smallholder Farmers in Malawi is likely to help in answering these questions. The project is to be implemented by CEPA, Oxfam and LandNet over the next three years in three districts and aims to: (1) conduct awareness raising on the new land administration system; (2) develop gender sensitive guidelines for the inclusive implementation of land governance; (3) develop a monitoring system for customary land governance systems; and (4) pilot the delineation and registration process. If implemented, this project will go a long way towards informing how to scale up the various processes to the national level. The project will draw on lessons from other countries, including Zambia's ongoing work in this area under the USAID-funded initiative Tenure and Global Climate Change.

Options and next steps:

Participatory forest management should be strengthened by:

- reviewing existing guidance on PFM and co-management requirements to distil the essential procedural needs and to address the identified challenges in implementation;
- reviewing existing management plans to create a template that will be tailored to various types of co-management arrangements;
- drafting regulations to formalize, and to provide a legal basis for, the requirements for establishing LFOs and for creating and implementing management agreements; and
- providing training and capacity building support to traditional authorities, communities and other key stakeholders to build their capacity to implement the requirements and to develop and implement sound management plans.

Intersectoral coordination on tenure should be strengthened by:

- creating an institutional mechanism for coordination between the Ministry of Lands and the Department of Forestry to address tenure issues (e.g. RExG and Land Governance Working Group);
- considering the establishment of a multisectoral REDD+ steering committee chaired by DoF to facilitate coordination and align policies and planning procedures among the land, environment, natural resource, mining, agriculture and water sectors, with a particular focus on aligning planning processes (including mainstreaming into local development planning) and establishing formal consultation mechanisms across sectors; and
- establishing new requirements for consultation, assessment and joint monitoring and enforcement in partnership with the Ministry of Lands to ensure the alignment of tenure requirements.

8.5 Procedural rights

Meaningful mechanisms for engaging stakeholders in the decision-making and implementation of both land and forestry planning and management are necessary if we are to understand how tenure rights might be affected by REDD+ activities. Stakeholders are defined as those individuals and organizations having a stake or an interest in forests and/or REDD+ and who may be positively or negatively affected by REDD+ activities. This includes government agencies, forest-dependent communities, private sector entities, civil society, research institutions and others.

The costs and benefits of REDD+ will be felt most strongly by those who depend on forests and related resources for their subsistence and livelihoods – the communities that live in and around forest areas. In Malawi, where poverty and resource dependence are pervasive, local communities must be allowed to actively participate in the decisions that will impact their rights to access and use forest resources and the sharing mechanisms for benefits that may accrue from REDD+.

Over the past three decades, there has been growing international recognition of the critical role of civil society in protecting and managing natural resources. The move to integrate stakeholders into forest resource management reflects a broader recognition of the public's fundamental right to be involved in decisions about the environment that have the potential to impact public health and well-being. This concept was clearly articulated in the 1992 Rio Declaration on Environment and Development, which outlines what were to become the three pillars of stakeholder or public engagement in environmental decision-making: (1) access to information, (2) access to decision-making and (3) access to justice. The three pillars of public participation operate synergistically. Public access to information allows for more informed and effective public participation. Public participation improves the information available to decision-makers and among stakeholders, and provides a means for resolving disputes before they escalate. Access to justice ensures that governments and other decision-making bodies respect the procedural rights of access to information and public participation, as well as the substantive interests of the various affected parties. Together, the three pillars provide the essential elements for a robust framework of forest governance.

A significant challenge to the effective administration and protection of land and forest tenure rights in Malawi is the lack of legal provisions for guaranteeing the procedural rights outlined above. Stakeholder engagement and public participation in forest decision-making and management are emphasized to the extent that PFM is promoted in the Forestry Act. However, beyond publication requirements for when the government is designating a protected area, there are no further provisions within the act to enable the stakeholders or the general public to access forest-related information or the decision-making processes.

Similarly, the Malawi National Land Policy emphasizes the need to assess the capacity for land use planning and development in order to more effectively promote local participation in land use decision-making. Yet, aside from the representation that is to be provided by the elected CLCs, and the publication requirements for adjudication records, there is little detail on how stakeholder participation is to be promoted in land use planning and development.

8.5.1 Access to information

As noted earlier in this report, land titling in Malawi is currently governed by the Registered Land Act (1967). Pursuant to the Malawi National Land Policy, one of the principal reasons for the enactment of the new land legislation is the weakness in the implementation of deed registration and the absence of documentary proof of title under the Registered Land Act.

The new Land Act (2016) mentions only sporadically the requirement that information be publicly available for comment. When making a decision to acquire unallocated customary land for a public utility, the government must publish the decision in the Malawi Government Gazette along with an invitation to “any person claiming to be entitled to any interest in the land to which the notice relates” to submit their claim to the responsible minister within two months of the date of the publication.¹⁸¹ Similar requirements for public notice apply to new regulations, sales of private land, revisions of rent rates and so on. None of these provisions, however, include the right to comment by the interested parties.

181 GoM. 2016. *Land Act*, art. 17.

The Customary Land Act provides that information related to the delineation and registration of customary land be recorded and kept on record. At the national level, TLMAs are to be registered with the land commissioner. At the TLMA level, the land clerk is to maintain a register of all land transactions (including land adjudications) and CLCs must maintain a register of both customary and communal customary land in accordance with any rules that may be prescribed. All certificates of customary estates must be signed, sealed and registered by the relevant district land registrar.

There are no procedural requirements in either of the Land Acts for ensuring that decisions regarding land transactions are made publicly available for comment. In addition, there are no provisions in either act for ensuring that there is broad awareness about the requirements of transaction-related or land-related decisions, or the requirements for facilitating participation in such decisions. This is a serious gap in the two Land Acts.

Similarly, the Forestry Act contains no requirements for forest policy or forest rule-making to be subject to notice and comment by the public or the stakeholders, although the Forest Rules (2001) do require that all subsidiary legislation and any regulations related to forest management and use shall require community consultation “except where it is unnecessary or impractical to do so.” While this certainly expands the minimal scope of stakeholder engagement provided for in the Forestry Act, it does not specify the procedural requirements, nor does it elaborate on what constitutes “unnecessary or impractical” circumstances for consultation, and thus leaves stakeholder engagement to the discretion of the relevant minister.

Options and next steps:

- “Tenure dialogues” should continue to be used to engage stakeholders across sectors in building consensus on contentious issues in the new Land Acts and identifying mechanisms for equitable and effective implementation.
- The dialogues and other stakeholder platforms should be used to educate legislators and policymakers on the VGGT principles and how these can be more effectively integrated into the implementation of land legislation.

8.5.2 Public participation

As with access to information, opportunities to participate actively in forest- and land-related decision-making are to be facilitated through local management institutions, which are meant to represent and seek feedback from their constituents. While this is a step in the right direction, there is a pressing need to further articulate the specific opportunities for engaging with stakeholders on matters of critical importance to their livelihoods and well-being.

REDD+ has the potential to impact a broad cross-section of stakeholders in Malawi. The UN-REDD Programme has articulated a number of principles to guide stakeholder engagement in preparing for and implementing REDD+:

- Consultation should include a broad range of relevant stakeholders at the national and local levels; the voices of forest-dependent and vulnerable groups should be heard in particular.
- Consultations should be premised on transparency and timely access to information as pre-requisites to meaningful dialogue. Stakeholders must have sufficient time to fully understand and incorporate their concerns, and this may require public awareness, information, education and communication activities to ensure that stakeholders understand REDD+ and its associated risks and benefits so they can make informed decisions and substantive contributions to the formulation of REDD+ policies and strategies.

- Consultations should facilitate dialogues, information exchange and consensus building, so that broad community support can be garnered for final decisions.
- Consultations should be voluntary and decisions that require the giving or withholding of consent should comply with the UN-REDD Programme's guidance on free, prior and informed consent.
- Special emphasis should be given to issues of land and resource tenure in order to contribute to the clarification of the rights of access and use.
- Impartial, accessible and fair mechanisms for grievance, conflict resolution and redress should be established and made available during the consultation process and throughout the implementation of REDD+.

While Malawi's land, forest and environmental policies and legislation broadly acknowledge the importance of community engagement in forest and natural resource decision-making, there is a paucity of specific requirements to guide the implementation of stakeholder and public engagement. For example, there are no stakeholder or public consultation requirements specific to the licensing process, the declaration (or revocation) of a forest reserve or a protected area, the demarcation of a VFA, or the development of an FMA. For each of these processes there are critical stakeholder interests and rights involved, and there should be a very clear mechanism for when and how stakeholders should be consulted and the ways in which their feedback can influence the decision-making. Integrating stakeholders into the decision-making process not only provides the stakeholders with a mechanism for understanding and protecting their rights, but also provides a forum for identifying and mitigating conflicts and concerns that may otherwise derail implementation and enforcement.

The public participation gap is an acknowledged weakness by all stakeholders interviewed for this assessment, and is reflected in the uneven levels of engagement that have been achieved at various levels of decision-making and implementation – from the formation of forest and related policies to the creation of local forest institutions. The proposed Environmental Management Bill (2016) attempts to remedy this situation by recognizing access to information, participation and justice as human rights and requiring all lead agencies to create mechanisms to realize such rights. A more robust legal framework for ensuring meaningful stakeholder engagement will be imperative as the REDD+ national strategy is developed, as decisions about the form and function of local forest management institutions are determined, and as REDD+ projects come on line. This will be necessary not only to meet the safeguard requirements under the UNFCCC, but also to achieve the policy goals of more effective community-based natural resource management and improved enforcement.

The likely prospect of legislative amendments to the Forestry Act provides an ideal window of opportunity to formalize the participation and engagement requirements and to align them with the forthcoming regulatory requirements under the proposed Environmental Management Bill and the two new Land Acts. At the national level, the REDD+ Experts Group (RExG) provides a mechanism for multi-stakeholder engagement, and this role should be carefully considered in determining the roles and responsibilities of REDD+ institutions. If a REDD+ steering committee is created to manage high-level decisions on policy and programming, RExG could be redefined as a permanent stakeholder engagement platform at the national level and tailored to meet its needs.

Options and next steps:

The requirements for public participation in land and forestry policy and in decision-making processes should be specified – which government agencies must be consulted, when and how; how the broader range of stakeholders (including the public) will be engaged; and what opportunities will be made available to inform decision-making in a meaningful way. This should involve the creation of specific institutional platforms for ongoing multi-stakeholder and intersectoral coordination and include:

- a clear set of procedural requirements for stakeholder consultation on: rule making (setting regulations), permitting/licensing, granting and revoking of different types of tenure, creating management agreements, and any other administrative decision-making processes;
- a clear set of procedural requirements for community consultation on the establishment of LFOs/VNRMCs and CLCs and on any decisions taken on land, forest or tree tenure (including defining the community that is being represented), and specific measures to be taken by local institutions/decision-makers to consult the marginalized members of a community and to ensure their meaningful representation;
- specific requirements for making tenure-related information publicly accessible in a timely manner with limited and well-defined exceptions for withholding information; and
- a definition of “forest-dependent communities” and the circumstances under which free, prior and informed consent is required to proceed with REDD+ activities (the definition provided under the proposed Environmental Management Bill is not in line with international best practice and should be reviewed and amended for these purposes).

8.5.3 Access to justice/dispute resolution

The enforcement of tenure rights requires a dispute resolution mechanism that is accessible, fair and accountable. Currently, land disputes are settled separately from disputes over land-based resources such as forests. For land disputes, there is the formal court system and the customary dispute resolution system. The Customary Land Act, in line with the Malawi National Land Policy, stipulates the creation of customary land tribunals to be chaired by the traditional authority of the relevant TLMA,¹⁸² which will adjudicate disputes concerning customary land. The relevant traditional authority will nominate six community members (including three women), who must be approved by the land commissioner (at central government level) and appointed on the basis of their knowledge of customary land law and boundaries, their standing in the community and their experience in handling social issues. Local government officials are not eligible to serve on the tribunals. The decisions of a customary land tribunal will be appealable to the relevant district land tribunal, which will also be established pursuant to the Customary Land Act. District land tribunals will be chaired by the district commissioner and its members will be appointed from among traditional authorities, citizens from the district with relevant knowledge and expertise and the district land registrar. Appeals from the district level are to be made to the Central Land Settlement Board, which shall be comprised of a presiding resident magistrate, three traditional authorities (one from each region of Malawi) and two other members with good standing in society, one of whom shall be a woman. Members of the Central Land Settlement Board are to be appointed by the land commissioner and approved by the minister in charge of land management.

At any point in the process, appeals can also be made directly to the High Court. This provides an interesting parallel avenue for conflict resolution under the proposed system, and presents the possibility

¹⁸² The traditional land management area is the area to be delimited under each traditional authority pursuant to the Customary Land Act, within which customary administrative structures will be established to allocate and manage land, including customary estates.

of forum shopping. It will be important that careful records are kept so that cases that pass between the land tribunals and the regular courts are in line with the new land legislation and respect and protect the rights of all parties. In particular, it will be important to further define the customary laws and practices being applied by the customary land tribunals, in order to ensure that they are consistently applied and to facilitate better accountability of the decisions made throughout the process.

Adjudication of forest rights on customary land has historically been the purview of traditional authorities. In order to ensure that forest rights are adjudicated equitably and accountably in the future, there is a need for a clear statement on how forest rights are defined in relation to the various categories of land tenure.

Options and next steps:

- Educate the prosecutors, judges, traditional authorities and other stakeholders involved in dispute resolution on the legal requirements related to land and forest tenure, both under customary law and statutory law.
- Clarify the definition and content of customary law to be applied in a transparent and accountable manner and use it in the implementation of the Land Act and the Customary Land Act.
- Create mechanisms to ensure that vulnerable individuals and groups have equal access to non-discriminatory dispute resolution (e.g. legal aid, education).
- Clarify the potential conflict of interest in having traditional authorities act as chairs of both customary land committees and customary land tribunals.
- Specify how forest (and carbon, if applicable) tenure rights can be adjudicated once established, and what will be the relationship between the adjudication process and the land tribunals.

8.6 Cross-cutting governance challenges: Corruption and enforcement

As noted elsewhere in this report, a targeted corruption risk assessment was recently completed in order to identify the specific risks that could undermine the integrity of REDD+ and present governance obstacles to its effective implementation. Land tenure insecurity was cited as a major underlying driver of illegal practices by communities, encouraging illegal encroachment onto government forests. Corruption also presents a real risk to the implementation of tenure reforms to support REDD+, and the assessment identified pervasive bribery by forestry officials, the police, prosecutors and judges. Although whistle-blower protections are in place, they are broadly regarded as ineffective.

Political interference was also cited as a major contributing factor to all forms of corruption, with the DoF stakeholders noting that interference from politicians was a major force in undermining their motivation to take enforcement actions. Several cases were cited of politicians becoming involved in the enforcement process and stalling procedures.

A critical enabling factor for corruption in the forestry sector and beyond is the failure of the existing legislation to provide clear criteria for official decision-making, stakeholder engagement and other procedural mechanisms that could contribute to transparency and accountability. Examples abound within the forestry sector of the lack of stakeholder engagement and the lack of public scrutiny when critical decisions are made, including when licenses are issued or revoked; concessions are issued or revoked; or VFAs and FMAs are established or revoked. The lack of specific procedural requirements and

criteria for decision-making, along with the failure to make any of this information public, creates an environment in which officials can act without accountability. There is an urgent need to elaborate on the procedural mechanisms for decision-making on key issues (e.g. permitting, rulemaking, creation of management agreements) either at the statutory or regulatory level. Moreover, this information should be made public and the decision-making processes should be subject to specific stakeholder and public engagement requirements, in order to ensure that officials are held accountable to the decision-making criteria established in the legal frameworks.

Finally, the corruption risk assessment identified weak enforcement against violators, which is tied closely to the low levels of monitoring in forest reserves. As noted earlier, REDD+ payments will be conditional on the ability to avoid leakage (displacement of deforestation and forest degradation to areas outside of REDD+ jurisdiction) and ensure permanence of reduced emissions. This, in turn, will depend on Malawi's capacity to stem illegal encroachment and harvesting on government land, monitor and enforce the terms of concession agreements, and ensure compliance with the provisions set up under FMAs on customary forest land and in forest reserves. Illegal activities are also a major obstacle to both the clarification and security of legitimate forest tenure rights on customary forest land and in forest reserves. Not only will tenure rights themselves require more effective enforcement, but the ability to exercise tenure rights will depend on the capacity to exclude those that would intrude on legitimate resource use and management arrangements. From a legal perspective, there needs to be greater clarity on the mandate and the process for enforcement, as well as a flexible mechanism for setting penalties that are capable of deterring violations.

While financial gains (bribes) were cited as undermining enforcement efforts, other reasons include low salaries of enforcement officials, a lack of technical and monetary capacity to enforce, security problems, a lack of cooperation between the police and the communities, and a lack of inspection training. Similarly, prosecutors and judges lack awareness of the requirements of the Forestry Act and other relevant laws and often provide insufficient penalties to violators. The lack of monitoring and enforcement is also a major enabler of corruption, as there is no credible threat of being caught or punished.

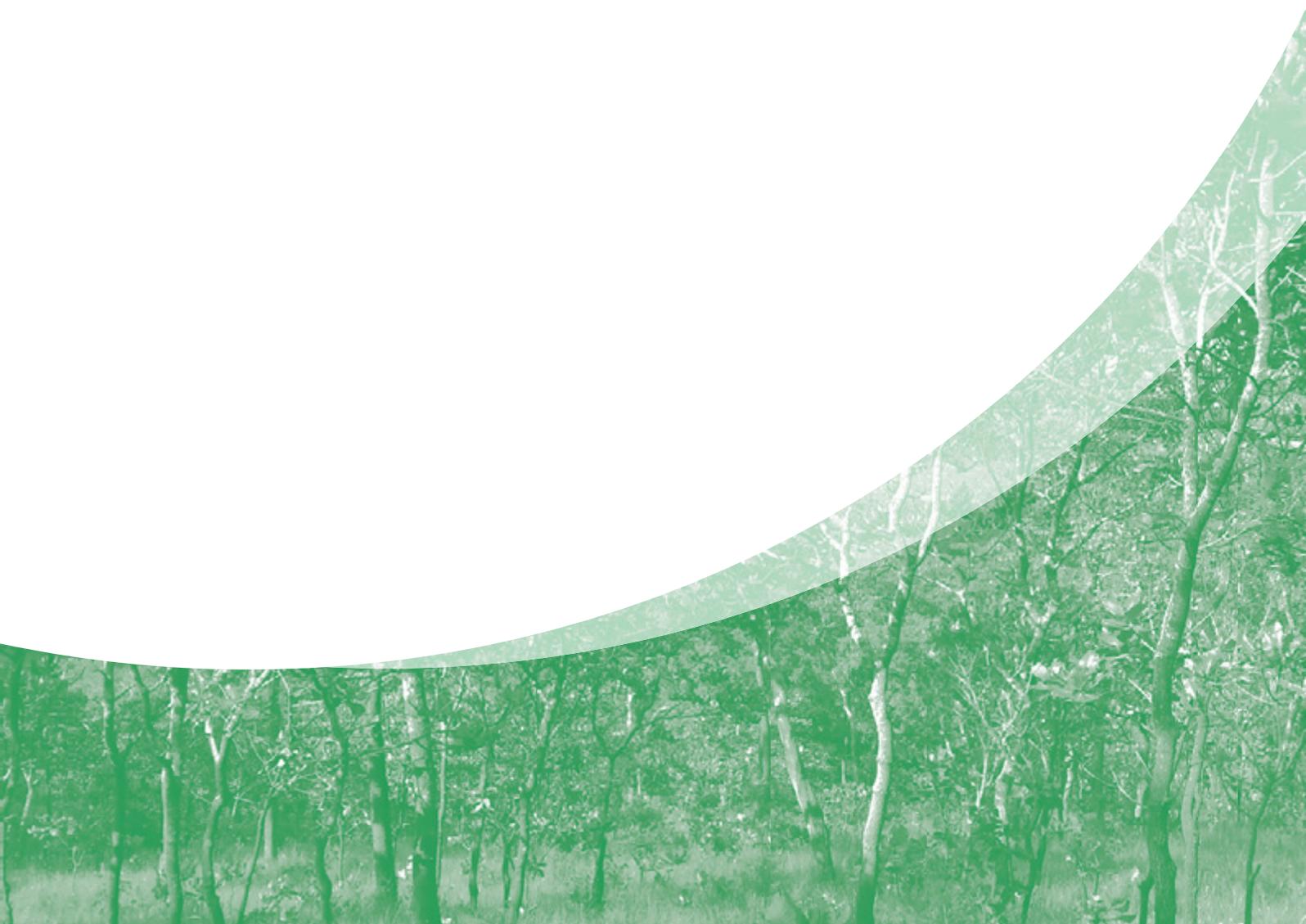
Options and next steps:

To address the cross-cutting issues contributing to corruption, there are a number of options for strengthening the legal framework, enforcement capacity and oversight mechanisms:

- Amend the Forestry Act to clarify the monitoring and enforcement roles and responsibilities, including provisions for joint law enforcement with the police and the communities under co-management agreements. This could begin immediately through a programme of enforcement capacity building that would train inspectors, enforcement officers, police prosecutors and judges on forestry law and REDD+. Joint law enforcement guidelines could be developed through the capacity building process.
- Include a provision within the Forestry Act to require corruption auditing. This could be started immediately with the establishment of an institutional integrity committee that could review corrupt practices and receive training from the Anti-Corruption Board.
- Clarify the role of traditional authorities in CLCs and ensure that a proper balance is struck between increasing accountability and transparency in land administration and leveraging legitimate local authority where it exists.
- Amend the Forestry Act to clarify the role of traditional authorities with respect to the establishment and oversight of VNRMcs/LFOs to ensure that the decision-making process is transparent and accountable.

With respect to compliance and enforcement, specific options include:

- amend the Forestry Act or create regulations that stipulate procedural requirements for all aspects of inspection, monitoring and enforcement to create a transparent, uniform process that can be tracked and to which officials can be held accountable for failure to enforce;
- create guidance on inspections and train forestry officers and their counterparts in the police;
- train district forestry officers, judges and other relevant stakeholders on how to apply the requirements of the Forestry Act and its regulations;
- create specific access to information and accountability requirements within the Forestry Act or through a regulation, specifying the type of information that needs to be publicly available and defining the limited circumstances under which exceptions can be made;
- revise the penalties section of the Forestry Act through a regulation that can be updated as necessary to ensure that fines and sentences are effective deterrents;
- identify where staffing resources for monitoring and enforcement are most needed and re-allocate staff accordingly, taking into consideration the need for higher salaries as an incentive;
- amend the Forestry Act to establish criteria for granting and revoking licenses, permits and management plans, and make this process publicly available to enable transparency and accountability in decision-making and enforcement; and
- formalize the process for setting up local forest organizations and concluding FMAs (or co-management agreements) so that both the communities and the forestry staff are able to come to the process on equal footing and be held accountable.



9 Conclusion and way forward

The options provided in section 8 cover a range of activities, including legislative amendments, advocacy efforts, institutional strengthening, capacity building and technical assistance. Many of the recommendations are interconnected and will need to be undertaken in concert. For example, in order to develop legislative reforms that are representative, coherent and effective, and to provide meaningful input into the implementation of the new land legislation, stronger coordination between the Ministry of Lands and the Department of Forestry will be required together with a more effective multi-stakeholder platform for engagement in the decision-making process. Ongoing dialogues on priority tenure issues that engage the government, the civil society and traditional authorities can also provide a meaningful mechanism for ensuring that the decision-making process is representative and transparent.

At the same time, there are limited resources for the implementation of the recommended options. The consultative workshops and stakeholder engagement undertaken as part of this assessment have been a good starting point for prioritizing among the proposed options, but continued work will be necessary to refine the options and to identify resources for their implementation. In particular, ongoing activities under the PERFORM project and the expected EU-funded project for piloting improved land governance should be leveraged and coordinated to address the priority issues identified in this assessment.

Table 3 beginning on the next page provides an overview of the recommended options and organizes the recommendations by the type of activity required and the corresponding lead institution. To facilitate alignment with ongoing efforts in Malawi to implement the Voluntary Guidelines on the Responsible Governance of Tenure, the table lists the relevant VGGT principles next to each option.

Table 3: Overview of recommended options for action

Option / Activity	Lead institutions	Priority	VGGT principles
Legislative / regulatory amendments			
<p>Amend the Forestry Act (1997) and/or draft new regulations to clarify the following issues:</p> <ul style="list-style-type: none"> • Who has the right to benefit from each type of forest tenure (include amendment of article 34)? • Define a clear and streamlined process for establishing co-management and community-based forest management (PFM) with specific criteria to facilitate accountability, based on a review of existing guidance and policy. • Who will have access, use and management rights to LFAs once customary estates have been established and what specific tenure rights will accrue under various types of PFM arrangements. This should include a specific definition of a 'forest-dependent community' and clarification of when and how free, prior and informed consent (FPIC) should apply to these types of communities (including with respect to REDD+ decision-making), and a clear definition of the FPIC process in line with international best practice. • How the above rights can be verified and what specific measures can be taken (and by whom) to enforce the rights and exclude others from infringing on them? • What evidence is necessary to support these rights and what dispute resolution mechanism can be used to uphold them? • What is the role of traditional authorities with respect to the formation and oversight of VNRMCs/LFOs and BMCs? • What specific tenure rights accrue under community based and co-management arrangements pursuant to the Forestry Act, and how can these be assigned and protected? • Outline specific procedural requirements for guaranteeing the rights of access to information, public participation and access to justice, as outlined in section 8.5 of this assessment. • Establish the requirements for consultation, assessment and joint monitoring relating to tenure administration between DoF and the Ministry of Lands. • Establish clear criteria and procedural requirements for the granting, revising and rescinding of permits, licenses, concessions and FMAs. • Establish clear enforcement mechanisms for forest tenure rights and PFM, including meaningful access to dispute resolution mechanisms (see 8.5.3). 	<p>Department of Forestry in coordination with Ministry of Lands, Housing and Urban Development</p>	<p>HIGH</p>	<p>3A 3.1.1 3.1.2 3.1.4 3.1.5 4.4 5.1, 5.3, 5.5 6.3</p>
<p>Develop regulations under the two Land Acts to:</p> <ul style="list-style-type: none"> • Clarify the application of the principles of non-discrimination and equality, particularly in the case of marginalized populations, including women. • Clarify the authority of traditional authorities with respect to the newly established CLCs and how it relates to forest governance oversight. • Establish the requirements for consultation, assessment and joint monitoring relating to tenure administration between DoF and the Ministry of Lands. • Clarify the definition of 'customary law' in relation to tenure rights to avoid the potential for elite capture as rights become formalized. 	<p>Ministry of Lands, Housing and Urban Development in cooperation with Department of Forestry</p>	<p>HIGH</p>	<p>3A, 3B 4.6 5.1, 5.3, 5.4, 5.5, 5.8 7.1, 7.3</p>

Table 3: Overview of recommended options for action

Option / Activity	Lead institutions	Priority	VGGT principles
Creation of coordination mechanisms and stakeholder platforms			
<ul style="list-style-type: none"> Leverage existing consultative platforms (including the Governance and Policy TWG in the RExG and the Land Governance Working Group of the Ministry of Lands) to create a platform for more effective coordination on tenure issues between the Ministry of Lands and DoF. Create a multisectoral REDD+ steering committee, chaired by DoF, to facilitate coordination and to align policies and planning processes with the land and other sectors. Continue “tenure dialogues” to engage key government and nongovernment stakeholders in the decision-making on tenure and REDD + (including legislative amendments) and to provide a forum for building broader consensus and awareness raising. Integrate projects designed to raise awareness of/implement the VGGTs with forest tenure activities under PERFORM and other initiatives. 	<ul style="list-style-type: none"> Department of Forestry RExG TWGs Ministry of Lands, Housing and Urban Development PERFORM CSOs engaged in land governance (CEPA, LandNet, Oxfam) 	HIGH	3A 3.1.3 3.1.5 3B 5.5 9.2, 9.7
Training/awareness raising/capacity enhancement			
<ul style="list-style-type: none"> Develop a coordinated strategy to engage diverse stakeholders in the decision-making on tenure. Create awareness raising programmes on the VGGTs and how they can be implemented on forest land. Leverage existing projects (PERFORM and the EU-funded land governance initiative) to raise awareness and build capacity of government officials, traditional authorities, local government officials and communities on the VGGTs, tenure issues, tenure rights and responsibilities under the new legislation, and how this impacts REDD+. Create specific training materials on gender-inclusive land governance processes targeting women, with clear information about their impacts on forest resources. This should include awareness raising on the impacts of banning gender-based inheritance. 	<ul style="list-style-type: none"> Ministry of Lands, Housing and Urban Development in coordination with DoF and EAD Department of Forestry and RExG (or a coordination mechanism within the Ministry of Lands) PERFORM, CSOs implementing land governance (CEPA, LandNet, Oxfam) Ministry of Lands, Housing and Urban Development with support from DoF and relevant projects 	HIGH MEDIUM-HIGH HIGH MEDIUM	3B 5.5, 5.7 9.2, 9.7 3.1.3, 3B 4.2 8 3A, 3B 4.1, 4.7 6.6, 6.7 9.2, 9.4

Table 3: Overview of recommended options for action

Option / Activity	Lead institutions	Priority	VGGT principles
<ul style="list-style-type: none"> Develop a training programme for traditional authorities, prosecutors and judges on equitable land dispute resolution, including the new legal requirements, as applicable, with a focus on mitigating corruption in tenure transactions. 	Ministry of Lands, Housing and Urban Development, CSOs (CEPA, LandNet)	HIGH	6.6, 6.7, 6.9 9.2, 9.4
<ul style="list-style-type: none"> Create training on inspections (including joint inspections between DoF and the Ministry of Lands), monitoring, compliance and enforcement of integrated land and forest resource governance. 	Ministry of Lands, Housing and Urban Development /DoF/EAD	HIGH	
Development of processes and tools for the transparent, equitable and sustainable implementation of tenure reforms / land administration			
<ul style="list-style-type: none"> Use ongoing pilot projects and lessons from other jurisdictions (e.g. Zambia and Uganda) to test low-cost, open source technology and other tools for delineating, registering and resolving disputes related to customary tenure rights. 	PERFORM	HIGH	3, 5.1 5.5
<ul style="list-style-type: none"> Focus specifically on areas where marginalized or landless groups (including women) are likely to need additional support to engage in the decision-making process for formalizing their rights. 			6.3 7
<ul style="list-style-type: none"> Develop specific pilot initiatives to see how forest and tree tenure are impacted by land tenure reforms and to identify incentives for strengthening forest tenure and sustainable forest management in line with the PFM goals under the Forestry Act. 	CSOs implementing the EU-funded land governance initiative		9.2, 9.4
<ul style="list-style-type: none"> Use lessons from pilot initiatives to inform further development of the requirements for the implementation of land and forest tenure reforms. 	DoF/Ministry of Lands, Housing and Urban Development		

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Annex B: Research questions

- 1 **Are tenure rights legally recognized?**
 - a individual
 - b community
 - c customary
 - d women's rights
- 2 **What is the legal basis for the promotion and protection of tenure rights?**
 - a clarity
 - b duration
 - c scope
 - d protection
 - e enforcement mechanisms
- 3 **What is the practical basis for promotion and protection of tenure rights under various customary practices/laws?**
- 4 **Does the law reflect policies on tenure rights systems?**
 - a forestry law
 - b land law
 - c planning law
 - d environmental law
- 5 **Do legal and policy requirements for tenure respect and reflect forest policies?**
 - a What about clarity of tenure over trees and forest products?
- 6 **What are the policy/legal provisions for community-based forestry management?**
 - a How well are these requirements being followed in practice?
 - b What is the capacity of local institutions for CBFM? What are the challenges?
- 7 **Does the legal framework provide a clear and fair process for adjudication of tenure rights?**
 - a To what extent are tenure rights justly adjudicated in practice?
- 8 **To what extent does the state acknowledge customary tenure in a manner that respects existing formal rights?**
 - a What conflicts exist between customary and formal rights systems?
- 9 **To what extent does the legal framework provide for the fair and effective administration of tenure rights?**
 - a comprehensiveness of legal framework
 - b clarity/simplicity/accessibility
 - c fairness
 - d accountability

- 10 To what extent does the policy/legal framework ensure equal tenure rights for women and men?**
- a Does it prohibit discrimination related to tenure rights, including discrimination resulting from change of marital status, lack of legal capacity, and lack of access to economic resources?
- 11 To what extent do government offices provide for tenure administration services?**
- a compliance with law
 - b nondiscrimination
 - c accessibility, timeliness, accountability (opportunities for corruption at national, district, local levels?)
 - d capacity issues
- 12 To what extent does the government maintain and provide access to high-quality information about tenure?**
- a centralized system
 - b comprehensiveness
 - c accuracy and timeliness
 - d accessibility
- 13 How is public participation promoted in policy-making and decision-making?**
- a access to information
 - b access to decision-making
 - c access to justice
- 14 How well are rights holders empowered to exercise their tenure rights?**
- a awareness of rights
 - b access to information
 - c access to decision-making
 - d access to capacity support
 - e assistance for vulnerable rights holders
- 15 To what extent are tenure rights widely recognized and protected in practice?**
- a recognition
 - b demarcation
 - c enforcement
 - d gender equity
 - e customary tenure
- 16 What dispute resolution mechanisms are available and how are they functioning?**
- a clear institutional framework and mandates
 - b accessibility
 - c recognition of customary practice/law
 - d capacity of dispute resolution bodies
- 17 How are protected areas and forest reserves delineated and designated?**
- a Is there a requirement that they be held in trust for the public?
 - b What are the decision-making criteria?
 - c consultation requirements
 - d transparency
 - e relationship to tenure rights

- 18 How does the designation of protected areas and forest reserves happen in practice?
- a oversight
 - b legal compliance
 - c respect of tenure rights
- 19 What is the legal basis for expropriation of rights?
- a public purpose requirement – definition
 - b transparency and consultation requirements
 - c compensation
- 20 How has expropriation taken place in practice?
- a justification
 - b consultation
 - c compensation
- 21 What is the legal basis for allocation of concessions?
- a transparency
 - b consultation requirements
 - c requirement to identify rights-holders
 - d work in practice
- 22 What are the legal requirements for forest concessions?
- a contracts
 - b social and/or environmental impact assessment
 - c mitigation
 - d monitoring

Annex C: Stakeholders consulted

In Lilongwe:

Name	Title	Organization
Richard Bunderson		Total Land Care
William Chadza	Executive Director	Centre for Environmental Policy and Advocacy (CEPA)
Alinafe Chibwana	Climate Change Officer	Malawi REDD+ Programme/PERFORM
Dr. Clement Chilima	Director	Department of Forestry
C. Chilimanpunga	Deputy Director, Chair of Forestry Fund	Department of Forestry
Stella Gama	Former REDD+ Focal Point	Department of Forestry
Alice Gwedeza	Principal Officer	Department of Surveys
Victoria Kachimera	Principle Legal Officer	Environmental Affairs Department
Emmanuel Mlaka	Executive Director	LandNet
Frances Kachule		Ministry of Finance
Aloysious Kamperwera	Deputy Director	Environmental Affairs Department
Judith Kamoto	Professor	LUANAR
Ted Kamoto	REDD+ Focal Point, Deputy Director for Policy	Department of Forestry
Ramzy Kanaan	Chief of Party	Protecting Ecosystems and Restoring Forests in Malawi (PERFORM)
Yoel Kirschner	U. S. Forest Service Officer	Malawi REDD+ Readiness Programme
Luke Malembo	Policy and Advocacy Specialist	PERFORM
Patricia Masupayi	Chief Forestry Officer	Department of Forestry
Nyuma Mghogho	Deputy Director	Department of Forestry
William Msiska	Legal Officer	Law Commission
John Mussa	Director	Department of Lands Resources Conservation
Blessings Mwale	Deputy Chief of Party	PERFORM
Shamiso Najira	Chief Environmental Officer	Environmental Affairs Department
George Namasika	Climate Change Officer	Ministry of Energy and Mining
Kwame Ngwira	Controller of Lands	Department of Surveys
Bright Sibale	Managing Director	Centre for Development Management
Henry Utila	Principal Forestry Research Officer	Forest Research Institute of Malawi
Titus Zulu	Principal Forest Officer	Department of Forestry

On field visits:

Mulanje District

Carl Bruesow	Director, Mulanje Mountain Conservation Trust
Lemos Mlavia	District Forestry Officer, Mulanje
Hector Nkawihe	Assistant District Officer, Mulanje
Fred Movete	District Commissioner, Mulanje

Zomba District

Gerald Meke	Chief Research Forestry Officer, FRIM
Mike Chirwa	Senior Research Officer, FRIM
Henry Utila	Chief Research Forestry Officer, FRIM
Eston Sambo	Professor, Biology Department, Chancellor College
Group Village Headman Mtogolo	Traditional Authority Malemia

Mwanza District

Gift Rapozo	District Commissioner
Brian Mtambo	District Forestry Officer
Moses Walola	District Council Chairperson
Village Headman Nthache	

Tiyanjane Club

Fainess Changwenda	member
Margaret Geniyo	chairperson
George Chinthema	member
Francis Wilson Mokesi	member

Lilongwe District

Paul Phokera	Forestry Assistant
FDH Chilimampunga	Deputy Director, Department of Forestry
Mphatso Kalemba	Environmental Officer, Environmental Affairs Department
Group Village Headman Chilulu	Traditional Authority Chadza

Ntchisi District

Ntchisi Forest Reserve

Nyanja group village headperson, block committee, mbiya (pottery) committee, beekeeping committee, nthilira (irrigation) committee

Kulera site visits

Nkhotakota Wildlife Reserve Association

1	TA Malengachanzi	Traditional Leader
2	TA Mwansambo	Traditional Leader
3	Henry Chiwayo	Nkhotakota Wildlife Reserve Association – Malengachanzi Zone A
4	Alefa Njawa	Nkhotakota Wildlife Reserve Association
5	Marnet Ngosi	African Parks - Nkhotakota
6	James Sadalaki	Nkhotakota Wildlife Reserve Association

Nyika Vwaza Association

1	Paramount Chief Chikulamayembe	Traditional Leader
2	Senior Chief Katumbi	Traditional Leader
3	Chiza Duncan Mkandawire	Nyika Vwaza Association
4	Peter Wadi	Department of National Parks and Wildlife - Nyika Vwaza Association
5	Henry Kadauma	Department of National Parks and Wildlife - Nyika Vwaza Association
6	Chimwemwe Nyasulu	Nyika Vwaza Association
7	Lovemore Ngala	Nyika Vwaza Association
8	Eddings Shuga	Nyika Vwaza Association

Annex D: National case study

Kulera Landscape REDD+ Programme

Background

The Kulera Landscape REDD+ Programme is the only active REDD+ project in Malawi. Although its official name includes the word programme, it should be noted that it is a REDD+ project, not a national programme. Implementation of the project has provided some critical lessons for the implementation of additional REDD+ projects, but also for the development of a national REDD+ programme.

The Kulera project is taking place in three protected areas under the management of the Department of National Parks and Wildlife (DNPW): (1) Nyika National Park, (2) Vwaza Wildlife Reserve, and (3) Nkhotakota Wildlife Reserve. The project is targeting 65,000 households (350,000 people) living on customary land in rural communities located within a five-kilometre radius of the protected areas. The project is managed by DNPW, Total Land Care (TLC) and Terra Global Capital in partnership with two community-based organizations: the Nyika Vwaza Association (NVA) and the Nkhotakota Wildlife Reserve Association (NAWIRA). The project was initially funded by USAID with TLC as the lead implementing partner. The main purchaser is Microsoft through the Carbon Neutral Company.

The main purpose of the Kulera project is to reduce deforestation and improve livelihoods in the protected areas by implementing co-management activities. Deforestation, wildlife poaching and limited benefits to communities for their involvement in the management of the protected areas have been the key concerns driving the initiative.

The Kulera project is reducing deforestation and forest degradation through:

- supporting the development of improved governance mechanisms for co-management of protected areas, including the development and implementation of sustainable forest and land use management plans;
- forest protection through increased patrolling, establishment of village patrols and community maintenance of protected area boundaries;
- fire prevention and suppression activities;
- reducing fuelwood consumption and increasing energy efficiency by promoting the use of fuel-efficient woodstoves;
- creation of alternative sources of fuelwood through the establishment and management of woodlots;
- sustainable intensification of agriculture on existing agricultural land; and
- development of local enterprises based on sustainably harvested non-timber forest products (NTFP) such as honey, coffee, macadamia nuts and livestock fodder.

Institutional and tenure arrangements

There are a number of institutions involved in the Kulera project, with NVA and NAWIRA representing the communities. The Nyika Vwaza Association has had a working relationship with DNPW since 2000, while NAWIRA was established in 2013 to manage the Kulera project activities. Traditional leaders have expressed a high level of interest in this initiative and they have influenced the activities of both associations, which serve as umbrella institutions for the various local natural resources committees that have been established around the three protected areas.

While more than 50 percent of the members of the various natural resource committees are women, there are only two women acting as executives in the associations. This lack of gender balance was attributed to the stringent educational qualification requirements imposed on candidates who want to serve in executive positions.

The Department of Natural Parks and Wildlife is a co-management partner of NAWIRA and NVA. As a government agency, DNPW owns the land on which the Kulera project is taking place. Total Land Care and Terra Global are the technical partners. Total Land Care manages the procurement and training components, and Terra Global serves as the fiscal manager with responsibilities for business planning.

The five institutions involved in the project are in the process of forming a Kulera REDD+ entity that would:

- hold emission reduction rights for the Kulera Landscape REDD+ Programme and act as the counterpart to the seller of the emission reduction sales;
- invest proceeds from REDD+ sales into the on-going management of the Kulera REDD+ project;
- manage the operational and financial aspects of the REDD+ mitigation and livelihood activities in the project areas;
- promote benefit sharing through implementation agreements that support project activities with DNPW, the community associations and the technical partners (such as Terra Global and TLC); and
- support performance-based (contribution to emission reductions) benefit sharing with communities that are members of the associations.

The three protected areas are located on public land, but the five-kilometre radius within which the communities reside is on customary land, where tenure is administered by traditional authorities. In the case of Nkhotakota, a private company – African Parks – has recently signed a 25-year concession with GoM to manage the wildlife reserve. It is not clear how this will affect the Kulera Landscape REDD+ Programme given that the initial agreement was with DNPW, but the management company has expressed willingness to enter into negotiations with the government and the communities. The outcomes of these negotiations and their impact on the project will provide important lessons on the need for guidance in community-private sector consultations related to tenure and REDD+. The current legislation provides no guidance on these matters, nor does it specify any benefit sharing requirements related to the private sector.

Progress

The Kulera Landscape REDD+ Programme is one of only three projects in the world verified under the Verified Carbon Standard and the Triple Gold status for Climate, Community and Biodiversity benefits. The verification was completed in September 2014.

In the first monitoring period (October 2009 to September 2013), the project generated 1,052,022 tons of verified carbon units (VCU). Verified reduction sales began in October 2014, aimed at selling one million tons. As of November 2015, the Kulera project had completed two sales: in January 2015 a total of 34,000 VCUs was sold at US\$7.47 per ton, generating US\$241,350, and in June 2015, a total of 50,000 VCUs was sold at US\$5.65 per ton, generating US\$268,584.

In all three protected areas there are resource use arrangements in place. Resource use zones have been established within a five-kilometre radius of the protected areas, where the communities access resources such as mushrooms and medicinal plants and hang their beehives. The communities get permits to gain access into the protected areas. The permits are valid for a specified period of time and the quantities harvested have to be verified by the respective natural resource committee.

Benefit sharing

There is no agreed, structured benefit sharing arrangement under the Kulera project. Currently, the benefit sharing arrangements from the carbon sales are based on needs as articulated in negotiations among the project partners. From the first carbon sale, benefits were shared as follows:

- DNPW was to receive US\$67,000, though the department has not yet received these funds due to delays in the government payment system. As a result, it was established that DNPW would receive some of the funds in kind through TLC, in particular in equipment (such as motorcycles).
- NVA received US\$68,000 and it also receives 25 percent of the total revenues from the Nyika National Park.
- Terra Global Capital received 5% of the total sale.

It was not possible to establish by the assessment team how much TLC and NAWIRA received from the first carbon sale.

Illegal activities, particularly poaching, timber sawing and bamboo harvesting, have decreased in all three of the project's protected areas. The natural resource committees are involved in patrolling the five-kilometre boundary radius of the protected areas, and the committees and the community associations report offenses to DNPW law enforcement personnel.

Challenges and lessons learnt

One challenge noted by the stakeholders is the lack of effective cooperation between the community-based associations and DoF personnel in relation to managing the forestry activities in the five-kilometre radius outside the protected areas and on customary land. This is attributable in part to the lack of ownership DoF has had over the project, as the main government proponent is DNPW. Clear delineation of forest tenure on customary land and more effective implementation of PFM could both support better coordination between the relevant government entities, particularly as the new Land Act and the Customary Land Act begin to be implemented. The national REDD+ strategy presents an opportunity to address these issues in an integrated manner.

The stakeholders interviewed for the assessment stressed that stakeholder engagement and the meaningful involvement of the local communities and their traditional leaders have been critical to the success of the Kulera project. While land in the protected areas is public land, and therefore controlled by the government, traditional leaders have the authority to curb those activities of their community members that could jeopardize conservation efforts on public land. Related to this is the need for effective institutions at the local level, such as community associations that are able to participate in negotiations on complex issues such as carbon markets and benefit sharing. It is notable that the associations involved were created specifically for the project and that existing community-based institutions were not able to participate and effectively advocate in shaping and implementing the Kulera project. This is partly attributable to the fact that there are numerous communities involved and the associations provide an umbrella function. However, both the community members and the government officials made it clear that capacity building for the associations and the community members has been an essential aspect of the success of the project. This indicates the need for integrating REDD+ training into the efforts to revitalize and expand PFM in Malawi.

The stakeholders consulted for the case study stressed that structured, transparent and thoroughly negotiated benefit sharing arrangements were extremely important in order to avoid any future misunderstanding and unmet expectations. While NVA was open and willing to discuss the financial issues related to the Kulera Landscape REDD+ Programme, NAWIRA was very sceptical about the legitimacy of the benefit sharing process. The traditional authorities engaged in NAWIRA stated that they have not been involved

in or apprised of the decision-making that resulted in the current financial benefit scheme. This indicates that more effective communication and engagement must be complemented by technically competent brokers who can support the verification process and engage with international carbon markets. Furthermore, the national REDD+ programme needs to have a guaranteed initial investment, as it takes time before financial benefits begin to flow. Communities must be aware of this delay and its potential impact on available benefits.

Specifically related to tenure, the stakeholders noted that initially there was widespread fear that communities would be dispossessed of their land, signalling their perception of tenure insecurity on the customary land surrounding the protected areas. Over time this fear has been alleviated with awareness raising and trust building, leading to the lesson that any further REDD+ activities should address tenure concerns from the start. Even where REDD+ activities are focused on public land, land ownership and user rights need to be clarified to ensure that benefits flow to the communities that are involved in the REDD+ activities and/or are the targeted beneficiaries. This lesson will apply to forest reserves and protected areas alike. Until such time when the land reforms are complete (see section 7), REDD+ initiatives will need to invest in clarifying the tenure arrangements in order to ensure the effective involvement of all relevant stakeholders and equitable benefit sharing.

Source: Field consultations, Nyika National Park and Nkhotakota Wildlife Reserve, December 2015.

Annex E: Inception workshop

Legal and policy frameworks assessment and tenure frameworks assessment for REDD+ in Malawi

28-29 July 2015

Golden Peacock Hotel, Lilongwe, Malawi

I Information about the inception workshop

1 Background

In April 2015, the UN-REDD Programme launched an integrated work programme in Malawi to support the country's progress towards REDD+ readiness. This work programme includes a country needs assessment and targeted support divided into six outputs:

- legal and policy frameworks assessment;
- tenure frameworks assessment;
- institutional and context analysis;
- corruption risk assessment;
- roadmap for a national REDD+ strategy
- roadmap for a national forest monitoring program; and
- knowledge management support.

2 Objectives of the workshop

This inception workshop addresses the first two outputs: the legal and policy frameworks assessment and the tenure frameworks assessment, both of which are closely aligned under the broad umbrella of REDD+ governance. This workshop convenes stakeholders from national and local government, traditional authorities, civil society, academia and the private sector to share information and solicit feedback on the proposed assessment methodologies, work plans and progress to date. It will build an understanding of the overall UN-REDD Programme's support to Malawi and the role and purpose of governance and tenure in achieving REDD+ readiness. Ultimately, the workshop will be an opportunity to gain consensus on the approach, methodology and priority issues to be addressed through these two programmes of work.

The legal and policy frameworks assessment (LPFA) is a thorough analysis of Malawi's existing and developing policies, laws and regulations relating to REDD+, as well as the institutional frameworks and procedures that are in place for implementing and enforcing them. The broad objective of the LPFA is to identify existing capabilities, inventory the gaps and needs of Malawi's policy and legal frameworks for implementing REDD+, and develop a roadmap for the Government of Malawi and other stakeholders to fill the prioritized needs based on input from a wide range of stakeholders.

The tenure assessment is an analysis of the land and resource tenure systems within Malawi's natural resource sectors that will impact the development and implementation of REDD+. The tenure assessment will also provide recommendations for tenure reforms that are in line with the country's broader sustainable development and national tenure reform objectives, and that can support the Government of Malawi in effectively implementing REDD+.

3 Expectations for the workshop

- Participants will be introduced to REDD+ to ensure definitions are understood.
- There will be an overview of the legal and policy framework assessment and its methodology, and participants will be expected to give the team comprehensive feedback.
- Participants will become familiar with definitions of tenure and the tenure assessment, and will be expected to provide comprehensive feedback on methodology and content.
- There will be breakout sessions, which will enable focused discussion and idea sharing on enforcement and compliance, policy coherence and policy implementation.

4 Next steps

Based on the feedback on the methodologies and content of the assessments, consultations will continue to be carried out, and a final report will be drafted and shared in advance of a validation workshop. The knowledge generated by these studies will be incorporated and synthesized into the larger targeted support effort of the UN-REDD Programme, and will ultimately help plan a way forward for the development of a long-term REDD+ strategy for the country.

II Report on day 1

1 Welcome

Thomas Makhambera, Deputy Director of Forestry, welcomed the participants and distinguished guests and provided an overview of the UN-REDD Programme's engagement in Malawi. He also outlined expectations for participation during the workshop.

2 Welcome on behalf of the FAO/Malawi Country Office: Florence Rolle, FAO Representative

Coherence between the agriculture and forestry sectors is important. Both are in competition today, but they have the potential to work together, and efforts such as this can help foster that collaboration. Often to avoid negative outcomes, we tend to look at policy frameworks as something to be enforced. I would encourage you to look at frameworks in a more positive way, because there are often valid reasons for why people are taking part in illegal activities. Charcoal is an example – we need to find a solution to support livelihoods that are based on illegal behaviour – and not by simply banning it.

In July 2014, the first awareness raising workshop on tenure in international forestry and fisheries was held. The voluntary guidelines were endorsed by 192 countries and provide the principles for what each stakeholder (public, private and civil society) should do to achieve good governance of land tenure in forestry and fisheries. I would encourage you to take that on board during your discussions. In Malawi, eleven land bills are expected to be taken to Parliament in November 2015.

In conclusion, I encourage you to be creative in these two days. As you know, 30 years ago Malawi was rich in trees, but today it is very poor. FAO created the Malawi land cover atlas, and if you consider the high deforestation rate that was assessed between 1990 and today, there is little forest left. I am not sure we can go back to what Malawi once was, so we need to be creative in how we look at trees today. What is the role that trees can play and how can forestry interact with different sectors, in particular agriculture and energy? Thank you.

3 Introduction to REDD+ in Malawi: Teddie Kamoto, Deputy Director of Forestry, Department of Forestry

Mr. Kamoto offered a broad overview of REDD+ in Malawi in order to familiarize those participants who had not been previously been involved in the Malawi REDD+ Programme.

Outline of the presentation:

- status of forest resources
- challenges and pressures of the forestry sector
- policy framework
- REDD+ evolution within the UNFCCC
- strategic importance of REDD+ for Malawi.

REDD+ was defined as a mitigation tool and also as a catalyst for broader transformation of the natural resource management sector. REDD+ readiness was defined conceptually and in terms of Malawi's place along the phased approach developed in Cancun. The governance arrangements for REDD+ in Malawi were described, including the REDD Experts Group and the technical working groups, and the designation of the Department of Forestry as the national focal point for REDD+. The Malawi REDD+ Readiness Programme was introduced, along with a breakdown of all major readiness activities to date, including activities carried out through the USAID-funded PERFORM project and other concurrent activities supported by the UN-REDD Programme. Mr. Kamoto also summarized the process of the revision of the National Forestry Policy and the development of the draft National Climate Change Policy, including the consideration of including REDD+ as a strategy for mitigation.

4 Overview of the legal and policy framework assessment: Jessica Troell, Senior Attorney, Environmental Law Institute

Ms. Troell introduced the legal and policy frameworks assessment (LPFA) to the participants. Her presentation covered the following points:

What is the LPFA?

The LPFA is a detailed analysis of Malawi's current and evolving natural resource policies, laws and institutional frameworks to identify capacities and gaps, and to develop recommendations for the development of a national REDD+ strategy. The LPFA will analyse the policies, laws and regulations of REDD+ relevant sectors; customary law and practices; and implementation and enforcement capacities and challenges at the national, district and local levels across all relevant sectors.

Why does Malawi need an LPFA?

The LPFA is needed to translate international requirements for REDD+ into tangible and specific national requirements through policies and measures for implementation. To support REDD+ implementation, legal and policy frameworks must be able to support REDD+ readiness. Malawi should be prepared to meet the international requirements under the UNFCCC for results-based payments, which requires an understanding of the broader forestry governance challenges.

Data sources to inform the LPFA:

The LPFA will look to the policies, laws and regulations of relevant sectors in Malawi; customary laws and practices related to land use and forestry; past and ongoing studies and programme documents related to forestry, tenure and other relevant aspects of REDD+ governance in Malawi; budgets and other organizational documents of relevant Malawian agencies; grey literature; and guidance documents.

Consultation:

The LPFA will carry out stakeholder interviews and stakeholder workshops to gather information. Planned field visits were described, including interviews with district forest officers, district commissioners and traditional authorities; focus group discussions with VNRMCs/LFOs; and project site visits and additional interviews.

Additional points covered in the presentation:

- criteria for site selection for field visits
- proposed sites
- analytical methodology
- Warsaw Framework
- assessment frameworks

Questions and comments:

- Where would be our point of entry to ensure that policies are supportive of REDD+?

Response: We are trying to prioritize entry points so that we can inform those issues and policies that are open to our input. For example, if entry of REDD+ into the Land Bills expected to be passed in November is possible, then we will circulate our final reports and follow with discussions on how we could influence them. The critical issue is the implementation of policies. One question we will ask is why policies have failed in the past and what we can do to make them succeed in the future. For the most part we are talking about broad policies and the key will be to use this assessment to implement these broad policies. If the Land Bills are passed and conflicts arise, we will have to sit down and come up with solutions, maybe through drafting of regulations that could clarify and offer options.

- Will this assessment discuss access to financing through carbon markets?

Response: There will be a meeting on 4 August to look at this issue and discuss accessing the Green Climate Fund. This is organized by the Environmental Affairs Department. Also, the PERFORM project is looking for options for financing REDD+ in Malawi.

- In terms of stakeholders to consult, are you going to consult politicians? Most of the decisions that are made are political in nature.

Response: Absolutely. For the tenure assessment we intend to specifically engage with politicians.

- I see community members missing as stakeholders during consultations. I don't know how low you will go in terms of consultations. I look at tenure as something that hinges more on communities because it affects them daily. This work should consider engaging communities in terms of community participation. That's what I have seen missing in the past.

Response: How do you think it would be best for us to access communities? At some point you need to rely on organizations; are there other recommendations you have for accessing unheard voices?

Answer: You should invite common villagers when doing your consultations, maybe a group of 15 men or women who don't belong to any organization or committee.

- In terms of corruption, are you going to look into the root causes? In many cases this is missed out.

Response: The corruption risk assessment to be carried out through the UN-REDD Programme's target-ed support has a comprehensive methodology. This activity will take off soon and inform other ongoing work on REDD+.

Additional comments made by participants:

- National park border zones were suggested as possible areas to visit for stakeholder interviews.
- Dedza was suggested as a potential field site to visit.
- The current disaster policy was suggested as a source of information.
- VNRMCs – subcommittees of VDCs – and VDCs were suggested as potential groups to interview, particularly the groups that were involved in the Department of Forestry IFMSLP project funded by the EU.

5 Tenure and REDD+: Best practice and lessons learnt: Amanda Bradley, Tenure Specialist, FAO

What is land tenure?

Land tenure is the set of institutions and policies that determine how land and its resulting resources are accessed, who can benefit from these resources, for how long and under what conditions.

Per Cancun Agreements, developing country partners are requested to address land tenure issues. The UN-REDD Programme is assisting Malawi in this regard.

What are the Voluntary Guidelines on the Responsible Governance of Tenure?

The guidelines are the first international document on tenure. They provide consensus on existing practices. They are a frame of reference for improving forest governance. There is synergy between the guidelines and the Framework and Guidelines on Land Policy in Africa. Initial work on the development of the guidelines began in 2000, followed by consultations in 2009-2010, drafting in 2011, negotiations in 2011-2012, and approval in May 2012.

What are the principles embedded in the guidelines?

For states:

- Recognize and respect all legitimate tenure rights and rights holders.
- Protect legitimate tenure rights against threats.
- Promote and facilitate the exercise of legitimate tenure rights.
- Provide access to justice in case of violations.
- Prevent land disputes, conflicts, violence and corruption.

For non-state actors:

- Avoid infringing on tenure rights.
- Prevent violations of tenure rights.
- Provide mechanisms for resolution.
- Identify and evaluate all violations.

What about women's land rights?

The African Union calls for women's land rights to be strengthened through a variety of mechanisms. It calls for: equal rights for women to inherit and bequest land, co-ownership by spouses, and promotion of women's participation.

What does research tell us?

- There is evidence that land tenure security is associated with less deforestation, regardless of the form of tenure.
- Securing tenure is a necessary enabling condition, but it is not a sufficient one.
- The perception of land security often has greater impact on land use decision-making than whether tenure is legalized.
- Tenure security is improved by demarcating boundaries and identifying legal rights holders.

- There are limitations to the ability to resolve issues that are national in origin and scope (policy, legal issues).
- There is a need for integration of national and local efforts.
- The ability to exclude, enforce rules and resolve disputes is key in determining effectiveness.
- Tenure security protects equally the right to reduce and the right to increase emissions.
- Securing community tenure leads to REDD+ effectiveness if it can compete with other economic interests that emit GHG.

What is customary tenure?

Customary tenure is a set of rules and norms that govern community allocation, use, access and transfer of land and other natural resources (USAID, 2011). Other terms used: “informal”, “indigenous”, “traditional law”.

The strengths of customary tenure include: 1. responsive to real needs; 2. protecting the rights of the disadvantaged; 3. highly resilient and responsive to changes; 4. based on trust and respect; and 5. low administration costs, especially in remote areas.

Best practice lessons learnt:

- Where pressures are low, formalize a tenure “shell” around the area.
- Where pressures are high, transform customary rights into statutory rights.
- Promote transparency, accountability and checks and balances.
- Prioritize interventions according to intensity of pressures.
- Allow communities to define most appropriate strategies for formalization.
- Facilitate public debate on tenure policy.
- Develop a plan to deal with conflicts.

Case information on the experience of Nepal and Indonesia with customary tenure was also shared.

Questions and comments:

• In the presentation you talked about land rights for women. It’s interesting to note that we have an issue in Malawi when it comes to land rights for women concerning matriarchal and patriarchal societies. Many times these rights are obscured by tradition and you need to look at that if you are going to come up with equal land rights for women.

Response: I’m especially excited to hear about your interest in women’s rights. We’re conducting focus groups and will also be talking with individual women to get their perspectives on the issue. It’s an interesting case in Malawi when you have matriarchal and patriarchal systems and you can look at what’s working and what’s not working. Thank you also for the comment on the pressures and importance of considering the different contexts.

• I’m interested in the case studies you presented. What in particular did Kenya and Indonesia do in recognizing customary land rights, was it by protecting their rights or through legislation?

Response: I’m not an expert on the details but I believe it was something at the legal and policy level. I’m assuming this is still in progress in terms of implementation. In Indonesia I think it’s going to be a long process – they have a goal of demarcating 40 million hectares of customary land and are just in the early stages. You can have the policy but to make it happen on the ground is the bigger challenge.

• Under the current forestry management system there are co-management communities who are allowed to access reserves and they participate in management activities. However the reserves remain under the tenure system and are referred to as public land tenure. In the communities their land is under customary land. What is your take on a scenario that would give both parties an equal footing as far as co-management?

Response: Co-management is usually the mechanism used in reserves and protected areas. Customary land would be fully owned by local stakeholders. I would turn the question back to you and the rest of the participants as to what is most appropriate for Malawi. This is a good question for the break-out groups.

The discussion then turned to traditional authorities. Each traditional authority has authority over a piece of land, and 30m x 30m plots are allocated to each family. If the family is big they are allocated 1 hectare. The remaining land is overseen by the traditional authority and it can be allocated to any person under their domain, especially to those who have large families. This is recorded and filed. If the person to whom land was allocated dies, the land automatically goes to the spouse and children.

Translation of comments made by traditional authorities:

Traditional Authority Kasakula: Some areas are reserved as forest areas i.e. VFA. All other customary land is put under the jurisdiction of the group village headperson.

Traditional Authority Kachindamoto: Each group village headperson has been allocated a VFA to look after. They are responsible for informing the villagers about the VFA, i.e. raising awareness about the benefits of the forest. Any person that is building houses or farming in the said area is removed with the help of the police. This was done in Dedza, however the encroachers were given a very small fine (MK2,500). They remain insolent and have vowed to encroach on the forest again as they can afford the fine.

Traditional Authority Kasakula: The Forestry Act is very old. Traditional authorities rely on customary laws that are not documented, so their authority is eroded when they try to enforce them. Ntchisi has by-laws at ADC and VDC level that they use, so they are lucky. There is a need to document customary laws that can be enforced. Traditional authorities rely on their own customary law to punish offenders. By-laws are used if available.

6 Assessment of the tenure framework for REDD+ readiness and implementation in Malawi: Gracian Banda, Centre for Environmental Policy

The presentation began with a background on the link between forests and tenure within the context of Malawi, where unclear and insecure tenure of land, forests and forest resources has been one of the drivers of deforestation and forest degradation. To reduce deforestation and degradation in Malawi, a clear and secure tenure framework over land and forest resources is necessary. The tenure assessment task, as outlined in this presentation, will contribute towards the process of developing a clear and secure tenure framework.

What are the key issues relating to tenure in Malawi?

- the interface between customary law and statutory law
- institutional arrangements affecting forest tenure
- tenure policy coherence for REDD+ readiness
- compliance and enforcement for REDD+ readiness
- accountability mechanisms for REDD+
- public participation and tenure for REDD+ readiness
- gender and tenure for REDD+ readiness.

Data sources to inform the tenure assessment:

- literature review: published and grey literature on tenure and REDD+
- policy and legislation review: land and forest resource tenure, and how they affect forest protection
- stakeholder interviews: government, NGOs, local communities

- field study: selected sites
- Kulera case study
- policy dialogue

Methodology for the tenure assessment:

- desk review of relevant policies and legislation and relevant literature
- undertake preliminary stakeholder consultations
- prepare inception report
- present report to stakeholders for review and further consultation
- conduct further stakeholder consultations and field studies
- prepare draft analytical report
- submit draft report to stakeholders for comments and facilitate policy dialogues
- facilitate national validation workshop
- incorporate comments and prepare final draft report
- prepare summary consultancy report.

Criteria for selection of sites for field studies:

- opportunity to understand customary tenure: matrilineal and patrilineal
- opportunity to understand the interface between customary and statutory laws in practice
- lessons in enforcement and compliance experience
- private concessions/community-based forest management
- project level implementation experiences
- decentralized forest management.

The presentation further outlined the legal and policy documents that will be reviewed; the stakeholders who will be consulted during the assessment; the sites that have been selected for field studies; and the proposed work plan.

Questions and comments:

- How do we ensure that traditional authority laws are entrenched in statutory law? I have experienced that where there is strong traditional authority leadership there is good management, and where there is weak leadership the forests are gone. Are you going to bring in the role of the traditional authorities into statutory law?

Response: I listed the review of the Chief's Act, which in combination with forest legislation needs to be assessed.

- In terms of site selection, I thought you missed out on areas where co-management is happening.

Response: We are going to Mulanje, where co-management is being tried, so that could provide such opportunity. I will talk to the Department of Forestry to see where more sites can be recommended.

- On the sites again, I want to bring up this area in Blantyre where DoF started plantations and handed them over to be managed by communities. We have varied experiences and I think the consultants would benefit from going there.

Response: We will speak to our colleagues to see about the feasibility of this proposal. Maybe we will ask the traditional authorities to check on the progress of this project.

- I'd like to know if your study will consider the intricacies of matrilineal vs. patrilineal societies. Whether matrilineal or patrilineal systems affect how decisions are made in investment in afforestation. I didn't see that in your presentation but maybe it's part of your work. I don't know how far your TORs go but most of the reports look at matrilineal and patrilineal issues only at the surface level – not deeply.

Response: We will address the social and cultural issues that impact on tenure and REDD+. It won't be a ground-breaking study on gender but we will try our best to provide some direction. You are right that there is a tendency to cut and paste from past studies like nothing has changed. It's important to get data on the ground.

- I wanted to find out if your study is also going to compare landscape health to leadership strength?

Response: The study needs to draw on examples to see how you can use strong leadership for making policy proposals.

Translation of discussion with traditional authorities:

Saustine Nkolokosa: You mentioned that traditional authorities can allocate land. Is there any land that traditional authorities can distribute presently i.e. unallocated land?

Luke Malembo: There is evidence that suggests that strong traditional leaders equal good management of protected areas. What would you suggest as a mechanism to incorporate this into policy?

Traditional Authority Kachindamoto: VFAs are indeed well protected mostly because communities have a sense of ownership. Each group village headperson has been allocated a block that they look after, however they are demoralized because offenders are not being punished and they get tired of reporting them. This is also difficult because the community members are doing it on a voluntary basis. Another reason why these blocks are not being looked after is because government employees are also corrupt and abusing their position by promoting charcoal production and illegal harvesting to support the demand for forest products in the cities. This discourages community members from looking after the forest.

7 Breakout sessions for assessment of legal and policy frameworks

A roundtable discussion was held with small groups of participants who responded to a set of questions (listed below). The salient features of the conversation were recorded on a poster board by a volunteer scribe. Although the leading question centred on sectoral policies, it was observed that most participants did not have a good knowledge of Malawian policies. Interests and actors contributing to drivers were discussed at greater length, and several case studies and anecdotes were shared, some from the participants' respective geographic regions. The facilitators noted that the lack of knowledge of sectoral policies driving deforestation (within the small sample of participants) was in itself important information for the LPFA and the tenure assessment.

Group 1: Policy coherence and coordination across sectors

Facilitated by: Amanda Bradley

What are the major sectoral policies or interests that contribute to or influence drivers of deforestation and forest degradation?

- road construction – EIA compliance issues
- agriculture – increased production (programmes more than policies – Limphasa programme)
- Nkhata-Bay District Hospital built into a forest reserve – forest policy has de-gazetting clauses
- tobacco – “special crops act” to promote production
- “Balkanization” – of departments, missions, policies
- Nkhata-Bay North – new farm land expanding to new land and intensifying current land use
- political interests – prior to elections lots of forests are encroached (political world above the law); they bulldoze the best policies
- policies simply not implemented – compliance + enforcement

- dam building plans – Lilongwe
- Forestry Act/Policy – clear instruction
- no systematic framework/way to connect sectors
- no policies on compensation for relocation
- structural adjustment policies (IMF conditions for loans)
- privatization push – forest concessions in the Chikangawa plantation were given by DoF to small, ill-equipped outfits with no interest or expertise in forest management or tree planting
- new charcoal policy in draft form in DoF
- no subsidies for alternatives to charcoal (electric grid access, blackouts)
- lack of paraffin subsidy (cooking + lighting)
- low incentives for alternative energy
- “tax holidays” for mining companies
- possible hidden/perverse incentives to keep alternatives unsuccessful (the decline of gel fuel was predicted by some participants in the group, since gel fuel threatened charcoal producers’ profit margins)
- charcoal is only legal from a “sustainable source” (but no permit has ever been issued that verifies a sustainable source, aside from the permit issued to Citrofine for excess blue gum plantation)
- coal policy
- EAD should be upgraded to an “environmental protection agency” to check on the work of other agencies
- The geographic outlines of water catchment areas do not correspond to districts and regions, which form the management structure on a spatial level. Therefore, addressing issues at a water shed or catchment level requires district-to-district cooperation, which no one has the mandate, or motive, to do.

What are the current mechanisms for coordination among policymakers and implementers to prevent deforestation and forest degradation?

- REDD+ Experts Group
 - negatives - feedback loops are weak, community representation is low -> consider involving traditional authorities and other local leaders
 - positives – multi-stakeholder and TWGs are working well
- National Council for the Environment (it has the Technical Committee for the Environment that reports to it) – sectors include water, land, forestry, agriculture and wildlife -> review composition to include people with expertise on REDD+
- Parliamentary Committee on Natural Resources and Climate Change
- Malawi Parliamentary Conservation Caucus (MPCC)
- gap – need better donor coordination mechanism

Group 2: Compliance and enforcement

Facilitated by: Gracian Banda

What are the compliance challenges in the forestry sector?

- lack of coordination exacerbated by disrespect for procedural hierarchy: corruption, abuse of privilege by duty bearers
- lack of a comprehensive monitoring system in the sector: no monitoring of projects such as IFMSLP, only implementation and then forgetting
- introduction of new concepts, e.g. co-management, without adequate/proper understanding -> need to see how concepts work in Malawi instead of focusing on what works in other countries

- inadequate knowledge of forestry legislation by front-line staff in the sector
 - fines were established in 1997 and have not been updated; ineffective if policies aren't updated
 - front-line staff do not know they are supposed to compound fines

What are the enforcement challenges in the forestry sector?

- hostile relationship between the forestry sector and community
- organized crime – charcoal vehicles travel in packs and inform each other when forestry staff are on patrol; vehicles carry stones to attack forestry staff; communities also inform charcoal traffickers
- inadequate resources
- lack of/inadequate capacity: few staff on the ground and with low levels of education; unable to translate and understand legislation
- political interference: plantations and reserves are controlled by political interests rather than policy and law
- cultural/traditional practices, e.g. slash and burn agriculture

What are the compliance challenges outside the forestry sector?

- conflicting policies and legislation: agriculture and forestry promote different practices
- lack of/poor communication among stakeholders

What measures do you propose to address the compliance challenges?

- training – forestry staff, judiciary, police
- awareness raising
- improved stakeholder collaboration
- strong lobbying and advocacy for environmental protection with political parties

What are the enforcement challenges outside the forestry sector?

- poor understanding of forest legislation
- regress – when challenges relate to lack of resources/capacity
- prioritization of forest protection
- capitalizing on synergies among projects/programmes for resource optimization

Questions and comments:

● I have an issue with training as the solution. I am thinking of forestry graduates who now work in other fields. I think that training at the level of a diploma also works in other fields. Forestry training doesn't seem like a solution to me.

Response: Training and learning are different terms. As soon as we identify a capacity need we think the solution is training, but we need to go deeper and take learning as an internal motive for capacity building. There is also the potential for using technology as a learning methodology. We normally think that attending workshops is the only way, but there are so many other ways of acquiring knowledge.

- On the issue of enforcement, where do you place the part of the military?

Response: Last week the deputy director was briefing us that we would hire the whole platoon because when the Malawi Defence Force (MDF) want to go on patrol they are a whole unit. To hire the whole platoon requires 1.8 million per day. At policy level they are still discussing this; there is some sort of MOU. I understand there is a good working relationship and it has been working in certain areas but we can't employ the MDF in all places. In terms of the use of MDF, Botswana is one country that is using the military, perhaps it might be a good idea to learn from them.

● We should also think about training community members when it comes to law enforcement. This is an area that requires capacity building. They are frustrated because when they report someone, the

people get arrested but they come back in two or three days and continue in illegal activities.

Response: When it comes to training it comes down to skill transfer, really understanding the different acts and policies. Even experts like professors still require training, even after retiring you need training.

- When you talk of abuse of privileges I'm lost. What are the privileges that officers are abusing? When you talk of crime I would rather not say "organized crime" because it's something different. It should be organized criminal activities; organized crime is the mafia.

Group 3: Policy implementation

Facilitated by: Jessica Troell

What are the challenges to policy implementation?

- there is a lack of:
 - proper guidelines to implement policies
 - financial resources to implement policies
 - knowledge about what is in the policies and laws for people charged with implementation
 - political will to implement – need better political leadership for the sector
 - incentives to implement – these are undermined by politicians
 - capacity to implement – human resources and technology deficits
- great difference between demand (what communities really want/need) and supply (what policies are giving)
- the forest sector has not done enough (and lacks capacity) to make clear the contribution of forests to GDP and to get budgets aligned to implement policy priorities
- problem of the culture within the government – not calibrating to new developments but relying on old ways of doing things – training does not necessarily reflect developments to align forestry with livelihoods, climate, etc.
- people implementing on the ground are not adaptive
- strategic decisions for the sector are not being made by technical experts but by politicians and there is no pushback from technicians – need political "cover" to make effective technical decisions at ministry level
- timelines do not match – forests need long-term perspective/investment and politicians are short-sighted
 - prior initiative to elevate ministry to a commission and centralize forestry to raise importance, but failed
 - this was also aligned with an effort to increase private sector participation, but that was not politically popular after some time
- when high-level decisions are made at macro level, there is good coordination among technocrats and politicians, but this does not translate to everyday implementation of policies
- political appointments of ministers are not aligned with capacity (ministers do not have technical expertise)
- politicians influence technical staff – this points to lack of transparency and accountability measures (e.g. agricultural subsidies: they are not working but no one is pushing back on this and politicians still "win")
- donor-funded initiatives do not experience the same pressure
- there is a need for a forest sector "champion" to stand up to and represent forest interests to Parliament (the agriculture sector has such a champion: CISANET)
- we need civil society to act as an advocate for forestry issues, but most organizations lack the capacity

What are the challenges to community engagement in policy implementation?

- community is engaged in co-management agreements: these agreements are between the government and communities, but the power alignment is off and not a level playing field – there is a need for a third party to arbitrate on behalf of communities
- communities are still under impression that they are “under” the DFOs – although this varies across communities
- there is a process of nested engagement for development and natural resource planning and management from district level to community – this is functioning and represents many interests, but not necessarily those of marginalized stakeholders
- the environmental impact assessment (EIA) process is another “consultative” process in resource decision-making
 - law requires EIAs to be done by developers but there are issues with consultation on EIAs
 - no consultation happens during EIAs; EAD is not overseeing the process as necessary
- where communities drive the process with their own needs, there is the best success with co-management
- at the national level we have the NEAP process – but we do not actually get stakeholder engagement beyond government – problem of resources and capacity to do it well
- most “good” public participation is under donor projects – government cannot spend that money, it is a matter of priorities
- there is a role for civil society in facilitating public participation, but most organizations are underfunded – where you hear the voice of civil society as an advocate, it is because they are well-funded, normally with international connections on international issues – it is very rare to have domestic agenda driven by civil society – no capacity or money
- communities will tell you what you want to hear and there is no consensus on why this is the case – fear of sanctions? mistrust of the government?

What are the challenges to data and information gathering in forestry planning and management?

- lack of scientific information – policy decisions are not made on the basis of scientific information
- FRIM has not been actively supported
- forestry research needs to happen over a long timeframe – donors are not prepared to invest over a long period of time
- information management, analysis and interpretation are all problems – data is interpreted in different ways to support different aims
- research has to be credible – it needs to be sanctioned
- there is a need for locally relevant guidelines for research – we normally use guidelines developed elsewhere to generate local information and data
- dissemination of data and information is not done, or it is done using inappropriate technologies or without proper consideration of the audience – strategic communication is lacking

Questions and comments:

- You said there is a need for a champion. What level do you envision this champion to be at? Presidential, ministerial, director-level?

Additional question to this point: Did the group look at entities like CEPA, or institutions like CEAPA, CURE or MEET? We should take advantage of existing institutions.

Response: We acknowledge that CEPA is there, but we are looking for a champion that can go beyond. We’re looking for an organization that can actually go to the Parliament and talk about the forestry sector. I know that if you take this up with politicians they will always say that forestry is supported at the highest

level because the president opens the national forestry season. In terms of operationalization though, I think it is lacking.

- On co-management, I feel like it's an issue of abuse of authority. Each partner has obligations, and participation is crucial. Is it more that the government is not doing its job?

Response: Even when we are doing co-management in all 12 districts no community has come up so far with a forest-based enterprise of charcoal production, yet we know that charcoal can be legally produced. No communities have said they would do it because DoF told them that charcoal is bad. If we had an arbitrator, he/she would help align the understanding between the government and the communities.

- I want to understand the issue of EIA better. Is it that they are not happening to our expectations?
- We have three interesting cases in Rumphu of EIAs with no consultation. The team that went there never consulted with us and yet the site has a community plantation, which is supposed to serve communities around Rumphu. Another EIA was for a mining company; the mining site is inside the forest reserve yet as a DFO I was never consulted. Another example is of a mine that is close to a water source for residents and again there was no consultation. It's interesting that these EIAs are being championed by EAD; perhaps it would have been better for them to be developed by an independent body.
- Just for my understanding, when you talk about nested engagement, what do you mean?
- There are processes in place that are meant to be consultative, where you have institutions at the local level that feed up to the district level and then to the national level. The question is whether they are actually representing stakeholders at the lowest level.

The group also observed that while there is inadequate finance and a lack of capacity to implement policies, we should also look at misallocation of resources. As an example, most projects in government specify the gaps they envisage and some specific training they need for policy implementation. Yet when you visit this "training", you find that some officials have not even bothered to attend. Misallocation of resources is a great problem.

III Report on day 2

1 Review of day 1 and overview of day 2

The session was opened with a prayer led by DFO Mwanza. Gracian Banda then summarized the outcomes of the first day of the workshop.

2 Breakout sessions on tenure assessment

A roundtable discussion was held with small groups of participants who responded to a set of questions on tenure (listed below). The salient features of the conversation were recorded on a poster board by a volunteer scribe.

Group 1:

What are the issues that impact tenure clarity and security in reserves?

- social tension between traditional and modern systems of tenure
- land scarcity is increasing pressure
- some people try to reclaim reserve land which they lost a long time ago
- international border issues
- some villages are located inside reserves legally
- lack of efficiencies in other sectors – low productivity of land
- construction – urban expansion
- transfers of customary land into leasehold
- lack of monitoring of leases
- if leased land ever reverts to customary land, it does not go back to the forest

What are the issues that impact tenure clarity and security in village forest areas?

- VFAs are better managed and less encroached
- they tend to depend on personalities, and once these are gone, everything collapses (e.g. strong leadership in Mangweru Hill – chief led stewardship and this resulted in mountain regeneration; for 15 years all went well but when the chief died, all changed)
- people participate in forest management
- VFAs – desire for private land – trees on farm
- need technical services
- need to understand the ecosystem service approach
- VNRCMs not always supportive – perceived as government

Options:

- integrate tenure responsibilities into existing institutions
- make meetings public to ensure accountability
- formalize VFAs – legal strengthening
- leasehold processes need review

Gender issues:

- female headed households do not own land
- customs are sometimes not respected/they are dominated by males

Group 2:

What are the issues impacting tenure security and clarity?

- On customary land with VFAs?
 - ownership of the land (claimed by chiefs or individuals)
 - benefit sharing
 - use of VFAs for political gain (at smaller scale)
 - irresponsible and weak leadership
- On customary land without VFAs?
 - individual clan ownership
 - cultural values assigned to land (e.g. graveyards)
 - open access land
- On reserves?
 - wrong/deliberate misperception that reserves belong to everyone
 - historical claims/aspects
- On protected areas?
 - unclear boundaries
 - used for political gains

How do these issues impact deforestation and forest degradation?

- customary land with VFAs is secured on the basis of a decision made by a few people
- absence of individual benefits demotivates participation, which contributes to degradation (transparency and accountability)

What are the options for addressing these issues?

- policy and legal options
 - enactment of proposed land bills
 - devolution of forest reserves and protected areas
- conduct survey and boundary demarcation in forest reserves and protected areas
- capacity building of traditional leaders

Group 3:

What are the issues impacting tenure clarity and security?

- On customary land with VFAs?
 - Clarity and security of tenure is sometimes compromised, as chiefs can decide to allocate land parcels to any person they wish.
 - Sometimes community members do not understand why VFAs are established.
 - The Forestry Act is not clear on this: "The chiefs shall establish a VFA in consultation with the director of forestry."
- On customary land without VFAs?
 - There is clarity as land is controlled by chiefs.
 - Security of tenure (land and trees) is not there because the area becomes de facto open access land (tragedy of the commons).
 - It is prone to corruption.
 - Reduced levels of excludability lead to deforestation (increased competitive consumption).
- On forest reserves?
 - Security and clarity of tenure in forest reserves is clear as per the Forestry Act (63:01).

- Co-management: the rights are transferred to the communities responsible for the block (user rights based on co-management agreement). However, these user rights are affected by governance issues such as incidences of block-to-block encroachment.
- In protected areas?
 - Security and clarity of tenure in protected areas is clear as per National Parks and Wildlife Act (2004).
 - Co-management: the rights are transferred to the communities responsible for the block (user rights based on co-management agreement). However, these user rights are affected by governance issues such as incidences of block-to-block encroachment.

How are these issues impacting deforestation and forest degradation?

- Powerful people use their positions to access resources by using community members or by manipulating people for personal power gains.
- Power imbalance between the village headperson and the committee (who has management powers between the two?), leading to resources being vandalized.
- Knowledge deficit of pertinent laws can cause over-exploitation.

What are the options for addressing these issues?

- policy and legal options
 - amendments needed to specific regulations to ensure clarity (e.g. VFA village heads empowered to establish VFAs in consultations with DoF)
 - harmonization of regulations (policy and lawmakers must speak to each other to ensure that relevant regulations are harmonized)
 - donors should follow proper channels in reviewing regulations (donors may dictate policy directions that may not work for the country because of its resources)
 - harmonization of local organizations (e.g. VNRMC, NRC, BVC, WUA); the same person can be active on all these committees
- management options
 - strengthen governance: do away with red tape, no sacred cows, improved networks, do not personalize things in the public domain, enforce laws

Comments on all group presentations:

- I feel we need to have a comprehensive law in place to cover VFAs. At the moment we see that the establishment of a VFA requires the willingness of the village head. To move forward we need to rescue the forests on customary land. Most are currently on customary land, so we need a clear law on how these forests should be governed.

- I want clarity in terms of devolution of protected areas, is it authority or power – can it be clarified?

Response: We said that it should be policy to devolve VFAs to district councils. There has been improved funding from central government to develop VFAs as opposed to money that goes to the DFO office. It is a problem in most areas. We are advocating for devolution.

I remember when I joined the public service there was talk of decentralization where each and every ministry was requested to clarify which power and functions they would want to devolve. This is for the consultants to research.

For DoF, we developed a document that highlighted which roles are being devolved to the district councils and which were retained by the central government. For example, some extension and communication services were devolved, while management of reserves and plantations was retained by the central government, because of the objectives of these assets – they serve national and global objectives. Moving

forward, however, local government was challenged to gazette reserves they wanted as local reserves. Since then none have moved forward with the announcement of their forest reserves.

- Related to forests on customary land, I wanted to say that trees on farms need to be recognized.

There was a recent study that showed that they are increasing not only in terms of numbers, but in terms of density. From a policy point of view, if in the tobacco sector people need 10 percent of their land dedicated to trees, how much could we say people need to keep on the farm? While we are talking about open access, there is also private customary land with trees on farm.

Response: The Ministry of Agriculture is looking into this question with its agro-forestry policy. I think it is a question of the sectors talking to each other and seeing whose mandate this is. ICRAF is working on an agro-forestry policy.

3 Panel discussion: Drawing on lessons learnt

Chaired by: William Chadza

Participants:

Blessings Mwale, Deputy Chief of Party, PERFORM

Nyuma Mughogho, Assistant Director of Forestry, Department of Forestry

Yakuwawa Msiska, Malawi Commission

Blessings Mwale: Kulera lessons

In terms of governance the key to success in Kulera was participation. The first step in protecting the areas and preventing illegal encroachment was providing clarity on governance structures, and how DPNW and communities could work together. Secondly, I think as a programme we worked hard to create decentralization structures like block management committees. In Kulera our starting point on the ground was the VNRMC, which is at GVH level, and then we moved up the scale to the zone VNRMC, which is at the TA level. Finally, at the national level, they created an executive body, which was represented at the zone VNMRC level. They made a democratically elected committee that was the executive, and this was overseen by a board of trustees. I think that participation has to start from the ground level, where the community members had to be trained.

One key aspect in governance structures in terms of patrols and maintenance is the issue of logistical support. You can create structures but do they have any support? Nyika is a very large area and for the chairman to go around to all the subareas was a major challenge. From the executive point of view the project was able to provide motorcycles to allow executive members to visit and monitor areas within their jurisdiction. At the local level the project also provided bicycles because the NRCs are at the GVH level so their areas are also very wide. From the DNPW point of view we supported the department with GPS but also with radios for ease of communication. For co-management to work we need participation and also effective communication.

When it comes to benefits, there were not only benefits within the protected forests, but also within the communities. One example in NVA is that we had a lot of individual VFAs through natural regeneration. It's another area that we cannot miss when talking about increasing forest cover in the country. We also had other livelihood activities in the communities. The DNPW in their co-management agreement stipulated revenue collection through tourism. The associations get a percentage of the money, which gives communities incentives to protect their forests. Kulera phased out but there was a "baby" that was born, which is the REDD+ landscape project, and the communities are continuing to implement the activities in their respective areas. Kulera embraced the importance of community participation through capacity building but also with related logistical support to allow all of the structures to be functional. NVA was already

established but NAWIRA was born out of Kulera by borrowing lessons from NVA and up to now these entities are still functioning.

Nyuma Mughogho: Lessons from the Department of Forestry

I am going to talk about experiences within the Department of Forestry. VFAs were created under the Forestry Act in 1971 but we also had them from 1942. There was already avocation for setting aside VFAs under village headpersons. In the central region there were VFAs that were established well before the act. The issue is that they are supposed to belong to the whole village, but sometimes they are perceived to belong to the village headperson only. For example, we took visitors to Lilongwe North, and the village headman kept saying "my forest my forest" while we thought the forest belonged to the whole village. Later on a lady took me aside and said that the village headman has managed the forest for several years now and if you give power to a committee, it will disappear.

Under the act they are supposed to get advice and make up rules and regulations for how they are being managed. Some experiences we have seen as forestry people is that extension workers go to a village and introduce the concept and sometimes the village headperson will go to an individual and ask for land to turn it to a VFA. The individual sometimes agrees and sometimes they change their mind and want to claim their land back. Security is a bit shaky. There are some people who are landless in a village. If the system is running properly people should benefit from the VFA.

We also have experience with the Blantyre project. With Norwegian assistance we established blue gum plantations in Blantyre and handed them over to communities. VNMRCs were formed and trained. There were issues on benefit sharing and some committees were formed with relations and would sell the products and not share. We also heard that some people said that this is a VFA but it was originally my land, so cut your trees, because I want my land back.

In forest reserves tenure is clear, that the forest belongs to the government. When co-management was introduced the first sites were Nkhata-Bay, Kasungu and Liwonde. When I went to Kasungu, the GVH was able to say that this part of the forest belongs to this GVH. Even if 50 years have passed people remember that the land belonged to their ancestors. I think the committees just share in management and benefit sharing but I have a feeling that the government is in a very strong position. If things aren't good the government can terminate the agreement. I feel that the issue of benefit sharing is tricky. You don't want to try co-management and then end up using communities as cheap labour. We need to look at all these implications. In some cases government has said ok, we will share the wood, you cut here and later you cut in a different area. Then we get outcries from people who say we are not managing the land properly. On open access, areas that have not been VFAs or reserves, if there is a registered VNRC they should have jurisdiction over these areas. VNRCs should look after their areas but also open access areas.

Msika Yakuwawa, Malawi Law Commission

Yesterday there was a presentation that talked about land pressure and issues of customary tenure. It was said that if there is pressure it means that our traditional systems may not cope. We need to formalize by coming up with statutes. The National Land Policy brings out a lot of issues. There are principles that talk about formalization of traditional land holdings in the sense that allocation issues of TAs are addressed. The law commission is reviewing land related laws. We looked into 19 statutes. First the Land Act; the policy was proposing we should only have two types of land, public and private. Government land is public land and the government is registered as the owner. Included in public land we are supposed to have unallocated customary land. Private land is leaseholder land. If I go to the Ministry of Lands and apply for land, that is lease holding. Examples are the Thyolo estates or the Mandala area. It's that scheme that has been adopted.

The main changes that I mean to bring about are that districts would be demarcated based on the number of traditional authorities. The scheme will be totally different from what we have under the Land Act now. In the act it's the chief as the trustee, but now he is only registered. He will have a land committee, and this committee according to the proposal is the trustee. The public are the beneficiaries, the communities are not supposed to benefit – they are supposed to manage the land on behalf of all individuals. The committee should take on the principle of sustainable development, which is critical to REDD+. We have talked of having different institutions at the local level doing different things, but they all have an impact on forestry management. The land committee will consult public authorities on administration in any matter. There is the element of insuring proper management of natural resources. There is this particular element that you may have been using land as communal land. That shall remain unallocated land. If we are to create VFAs these unallocated communal lands will suit that. In villages there is an area where you graze your goats or cattle – that is unallocated land. There is land that is not suitable for other land use but can act as a VFA. When you look at the importance of planning it assists in identifying the land use of any particular area. If you look at the planning period you should have the background in your mind.

The biggest problem we have is lack of enforcement, even though when you look at the Land Act there are provisions on local encroachment. There are several factors. The forestry officials' hands are tied. Work is in progress but at this moment the Land Bill has not passed into an act because the president (Joyce Banda) withheld her assent without proper information. Now the same people who prevailed over Joyce Banda are saying that our land is going to foreigners.

The Chiefs Act oversees the maintenance of law and order and collection of taxes. Now the commissioner has recommended that the upcoming Chiefs Act will outline the functions, most importantly in managing natural resources in a sustainable manner. The reforms on chiefs have been carried out and we've brought in the issue of natural resource management.

Comments on all three presentations:

- I would like to request that the conflicts mentioned in Blantyre and Lilongwe should be resolved with the assistance of the traditional authorities of the area. It is good to clarify whether traditional authorities, group village headmen or the chiefs are responsible for these negligent actions. In this case it is important to involve all these people in these kinds of meetings, including the councillors and district commissioners.

Response: To respond to the chief, the organizers of the inception workshop have taken note of the need to invite stakeholders concerned with some of the common problems related to deforestation that have been highlighted in the workshop, such as members of Parliament and ward councillors.

- What were the issues on tenure when setting up Kulera and DoF projects?
- When it comes to parks, there are clear demarcated areas that are already in place. An important aspect in the implementation of Kulera was the clarity of these boundaries. In some cases there was the need to develop zoning with stakeholders. In the protected areas it's very clear; the most important aspect was to make clear which areas required zoning and re-zoning. The relationships of VNRMCs have specific rules and responsibilities as far as parks management is concerned. It is different from the VNRMCs in the community on customary land. Within the agreement with parks, people can have access to products from the parks. Between the different sectors these are some issues that need to be looked at.
- For Kulera, were there VNRCs beforehand that had failed and then new ones were formed when Kulera began? Also on benefit sharing, I think that what we are forgetting often is cost and benefit sharing.
- On VNRCs we had two pilot areas, Nyika and Vwaza. We were limited in terms of capacity so we

thought the entry point would be the group village head level. It was not possible to go village by village. On benefit sharing, conservation cannot succeed without participation of stakeholders from surrounding areas.

- REDD+ places emphasis on the ecosystem service. I want to know how you have put that into your work in Kulera. It's one of the difficult areas to demonstrate and gain appreciation from communities.

Response: The programme managed to look at all the possible livelihood activities. We had irrigation programmes and communities could see that these were correlated with the conservation of the parks. People could directly link the importance of conservation through the reduction of downstream erosion and run-off. We had interventions that were directly linked to the conservation of parks.

Inception workshop participant list

Last name	First name	Organization	Title	Location
Banda	Gracian	Center for Environmental Policy		
Bradley	Amanda	FAO	Tenure Specialist	
Chadza	William	Centre for Environmental Policy and Advocacy	Executive Director	Blantyre
Chibwana	Alinafe	MRRP	REDD+ Associate	Lilongwe
Chirambo	Lonnie	Department of Forestry	Forest Extension Officer	Lilongwe
Chisale	Harold	LUANAR	Lecturer	Lilongwe
Chisale	Mada	USAID		Lilongwe
Chitenje	Ulemu	Department of Forestry	District Forestry Officer	Nkhota-kota
Chizanda	Precious	FAO	NAP	Lilongwe
Elenitsky	Lucas	MRRP	REDD+ Volunteer	Lilongwe
Florence	Rolle	FAO		Lilongwe
Gama	Stella	Department of Forestry	REDD+ Focal Point	Lilongwe
Gondwe	Charles	Department of Forestry	Forestry Officer - Publicity	Lilongwe
Jia	Ramosh	Department of National Parks and Wildlife	Deputy Director	Lilongwe
Kachindamoto	STA	Government of Malawi	Traditional Authority	Dedza
Kamanga	Gerald	Department of Forestry	RFO South	Blantyre
Kamoto	Teddie	Department of Forestry	Assistant Director of Forestry	Lilongwe
Kamoto	Judith	LUANAR	Professor, Forestry	Lilongwe
Kasakula	STA	Government of Malawi	Traditional Authority	Ntchisi
Kirschner	Yoel	MRRP	REDD+ Advisor	Malawi
Malembo	Luke	PERFORM		Lilongwe
Mangoche	Agnes	Sustainable Rural Growth and Development		Blantyre
Masupayi	Patricia	Department of Forestry		Lilongwe

Last name	First name	Organization	Title	Location
Mbona	Tuntu	Department of Forestry	District Forestry Officer	Ntchisi
Mclvor	Sarah	UNDP		Lilongwe
Mijoni	Lexa	Department of Forestry	Secretary	Lilongwe
Milinyu	Moses	JICA		Lilongwe
Mkandawire	Duncan	Nyika-Vwaza Association	Co-Chairman	Rumphi
Mkanthame	Clifford	PERFORM		Lilongwe
Mtambo	Brian	Department of Forestry	District Forestry Officer	Mwanza
Mughogho	Nyuma	Department of Forestry	Assistant Director of Forestry	Lilongwe
Mwale	Blessings	PERFORM	Deputy Chief of Party	Lilongwe
Mwambene	Chris	Cure	ED	Blantyre
Namwera	Steve	SRGDI	Program Manager	Blantyre
Nkolokosa	Saustine	Department of Forestry	Forest Officer	Lilongwe
Nyirenda	Gift	Department of Forestry	District Forestry Officer	Rumphi
Phiri	George	Food and Agriculture Organization	Technical Coordinator	Lilongwe
Sadrack	James	NAWIRA	Chairman	Nkhota-kota
Sambo	Eston	Chancellor College	Lecturer, Biology	Zomba
Sibale	Bright	Centre for Development Management	Lead Consultant	Lilongwe
Swira	Jane	Ministry of Planning	Programme Manager - Climate Change	Lilongwe
Thomas	Makhambera	Department of Forestry	Deputy Director	Lilongwe
Troell	Jessica	Environmental Law	Senior Attorney	Lilongwe
Yakuwawa	Msiska	Malawi Law Commission		Lilongwe

Annex F: Validation workshop

Tenure frameworks assessment for REDD+ in Malawi

23 March 2016
Crossroads Hotel, Lilongwe, Malawi

Background

In April 2015, the UN-REDD Programme launched an integrated initiative in Malawi to support Malawi's progress towards REDD+ readiness. This initiative (also referred to as 'work programme') includes a country needs assessment and targeted support, which are divided into six outputs:

- 1 legal and policy frameworks assessment;
- 2 tenure frameworks assessment;
- 3 institutional & context analysis;
- 4 corruption risk assessment;
- 5 roadmap for a national forest monitoring system; and
- 6 knowledge management support.

The validation workshop was organized to validate the report on the tenure frameworks assessment (output 2). The tenure frameworks assessment addresses the complex issues relating to land and forest tenure in Malawi and REDD+ (reducing emissions from deforestation and forest degradation and conserving, sustainably managing and enhancing forest carbon stocks). REDD+ is premised on providing benefits to individuals who maintain or enhance forest carbon stocks to compensate for lost opportunities and incentivize good forest stewardship. This requires clear understanding of who owns the land and the resources in question and the ability of the rights-holder to exclude others from accessing and changing land cover. A clear understanding of who holds which rights is a key prerequisite for ensuring that all legitimate rights-holders are included in the REDD+ decision-making processes. If tenure is insecure, unclear or in conflict, there is a risk that powerful actors will gain rights to forest resources and therefore the potential benefits derived from REDD+. This is of particular concern on customary land, where informal rights holders can be accidentally or deliberately overlooked or convinced to cede their rights without a full understanding of the consequences. The tenure frameworks assessment therefore provides a detailed analysis of the existing and proposed land and forest tenure regimes in Malawi and how they are likely to impact the success of REDD+.

This report presents the recommendations of the tenure frameworks assessment report that were endorsed by the participants who attended the validation workshop (participant list is attached at the end of this report). The recommendations are:

Enhancing clarity and alignment of forest and land tenure rights

- Clarify forest and tree tenure under the existing and proposed land tenure and forestry legislation through amendments or regulations to specify:
 - who has the right to benefit from each type of forest tenure (including clarification of the definition of individual tree tenure for each type of forest land);
 - what specific tenure rights accrue under various types of co-management and participatory management arrangements;

- who will have access, use and management rights to LFAs once customary estates are established;
- how these rights can be verified, and what specific measures can be taken (and by whom) to exclude others from infringing on such rights;
- what evidence is necessary to support such rights;
 - the role of traditional authorities with respect to the formation and oversight of VNRMCS/LFOs and BMCs; and
- the legal definition of carbon rights and whether these are severable from land and forest tenure, and the implications for benefit sharing under REDD+.

Harmonization of customary and legislative rights

- Clarify the statutory recognition of customary land and resource legislation to ensure equity, transparency and accountability in customary land administration:
 - Provide legal clarity on the precise tenure rights that accrue under various forms of PFM and how these relate to the proposed land tenure changes (i.e. establishment of customary estates).
 - Clarify the legal relationship between traditional authorities and the customary land committees proposed under the Land Bills to ensure transparency and accountability of land allocation and management decisions.
 - Consider a participatory process for clarifying the content of customary tenure laws and practices that considers the need for safeguarding the rights of women and other vulnerable groups and is consistent with the Constitution.
 - Clarify the mechanisms for the protection/enforcement of customary forest tenure rights and how these relate to mechanisms for land tenure dispute resolution.

Protection of all legitimate tenure rights: Women and other vulnerable groups

- Incorporate the principles of non-discrimination and equality into the Land Bills and a Forestry Act amendment/regulation.
- Legislatively guarantee the procedural rights of access to information, participation in decision-making and access to justice in the Land Bills and a Forestry Act amendment/regulation.
- Develop capacity building mechanisms for ensuring that women and other vulnerable groups understand their rights and are able to effectively exercise and enforce them.
- Implement education, communication and behaviour change programmes to support the transition to non-gender based inheritance.
- Consider other mechanisms for enforcing the tenure rights of women and other vulnerable groups (education programmes for prosecutors and judges, increased penalties for gender-based discrimination/dispossession, and awareness raising of traditional leaders).
- Clarify the legal relationship between traditional authorities and the customary land committees proposed under the Land Bills to ensure transparency and accountability of land allocation and land management decisions.
- Consider a participatory process for clarifying the content of customary tenure laws and practices that focuses on the need to safeguard the rights of women and other vulnerable groups and is consistent with the Constitution.

Institutional frameworks and intersectoral coordination

- Strengthen participatory forest management by:
 - drafting regulations to formalize the basic procedural requirements and criteria for establishing LFOs and creating and implementing management agreements;

- reviewing existing management plans to create an easily modifiable template;
- working with traditional authorities to ensure their roles are clear and are embedded in the new regulations/requirements; and
- enhancing the capacity of government, NGO and community stakeholders to implement these requirements and tools.
- Strengthen intersectoral coordination on tenure issues by:
 - creating an institutional mechanism for coordination among DoF and the Ministry of Lands to address tenure issues and to implement reforms;
 - considering the establishment of a multisectoral REDD+ steering committee; and
 - establishing new requirements for consultation, assessment, and joint monitoring and enforcement in partnership with the Ministry of Lands to ensure alignment of tenure requirements.

Procedural rights: Access to information and participation

- Create and regulate a clear set of procedural requirements for stakeholder consultation with a focus on:
 - rule making (setting regulations);
 - permitting/licensing;
 - granting (and revoking) of different types of tenure;
 - the creation of any form of management agreement; and
 - other administrative decision-making processes.
- Create and regulate a clear set of procedural requirements for consultation with communities on the establishment of LFOs/VNRMCs and CLCs and on any decisions taken on land, forest and tree tenure, including:
 - defining the “community” that is being represented and is able to nominate representatives; and
 - identifying the specific measures to be taken in consulting marginalized members of the community and ensuring their meaningful representation by local institutions/decision-makers.
- Identify specific requirements for making tenure-related information publicly accessible in a timely manner with limited and well-defined exceptions for withholding information.
- Legally define “forest-dependent communities” and the circumstances under which free, prior and informed consent is required to proceed with REDD+ activities.

Procedural rights: access to justice/dispute resolution

- Enhance the capacity of prosecutors, judges, traditional authorities and other stakeholders involved in dispute resolution on the legal issues of land and forest tenure, both under customary and statutory law.
- Clarify the definition and content of customary law to be applied in a transparent and accountable manner and incorporate it into the Land Bills.
- Create mechanisms to ensure that vulnerable individuals and groups have equal access to non-discriminatory dispute resolution (e.g. legal aid, education).
- Clarify the potential conflict of interest in having group village heads serve as chairs of customary land committees and traditional authorities serve as chairs of customary land tribunals.

Cross-cutting governance challenges: Corruption

- Amend the Forestry Act to clarify monitoring and enforcement roles and responsibilities, including the provisions for joint law enforcement with the police and communities under co-management, and establish joint enforcement guidelines.

- Include a provision within the Forestry Act to require corruption auditing. This could be started immediately with the establishment of an institutional integrity committee that could review corrupt practices and receive training from the existing Anti-Corruption Board.
- Either amend the Forestry Act or establish (through regulations) a system for rotating enforcement positions on a set timeframe to protect against favouritism/cronyism.
- Revise licensing procedures to require more transparency and accountability and train licensing officials in the new processes and requirements.

Cross-cutting governance challenges: Enforcement

- Amend the Forestry Act or create regulations that stipulate the procedural requirements for all aspects of inspection, monitoring and enforcement to create a transparent and uniform process that can be tracked and to which officials can be held accountable for failure to enforce.
- Consider creating an investigation and prosecution unit within DoF with a legal mandate (under a regulation or an amendment to the Forestry Act) from the Department of Justice.
- Create guidance on inspections and train officers and their counterparts in the police.
- Enhance the capacity of district forestry officers, judges and other relevant stakeholders on how to apply the requirements of the Forestry Act and its regulations.
- Create specific requirements for access to information and accountability within the Forestry Act or through a regulation, including information that needs to be publicly available and defining the limited circumstances under which exceptions can be made.
- Identify where staffing resources for monitoring and enforcement are most needed and re-allocate staff accordingly, taking into consideration the need for higher salaries as incentive.
- Amend the Forestry Act to establish the criteria for granting and revoking licenses, permits and management plans/authority and make this process publicly available to enable transparency and accountability in decision-making and enforcement.

Participant list

Name of institution	Participant
Government departments	
Department of Forestry	Dr Clement Chilima, Director
Department of Forestry	Teddie Kamoto, Assistant Director
Department of Forestry	Nyuma Mughogho, Deputy Director
Department of Forestry	Patricia Masupayi
Department of Lands and Resources Conservation	James Banda, Deputy Director
Department of Climate Change and Meteorological Services	Jolamu Nkhokwe, Director
Department of National Parks and Wildlife	Davis Kalima
Department of Mines	Emmanuel Mwathunga
Surveyor General	Christopher Simkonde
Nongovernmental organizations	
LandNet	Emmanuel Mlaka, Coordinator
LEAD SEA	Dr Dalitso Kafumbata, Research Fellow
CEPA	William Chadza
CEPA	Gracian Banda
Environmental Law Institute	Jessica Troell
CURE	Reginald Mumba
CISONECC	Heather Maseko
CISONECC	Ellen Howa
Action Aid	Chikondi Chavuta
Action Aid	Elyna John
Academia	
LUANAR	Dr Judith Kamoto
Development partners	
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Traditional authorities	
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