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Policy, legal and institutional frameworks for REDD+ in Malawi

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The UN-REDD Programme is the United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries. The Programme was launched in 2008 and builds on the convening role and technical expertise of 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 promotes the informed and meaningful involvement of all stakeholders, including indigenous peoples and other forest-dependent communities, in national and international REDD+ implementation.



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Cover photograph:

Gina Althoff, PERFORM

Mzimba District, Indigenous trees of Perekezi Forest Reserve – a project site for PERFORM.

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	Programme 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

I. Introduction and objectives

Reduced Emissions from Deforestation and Forest Degradation (REDD+) is an international response to the fact that land use change, including deforestation, is estimated to generate 3.3 billion tons of carbon emissions annually.¹ REDD+ provides financial incentives to developing countries to reduce emissions associated with converting forest resources to alternative land uses. The + sign indicates a broad approach that includes not only a focus on reduced emissions, but also activities that promote conservation and enhancement of existing carbon stocks, as well as the sustainable management of forests.

In recognition of this broad framework, the Government of Malawi (GoM) has clearly stated its commitment to provide the broadest possible range of social and environmental benefits by taking a “no regrets” approach to preparing for and implementing REDD+. Thus, REDD+ is seen in Malawi as a mechanism for climate mitigation as well as for promoting sustainable livelihoods, conservation of forests and biodiversity, and protecting and enhancing ecosystem services.

In 2014, Malawi became the 50th partner country to the United Nations Programme on Reducing Emissions from Deforestation and Forest Degradation (the UN-REDD Programme), a collaborative initiative among 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 is providing the Government of Malawi (GoM) with support for a country needs assessment, which includes this assessment of legal and policy frameworks and guidance to design a national REDD+ strategy. This is being complemented by targeted support from the UN-REDD Programme, which is focusing on institutional and governance aspects as well as work related to land tenure and measurement, reporting and verification (MRV).

The overarching objectives of this assessment are to provide the GoM with a clear understanding of: (1) the international legal requirements for achieving REDD+ readiness; (2) the areas of domestic policy and law that will impact on the ability of Malawi to effectively implement REDD+; (3) where there are gaps, overlaps or even contradictions within existing policies and legislation that could negatively impact the success of REDD+; and (4) options for addressing these challenges, taking into consideration the capacities and constraints of existing institutions.

In order to provide a comprehensive understanding of the legal and policy requirements for REDD+ readiness and implementation in Malawi, the assessment team took a two-pronged analytical approach. The approach assesses Malawi's alignment with the international legal requirements under the United Nations Framework Convention on Climate Change (UNFCCC) – specifically the Warsaw Framework – and draws on the experience of other countries as well as academic research on REDD+ governance to distil areas of policy and law that are likely to impact REDD+ implementation in Malawi. The data for the assessment was collected and analysed through the following sets of activities: (1) literature review/desk study; (2) key informant interviews; (3) field visits in three different areas of the country; and (4) stakeholder workshops.

1 Denier, Korwin, Leggett & MacFarquhar, 2014.

II. International and domestic legal frameworks for REDD+

The Conference Of the Parties (COP) to the UNFCCC decides on the overall framework under which REDD+ will be implemented. At COP 19 in 2013, seven decisions were taken to guide the implementation of REDD+ at the domestic level. These decisions, commonly known as the Warsaw Framework on REDD+, include four pillars of REDD+ readiness: (1) a national strategy or action plan for REDD+; (2) mechanisms for promoting and supporting the Cancun Safeguards and establishing a safeguards information system (SIS) for monitoring and reporting on compliance with the safeguards; (3) a national forest monitoring system (NFMS), including measures for complying with requirements on MRV; and (4) a national forest reference emission level (FREL) and/or forest reference level (FRL).²

In addition to the four pillars listed above, the Warsaw Framework also recognizes the need to establish effective institutional arrangements for implementing REDD+, and to address the drivers of deforestation and forest degradation with a view to reducing emissions and enhancing forest carbon stocks through sustainable forest management.³ These requirements formed the basis for this assessment of Malawi's legal and institutional preparedness for REDD+ readiness.

Domestic governance frameworks set the "rules of the game" for REDD+ implementation. Malawi's policy and legal frameworks will thus be the vehicle through which many of the international requirements for REDD+ will be translated into tangible and specific national prerequisites.⁴ The successful implementation of REDD+ also depends on legal and policy frameworks that address broader governance challenges, such as corruption and meaningful stakeholder participation. Moreover, well-designed legal frameworks for REDD+ have the potential to produce co-benefits in other sectors by creating more effective, accountable and equitable governance approaches to natural resource management, and promoting sustainable ecosystem-based approaches.

While REDD+ is still in its formative stages in most countries, there is an increasing wealth of experience in assessing the types of governance challenges and opportunities that are associated with its implementation. These include: (1) legal definitions of forests and REDD+ terminology; (2) stakeholder engagement and free, prior and informed consent (FPIC); (3) benefit sharing; (4) forest, land and carbon tenure; (5) participatory forest management (PFM) and REDD+; and (6) cross-cutting governance challenges including transparency, accountability and corruption; intersectoral coordination and policy coherence; and compliance and enforcement. These areas were the focus of this assessment of Malawi's legal and institutional preparedness for REDD+ implementation.

III. Institutional frameworks pertaining to REDD+ in Malawi

Efforts to date surrounding REDD+ in Malawi have resulted in the establishment of a REDD+ governance structure within the Department of Forestry (DoF), which is housed in the Ministry of Natural Resources, Energy and Mining (MNREM). The management structure created to support and facilitate REDD+ readiness is comprised of the following:

The REDD+ Secretariat sits in DoF and is made up of the REDD+ focal point and two embedded advisors funded by the United States Government. The REDD+ focal point is appointed by the director of forestry and the position is currently held by the deputy director for policy.

² Denier, Korwin, Leggett & MacFarquhar, 2014.

³ UNFCCC Decision 1/CP.16; Climate Law & Policy, 2015 (available here).

⁴ Denier, Korwin, Leggett & MacFarquhar, 2014.

The REDD+ Experts Group (RExG) currently has a membership roster of more than 100 people, including representatives from government, civil society, donors and the private sector, both resident in Malawi and abroad. These experts were identified through a series of workshops supported by the Malawi REDD+ Readiness Programme (MRRP) in 2012 and they meet regularly.

Three technical working groups (TWGs) function under RExG – Communications and Awareness TWG, Governance and Policy TWG and Science and Technology TWG.

As indicated by the director of forestry in a personal communication with the authors, DoF has clearly stated that it intends to maintain oversight of REDD+, at least until the conclusion of Malawi's REDD+ strategy. One key question that Malawi must answer is whether there is a need for legally formalizing the existing REDD+ institutional structures to facilitate more effective uptake and mainstreaming of REDD+ into the national climate change and development agendas.

The lack of legal status of the Malawi REDD+ Programme to date has meant that there are no formal linkages between the REDD+ Secretariat and the decision-making and management structure within DoF, and thus no formal mechanisms for integrating REDD+ plans, policies and strategies into DoF and other government planning and implementation processes. Currently, the United States Agency for International Development (USAID)-supported Protecting Ecosystems and Restoring Forests in Malawi (PERFORM) project is assisting with a review of the terms of reference for the secretariat, RExG and TWGs, to refine their mandates and align them more closely with what is needed in order for REDD+ to move forward.⁵ It is expected that this will result in a more active role for the three TWGs and the creation of a broader multi-stakeholder forum from the existing RExG. The secretariat will continue to support REDD+ readiness, but it will take a more active direction from TWGs, which together will constitute the REDD+ Experts Group.

In addition to the potential need to formalize the institutional structures for REDD+, a number of other issues have emerged through this assessment. These include the lack of clear institutional mandates for REDD+ implementation, failures in the implementation of community-based resource management frameworks, and an overall lack of effective intersectoral coordination that could undermine REDD+ planning and implementation. These are highlighted in the policy, law and regulation gap analysis in section 6.

Key institutional challenges for REDD+ in Malawi

- lack of engagement of all relevant sectors in REDD+ and ineffective intersectoral coordination;
- unclear and/or overlapping institutional mandates;
- lack of legislative basis for some institutions;
- failures in implementing community-based institutional frameworks for forest management;
- technical and resource (including personnel) capacity gaps; and
- pervasive corruption and management failures across sectors.

IV. Policy and legislation related to REDD+ in Malawi

A critical aspect of REDD+ implementation is the need for involvement and coordination of sectors beyond forestry and climate change. National-level REDD+ policies and laws must address the drivers of deforestation and degradation in Malawi and many of these drivers emanate from other sectors, notably land use, energy, environment, water and agriculture. National ownership and political sustainability are also key aspects of successful REDD+ initiatives, and these will require that implementation of the Malawi REDD+ Programme is in line with (or at least does not conflict with) the development objectives of these sectors.

⁵ These decisions are the outcome of a RExG Governance and Policy TWG meeting held at the Golden Peacock Hotel in Lilongwe, Malawi, on 4 February 2016.

This assessment analysed sectoral policies and laws across all sectors relevant to REDD+, including forestry, land, environment (including climate change), agriculture and energy, as well as the broader development policies within which the sectoral policies are to be implemented. Table 1 provides an overview of the relevant sectoral policies and laws, along with the institutions that have the mandate for their implementation.

Table 1: Overview of policies and laws relevant to REDD+ in Malawi

Policies	Laws	Institutions
Forestry		
<ul style="list-style-type: none"> National Forest Policy (1996) Community Based Forest Management: A Supplement to the National Forest Policy (2003) Draft National Forestry Policy (2015) 	Forestry Act (1997)	<ul style="list-style-type: none"> Ministry of Natural Resources, Energy and Mining Department of Forestry Forest Research Institute of Malawi regional forestry offices district forestry offices traditional authorities village natural resource management committees / local forestry organizations block management committees
Natural Resources / Environment / Climate Change		
<ul style="list-style-type: none"> National Environmental Policy (2004) Draft National Climate Change Policy (2014) 	<ul style="list-style-type: none"> Environment Management Act (1996) Environmental Management Bill (2016) 	<ul style="list-style-type: none"> Ministry of Natural Resources, Energy and Mining Environmental Affairs Department National Council for the Environment Department of National Parks and Wildlife Department of Meteorological Services and Climate Change National Steering Committee on Climate Change National Technical Committee on Climate Change
Agriculture		
Draft National Agriculture Policy (2016)		Ministry of Agriculture, Irrigation and Water Development
Water		
National Water Policy (2005)	Water Resources Act (2013)	<ul style="list-style-type: none"> Ministry of Agriculture, Irrigation and Water Development National Water Resources Authority
Land		
Malawi National Land Policy (2002)	<ul style="list-style-type: none"> Land Act (1965) Customary Land (Development) Act (1967) Land Bill (2015) Customary Land Bill (2015) 	<ul style="list-style-type: none"> Ministry of Lands, Housing and Urban Development Department of Lands and Valuation

Table 1: Overview of policies and laws relevant to REDD+ in Malawi

Policies	Laws	Institutions
Finance and Development		
Malawi Growth and Development Strategy II (2011-2016)	Public Finance Management Act (2003)	Ministry of Finance, Economic Planning and Development
Energy		
National Energy Policy (2003)	Energy Regulation Act (2004)	<ul style="list-style-type: none"> Ministry of Natural Resources, Energy and Mining Malawi Energy Regulatory Authority
Mining		
Mines and Minerals Policy of Malawi (2013)	<ul style="list-style-type: none"> Mines and Minerals Act (1981) and Petroleum (Exploration and Productions) Act (1983) Draft Mines and Minerals Act (2015) 	Ministry of Natural Resources, Energy and Mining

V. Policy, law and regulation gap analysis

a. Legal preparedness for REDD+ under the Warsaw Framework

The four pillars of REDD+ readiness under the Warsaw Framework include: (1) preparation of a national strategy or an action plan; (2) development of mechanisms for promoting and supporting the Cancun Safeguards and establishing a safeguards information system for monitoring and reporting on compliance with the safeguards; (3) a national forest monitoring system, including measures for complying with requirements on measurement, verification and reporting; and (4) a national forest reference emission level and/or forest reference level.

Malawi's legal preparedness for achieving these pillars is a work in progress, and will require additional financial and technical support to achieve full readiness. A brief summary of the support required for each of the pillars follows.

National strategy or action plan. Malawi is committed to developing a national REDD+ strategy, and to using the input from this assessment, as well as other assessments supported by the UN-REDD Programme, to guide the strategy development process. These assessments will be used as the basis for developing a roadmap for completing the national strategy, and the quality of the resulting national strategy will ultimately rely on the process that is undertaken for its development. Engagement across key sectors will be essential, as there are still numerous stakeholders within and outside government who lack a real understanding of the concept of REDD+ and the cross-sectoral requirements for its planning and implementation. The Department of Forestry will require significant support in convening such a process and building the political will across various government departments to participate actively in drafting the REDD+ strategy.

Safeguards. Safeguards are policies and measures that aim to address both direct and indirect impacts on communities and ecosystems, by identifying, analysing and ultimately managing risks and opportunities.⁶ If designed and implemented appropriately, safeguards can help provide a suite of multiple benefits to REDD+. As Malawi has not yet determined the scope of the country's REDD+ activities, identification of specific safeguards is premature. A comprehensive approach to safeguards identification at the national and local levels will be necessary once Malawi determines the specific REDD+ activities it will prioritize, and at what levels these will be implemented. This must include the development of an effective safeguards information system (SIS) to report on how safeguards are being achieved. The UN-REDD Programme has developed a specific tool for undertaking this process, the Benefits and Risks Tool, which breaks the safeguards down into sets of key issues with guiding questions to identify the potential benefits and risks associated with REDD+ activities. The tool could form the basis for a national participatory process for safeguards identification and the development of SIS as required under the Warsaw Framework.

National forest monitoring system and national forest reference emission level. In order to obtain results-based financing, Malawi must be able to measure, report and verify "anthropogenic forest-related emissions by sources and removals by sinks, forest carbon stocks, and forest carbon stock and area changes" resulting from REDD+ activities.⁷ This includes using data that is transparent and consistent over time with an established forest reference emission level and/or forest reference level, undertaking monitoring as part of a national forest monitoring system (NFMS), and submitting the data as part of the country's biennial update report.⁸ Moreover, in order to qualify for payments, countries must have their data verified by a team of technical experts to ensure the accuracy, consistency, completeness and transparency of the results.⁹

As part of the technical support package to Malawi, an NFMS roadmap has been drafted that identifies four critical components: (1) land monitoring; (2) field-based forest inventory; (3) the national greenhouse gas inventory; and (4) reference-level setting. Across these areas, the NFMS roadmap highlights the challenges of integrating the mandates of the various institutions involved and ensuring that monitoring and data collection is effectively coordinated and managed. None of the relevant policies or laws addresses the question of how best to coordinate data collection for monitoring, reporting and verification. Clarity on mandates across institutions and specific requirements relative to the greenhouse gas (GHG) inventory and reference level setting will require regulatory amendments or, at the very least, cooperative agreements among the relevant agencies to avoid overlap and ensure effective coordination and use of limited resources.

Financing. Malawi's REDD+ Programme will need to develop a REDD+ fund at the national level and establish a unit to manage revenues. The unit will be responsible for disbursing funds to support development and implementation of REDD+ policies, programmes and projects; instituting revenue policy measures; establishing a payment system to carbon rights holders; providing a legitimate benefit-sharing system; and establishing a transaction registry. One option for a national funding mechanism is the existing Forest Development and Management Fund (FDMF), which was set up under the Forestry Act and is managed and controlled by MNREM. A major concern with this option is that FDMF is ultimately controlled by the Treasury under the Public Finance Management Act.¹⁰ Issues with corruption and mismanagement of national development funds have undermined the trust of development partners and investors in this option. There is also the potential for a conflict of interest in terms of equitable sharing of benefits if the Department of Forestry has oversight of all REDD+ funding.

6 Murphy, 2011 (available here).

7 UNFCCC Decision 2/CP.17, para. 64; UNFCCC Decision 9/CP.19, para. 3.

8 UNFCCC Decision 14/CP.19.

9 UNFCCC Decision 14/CP.19, para. 11.

10 Government of Malawi. 2003. *Public Finance Management Act*, part V.

A second option is to place the funding mechanism under the Environment Fund envisioned in the Environmental Management Bill. While this fund will also fall under the Treasury, it will be controlled by the proposed National Environmental Authority, which will have some political independence from the line ministries, and this could insulate it from the pressures FDMF would feel to allocate funding elsewhere. A third option is to establish an independent REDD+ trust fund to which both government and development partners could contribute and through which they could jointly manage and control REDD+ activities. The trust would be established under Malawi's Trustees Incorporation Act, which requires that the majority of trustees be from outside the government. Ultimately, the shape of Malawi's REDD+ Programme will need to inform the decision of which funding mechanism is most appropriate. Only then can a comprehensive analysis of the options for setting up a REDD+ funding mechanism be undertaken.

b. Domestic legal requirements for REDD+ implementation: Malawi's legal preparedness

As noted above, there is an increasing wealth of experience in assessing the various policy and legal challenges and opportunities associated with REDD+ implementation. Lessons from other countries coupled with Malawi-specific governance challenges have helped to distil the following key areas for legal preparedness for REDD+ implementation: (1) legal definitions of forests and REDD+ terminology; (2) stakeholder engagement and free, prior and informed consent (FPIC); (3) benefit sharing; (4) forest, land and carbon tenure; (5) participatory forest management (PFM) and REDD+; and (6) cross-cutting governance challenges, including transparency, accountability and corruption; intersectoral coordination and policy coherence; and compliance and enforcement.

Legal definitions. How forests are defined in national policies, laws and regulations is of critical importance to effective operation of REDD+ programmes. Malawi's Forestry Act provides a very general definition of forests, one that does not account for the density or diversity of tree species. Furthermore, changes to the structural composition of a forest cannot be measured under this definition. As it stands, the definition precludes the possibility of classifying forest land into subtypes based on physical attributes and species composition, as well as rigorous monitoring and measurement of changes to forest land across management types. In 2014, the MRRP supported a technical cooperation initiative with the U. S. Forest Service to develop a set of recommendations for land use/land cover standards for Malawi.¹¹ These recommendations were finalized in February 2015 and include a definition of a forest, as well as several subcategories of forests, both managed and unmanaged. This work meets the guidelines of the Intergovernmental Panel on Climate Change (IPCC) and, once approved, will provide a much more workable definition for the purposes of REDD+ implementation.

Stakeholder engagement and free, prior and informed consent. REDD+ has the potential to impact a broad cross-section of stakeholders in Malawi, including government agencies, forest-dependent communities, private sector entities, civil society, and academic and research institutions. To ensure that these stakeholders have access to the decisions that will directly impact their rights, the Cancun Safeguards under the UNFCCC specifically emphasize the need for the "full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities."¹²

While Malawi's environmental and forest 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 involvement in the decision-making process. This gap is an acknowledged weakness, and the proposed Environmental Management Bill attempts to remedy this

11 Malawi REDD+ Readiness Programme (MRRP), 2015.

12 UNFCCC, Cancun Decision 1/CP.16.

situation by recognizing access to information, participation and justice as human rights, and requiring all lead agencies to create mechanisms to realize these rights. The likely prospect of legislative amendments to the Forestry Act provides an ideal window of opportunity to formalize these requirements and align them across sectors and with REDD+ goals.

Benefit sharing. As Malawi proceeds with defining the scope of the country's REDD+ activities, it will be paramount to also clearly delineate the rationale under which stakeholders will be eligible to benefit from REDD+ activities, and how those benefits will be targeted or shared. Past and ongoing benefit sharing arrangements under participatory forest management have led to community dissatisfaction, and this has in turn undermined sustainable forest management. A clear, transparent and thoroughly negotiated system of benefit sharing under REDD+ is necessary to avoid any misunderstanding and to manage expectations of all parties.

Forest, land and carbon tenure. Under the Land Act, customary land and resource tenure is administered through the traditional authority system, but the government has unlimited rights to convert and lease customary lands. This has led to alienation of over one million hectares of customary land, increasing the perception of insecurity of tenure on customary lands, which cover between 65–75 percent of Malawi.¹³ Tenure security is also closely connected to the gender-based inheritance systems prevalent in Malawi. As will be explored further in this report, women face much greater levels of discrimination and disempowerment in tenure security than men.

The Forestry Act's definition of forest tenure is vague and in conflict with the requirements for assigning tenure rights to communities under the two forms of participatory forest management outlined in the act. The National Land Policy highlights the need for clarity, security and equity of tenure, as well as for synergies and integration of land use/management and other natural resource management policies and practices, including forestry. The following key policy and legal challenges related to tenure have been identified in *Tenure and REDD+ in Malawi*:¹⁴

- No clear legal basis for secure tenure rights on customary forests.
Neither the Forestry Act nor the proposed Land Bills make clear the specific forest tenure rights that accrue under participatory management arrangements. Similarly, under the proposed land legislation, there is no clear statement of how forest resource rights relate to categories of land tenure and how that might impact on their use and management. There is thus a clear need to clarify forest and tree tenure under both existing and proposed land tenure and forestry legislation.
- Lack of legal basis for defining/granting secure tenure under PFM schemes.
Broadly speaking, there is a lack of legal clarity related to: (1) when and how participatory forest management (both co-management and community-based management) institutions should be created; (2) how they must be constituted; (3) what procedural mechanisms and criteria should guide their formation; (4) the process and criteria for completing (or revoking) a management plan and its required contents; and (5) what forest or tree tenure rights (if any) are devolved to individuals or communities once the process has been completed.
- Lack of clarity about the relationship between customary and legislative tenure rights.
The National Land Policy recognizes that many of the existing tenure rights have been allocated and are protected under customary law. The proposed Customary Land Bill refers to the application of customary law in making allocation and dispute resolution decisions, but neither of the proposed Land

¹³ MRRP, 2015.

¹⁴ For a detailed analysis of the tenure policy and legal issues related to REDD+ in Malawi, see Troell and Banda, 2016a and Malawi REDD+ Programme (MRP), 2016.

Bills provides 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 opportunities for elite capture.

A related issue is the role of traditional authorities in land administration under the proposed legislative changes. The National Land Policy explicitly sets out to address issues of opacity and lack of accountability in land transactions. It is therefore important to ensure that a balance is struck between increased accountability and transparency of traditional leadership and their decision-making and activities, and leveraging legitimate authority where it exists.

- Need for legal protection of all legitimate rights holders.

Malawi's National Land Policy recognizes that many existing land management customs foster prejudice and fail to represent vulnerable populations, especially women. Without a proactive approach to securing land tenure equitably for vulnerable populations, it is likely that registration will be granted only to community members with power and resources, further marginalizing those who are landless and preventing them from benefitting from REDD+ arrangements.

Carbon rights. To date, Malawi has not defined carbon rights separately from land and tree tenure. The rights to benefits from REDD+ activities under the current legal system would therefore depend on forest and land tenure rights, which are veiled in the challenges described above. It is possible, however, that Malawi may consider a more specific legal definition of carbon rights as property rights in forest ecosystems that have value pursuant to REDD+ markets or projects. This would require elucidating the nature of the property rights and the derivative rights associated with trading carbon – or how individual or community rights are integrated into the national REDD+ regime and the processes and responsibilities associated with the right to access benefits from carbon trading. Malawi will need to determine how to assign these rights in order to determine who is eligible to benefit under REDD+ activities. Broadly speaking, defining carbon rights (and thus the benefits from REDD+) as permanently attached to forest resources is a more straightforward proposal, as opportunity costs are more easily identified with one person or community holding those rights. If carbon rights are separated and vested in a number of different individuals, it becomes more difficult to align incentives and ensure that benefits are allocated effectively and equitably. The transaction costs associated with separating carbon rights make it unlikely to be an effective solution for Malawi. Despite this, it is still necessary to legally define who is eligible to acquire forest carbon rights, a question that is tied up in the uncertainties surrounding land and forest tenure discussed above.

Participatory forest management. While participatory forest management (PFM) – both in the form of community-based management of customary forest areas and co-management with communities in the buffer zones surrounding forest reserves – is broadly supported in policy and legislative frameworks, there have been major challenges in operationalizing PFM, and forest degradation and deforestation continue apace. These challenges include a lack of capacity on the part of the Department of Forestry to support communities in formalizing institutions and developing management plans; lack of clarity of the role of traditional authorities in PFM governance structures; and failure to include communities effectively in the planning processes. Many of these issues stem at least in part from a lack of clarity of the legal procedural requirements for establishing local forestry institutions and their ultimate legal status. There is a need to operationalize PFM as part of the legal frameworks governing forestry and natural resource management rather than leaving PFM to the discretion of the officers charged with implementing the broad guidelines currently in the law.

Corruption, transparency and accountability. A critical enabling factor for corruption in the forest sector and beyond is the lack of provisions for promoting and securing transparency in legal frameworks. Examples abound within the forestry sector of the lack of public scrutiny and/or no specific requirements

for stakeholder engagement when critical decisions are made, for example decisions on issuing or revoking licenses, issuing or revoking concessions, or establishing (or revoking) village forest areas and forest management agreements on customary lands. 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, such as permitting, rule making and 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 to ensure that officials are held accountable to the decision-making criteria established in the legal framework.

Compliance and enforcement. As noted above, one of the most consistent forest governance issues raised by stakeholders that will impact REDD+ implementation at all levels is that of inadequate enforcement. A number of reasons were cited for this:

- lack of effective legal provisions for enforcement, including inadequate penalties;
- lack of resources for effective enforcement (personnel, equipment, etc.);
- lack of technical capacity/insufficient training for monitoring, inspections and enforcement;
- overly complex requirements for community-based forest management;
- lack of judicial and prosecutorial awareness of forest issues and legal requirements; and
- corruption.

From a legal perspective, there needs to be better clarity on the mandate and procedural requirements for enforcement, as well as a flexible mechanism for setting penalties that are capable of deterring violations. Similarly, there is a broad lack of awareness among officials and communities of their precise enforcement duties under forest management agreements. Lack of transparency in enforcement proceedings is another factor that both facilitates corruption and undermines effective implementation. This makes it critical to formalize the process for setting up local forest organizations and concluding forest management agreements so that both communities and forest staff are able to come to the process on equal footing and can be held accountable. An additional challenge for enforcement is the fact that communities perceive that there are no incentives to comply with and enforce management agreements in areas under participatory forest management.

Policy coherence and intersectoral coordination. Perhaps the most critical issue raised from a REDD+ governance perspective is the lack of policy and legal coherence across all relevant sectors and the failure of existing coordination mechanisms to promote real integration and avoid overlapping or even contradictory efforts. Several sectoral policies, including the draft National Forestry Policy, highlight the need for effective intersectoral coordination and alignment with policies of other sectors. While the policy statements are clear, there are no real mechanisms within the Forestry Act to support and facilitate an intersectoral collaborative approach.

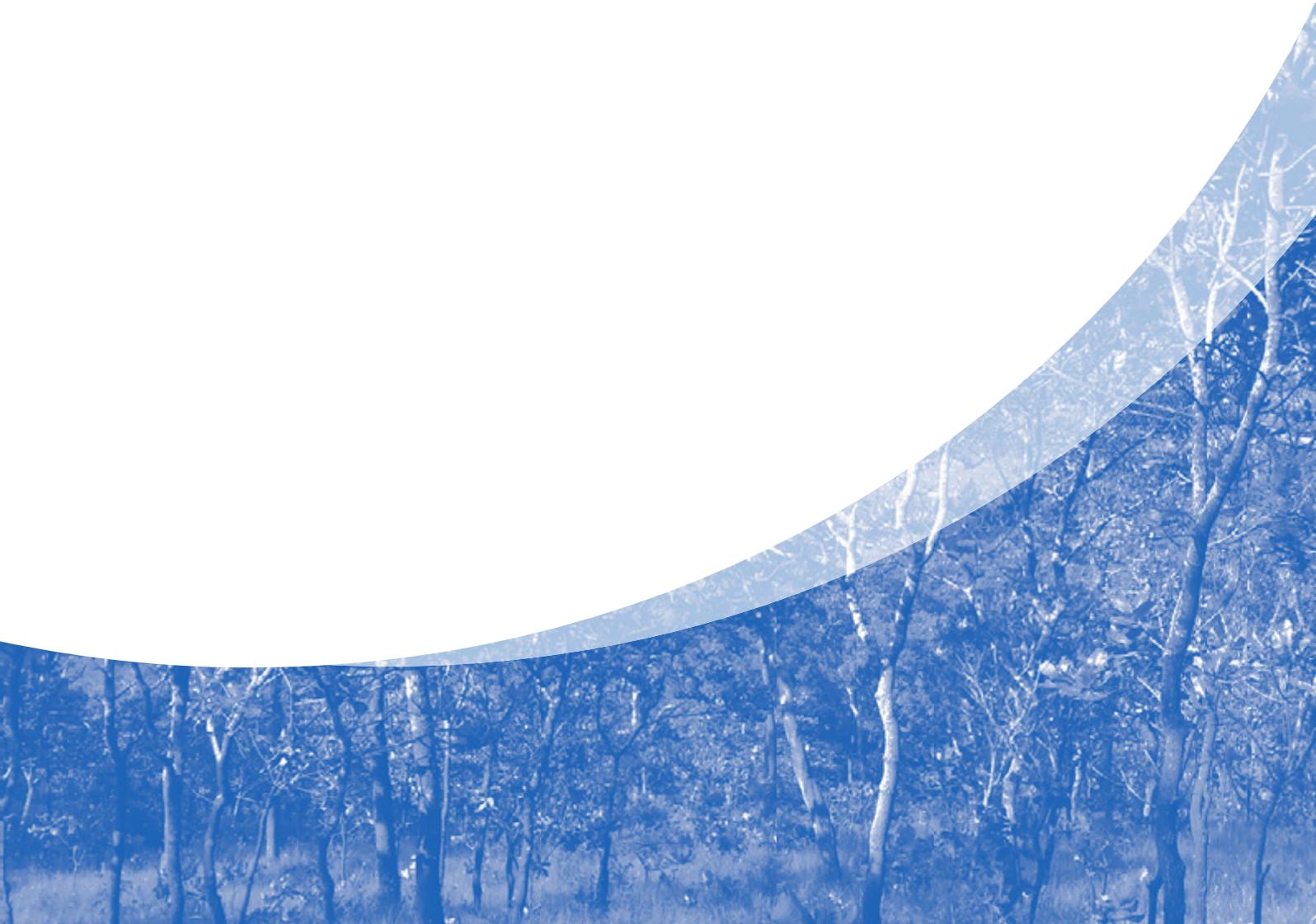
In recognition of the need for effective coordination among natural resource and development sectors, the Environment Management Act established the National Council for the Environment (NCE), which is comprised of all principal secretaries of government institutions and other public agencies, as well as NGOs whose functions are related to the environment and natural resource management.¹⁵ Unfortunately, stakeholders have consistently raised concerns that NCE has not performed as expected, in part as a result of inconsistent participation by senior officials with decision-making authority, and also owing to the fact that while NCE is expected to coordinate other ministries, it has no independent authority outside of MNREM. To remedy this, the Environmental Management Bill is proposing to raise the political level of this

¹⁵ Government of Malawi. 1996. *Environment Management Act*, sec. 10.

coordination mechanism and establish an independent environmental authority that would report directly to the Office of the President. This is an opportunity for the Department of Forestry to mainstream REDD+ into high-level discussions and raise the cross-sectoral implications and coordination needs related to REDD+.

Another key issue relates to the overlapping mandates of the ministries governing land, forests and water with respect to their ability to make regulations that impact on and grant access to/control over forest land. While these are not necessarily in conflict with each other, there is a need to determine how best to coordinate among them and how to balance the policy priorities for development on one hand and forest land protection on the other. 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 effective realization of forest policy goals. However, it will be critical that this process learns from past and ongoing efforts of various sectors to strengthen capacity and create institutional mechanisms at the local level, and build on what successes such efforts have generated.

The summary of findings and options for action, found at the end of this report, includes an overview table outlining various options for addressing the priority issues highlighted above.



Introduction and methodology

1.1 Background

Malawi is a small, landlocked country in sub-Saharan Africa, home to over 16.7 million people.¹⁶ Approximately 94,000 square kilometres in land area, Malawi is one of the most densely populated countries in Africa, with an average land holding of less than one hectare per household.¹⁷ It is also one of the poorest countries in the world. In 2014, Malawi had a per capita Gross Domestic Product (GDP) of US\$255, one of the lowest in the world,¹⁸ and it 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 the GDP, employs 65 percent of the Malawian workforce, and generates over 80 percent of national export earnings.²⁰ The sector is divided between the smallholder and estate subsectors, with more than 70 percent of agricultural GDP coming from smallholders.²¹ Conversion of land from forest to agricultural use has been widely documented, particularly on customary lands. With a population growth rate of approximately 2.8 percent, increasing land pressure continues to drive deforestation.²²

In addition to agriculture, the people of Malawi rely heavily on forest resources for livelihoods and as a source of energy.²³ While Malawi is technically a “low carbon” society, its 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 tonnes and accounts for a third of household energy use.²⁴ Poorer households are estimated to produce 35 percent of the total charcoal production, with large-scale producers responsible for 38 percent of total charcoal production in 2008.²⁵ The use of fuelwood for cooking and for tobacco processing and other cottage industries, especially brick making, is also driving deforestation and forest degradation.²⁶ Moreover, illegal logging in government forest reserves continues to take a toll. Forest resources are particularly stressed in the southern and central regions, where population pressures are the greatest.

Poverty, population growth and density, and limited alternatives to fuelwood and charcoal are all indirect drivers of deforestation and degradation in Malawi. These drivers, in turn, are directly or indirectly linked to weaknesses in governance that have undermined effective and equitable forest resource management. Specific governance weaknesses include: lack of coordination among forest-related sectors; 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; unclear and insecure land and resource tenure systems; and lack of transparency and accountability, which have both contributed to widespread corruption in the forestry and related sectors.

16 World Development Indicators (available here).

17 USAID, 2010 (available here).

18 World Development Indicators.

19 UNDP, 2016 (available here).

20 GoM. 2015. *National Agricultural Policy: Zero Draft*.

21 GoM. 2015. *National Agricultural Policy: Zero Draft*.

22 LTS International, 2015.

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

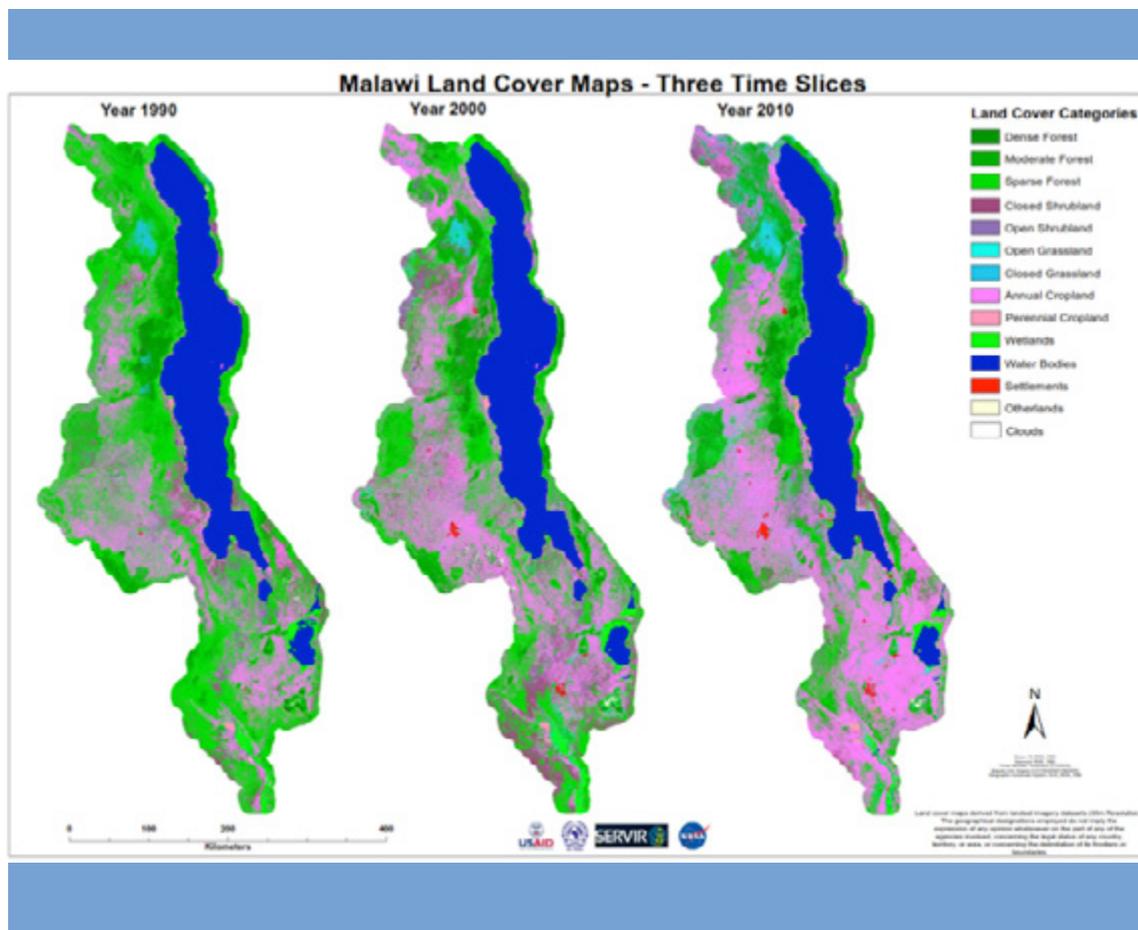
24 Three national studies have been undertaken, each of which provides a different estimate. The most recent study (2009) requires updating, given the annual urban population growth rate of 4.2 percent. See LTS International, 2015.

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

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

The results have been devastating. Between 1972 and 1992, Malawi's total forest cover fell from 47 percent of land cover to 20 percent. A number of studies report various rates of the current level 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.²⁷ Taken together, changes in woody biomass stocks account for 69 percent of Malawi's total carbon emissions.²⁸ There is thus an urgent need to halt and reverse deforestation and forest degradation while simultaneously providing alternatives for sustainable economic development. The Reducing Emissions from Deforestation and Forest Degradation (REDD+) initiative provides an important mechanism for achieving these goals.

Figure 1: USAID Commissioned Land Use/Cover Maps for 1990, 2000 & 2010 (RCMRD 2012).²⁹



27 "Malawi Ranked First in SADC Deforestation Rate", Malawi News Agency, May 12, 2015 (available here).

28 Gama, 2015.

29 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.

1.2 Context and rationale for this assessment

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.³⁰ The conversion of forests to other land uses accounts for approximately 10 percent of global carbon emissions.³¹ REDD+ provides financial incentives to developing countries to reduce emissions associated with conversion of forest resources to alternative land uses. The “+” indicates a broadened approach that focuses not only on reduced emissions, but also on activities that promote conservation and enhancement of existing carbon stocks and sustainable forest management.

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

Activities related to REDD+ in Malawi commenced in 2006 and involved the Forestry Research Institute of Malawi (FRIM) and Leadership for Environment and Development (LEAD) Southern Africa. These initiatives culminated in the designation of the Department of Forestry (DoF) as the official focal point for REDD+ activities. Additionally, the Norwegian Government funded a Lake Chirwa Basin Climate Change Programme under LEAD. In 2012, GoM partnered with the United States Agency for International Development (USAID) and the U. S. Forest Service International Program (USFS-IP) to establish the three-year Malawi REDD+ Readiness Programme (MRRP). MRRP succeeded in supporting 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 framework to oversee and coordinate Malawi’s pursuit of REDD+ readiness. This management structure, described below, has played a major role in furthering REDD+ readiness in Malawi to date.

The Malawi REDD+ Programme (MRP) has the responsibility for bringing together interested stakeholders to support REDD+ readiness in Malawi. MRP includes representatives from GoM, civil society, academia, private sector, media and the development community. Launched in 2012 with the support of USAID and USFS-IP, MRP is coordinated from within DoF by the REDD+ Secretariat, while development partners, including the UN-REDD Programme, provide technical and financial support.

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

The country needs assessment is being complemented by the UN-REDD Programme’s technical support, which focuses on institutional and governance aspects and work related to measurement, reporting and verification (MRV), as well as land tenure. This two-pronged approach is being coordinated to ensure that appropriate synergies are developed. The technical support aims to assist with a variety of governance and monitoring elements of REDD+ readiness and has the following four core elements: 1) an institutional and context analysis, which will provide the basis for multi-stakeholder engagement towards the design

30 Denier, Korwin, Leggett & MacFarquhar, 2014.

31 IPCC, 2014.

of a national REDD+ strategy, as well as policies and safeguard systems; 2) a corruption risk assessment to support an understanding of forest governance challenges that impact the drivers of deforestation and degradation and barriers to “+ activities”³², and inform the design of elements of REDD+ readiness; 3) an analysis of Malawi’s resource/land tenure regimes as they relate to REDD+; and 4) the development of a roadmap for the design of a national forest monitoring system (NFMS).

This assessment of policy, legal and institutional frameworks for REDD+ in Malawi is thus part of a larger, integrated package of technical support intended to help create a national REDD+ strategy for Malawi. The assessment builds on and feeds into other aspects of the support package through formal and informal consultation mechanisms involving the authors of this assessment, staff of the UN-REDD Programme, key personnel at DoF, and the consultants engaged to assist with other components of the technical support package.

1.3 Objectives and target audience

The overarching objectives of this assessment are to provide the Government of Malawi with a clear understanding of: (1) the international legal requirements for achieving REDD+ readiness and qualifying for results-based payments; (2) the areas of domestic policy and law that will impact the ability of Malawi to effectively implement REDD+; (3) where there are gaps, overlaps or even contradictions within existing policies and legislation that could negatively impact the success of REDD+; and (4) options for addressing the identified challenges, taking into consideration the capacities and constraints of existing institutions.

There is a large body of international law and guidance that applies to countries that are in the process of developing and implementing REDD+. This includes agreements and guidance that are specific to REDD+ as well as multilateral agreements that address issues related to forestry, biodiversity and land and resource tenure, among others. In order to prepare for and effectively implement REDD+, the Government of Malawi must assess the extent to which its domestic legal frameworks comply with the applicable international laws and guidance on best practice for REDD+.

In addition to meeting the international requirements for REDD+ readiness, the Government of Malawi must also have in place domestic policy and legal frameworks that are supportive of equitable, effective and sustainable REDD+ implementation. This assessment has identified critical legal and policy issues related to implementation, and provides an analysis of the gaps, overlaps and conflicts within existing policy and legal frameworks across the many sectors that will impact on REDD+. The assessment is thus an important first step in ensuring that Malawi has consistent and supportive legal and policy frameworks for integrating REDD+ into national development and climate policies and mitigating the economic, social and environmental risks related to REDD+. The recommendations of this assessment are tailored to guide policymakers in Malawi to support more informed, relevant and strategic policymaking related to REDD+.

The analysis in this assessment is designed to function as a preliminary review of existing Malawian legislation to help ascertain Malawi’s legal preparedness to proceed on the road to a full-fledged REDD+ programme. Currently, Malawian law does not address REDD+, nor has any such law been proposed. Thus, the assessment broadly asks the questions: 1. Can a REDD+ programme – or key elements of such a programme – be enacted under existing Malawian law, or is new legislation necessary? 2. If new legislation is necessary, what form can and should it take?

This assessment concludes that certain aspects of REDD+ can be implemented in line with existing Malawian law, without the need for new legislation. However, because Malawian laws and the institutional structures that implement and enforce them are actively evolving, there is a window of opportunity to

³² “+ activities” refers to activities that contribute to the conservation and sustainable management of forests and enhancement of forest carbon stocks.

address aspects of REDD+ more comprehensively through legal amendments and the creation of new institutional mechanisms. A REDD+ programme enacted with complete legislative underpinning would be on much surer legal footing than a programme established solely through regulations or guidance under existing law. Legislative enactment would provide an opportunity for a comprehensive programme design and allow lawmakers to give clear guidance to implementing agencies, affected communities and other stakeholders. In addition, the legislative and executive weight carried by the inclusion of REDD+ under new legislation could help build public knowledge about and confidence in Malawi's REDD+ Programme. New legislation could also be expected to provide greater confidence to donors and international investors.

It is important to recognize, however, that REDD+ has not yet achieved the kind of status in Malawi that would make it politically expedient to create independent legal provisions or regulations to govern the programme's structure and implementation. The draft National Forestry Policy acknowledges REDD+, but its inclusion in the policy was contentious. Many stakeholders interviewed for this assessment expressed concerns that it is too soon to know whether REDD+ will actually be implementable as a national programme, rather than as a collection of projects. Thus, options outlined in this assessment provide mechanisms for REDD+ implementation that build on existing policy and legal frameworks.

The audience for this assessment includes the Department of Forestry, which is home to the Malawi REDD+ Programme (MRP) and will likely continue to act as the institutional home of REDD+ in Malawi for the foreseeable future; decision-makers and officials with mandates related to policymaking, legislative development and intersectoral coordination across sectors relevant to REDD+, including environment, finance, land, water, mining, agriculture and energy; civil society; academic institutions working on forestry governance and management; and donors who will continue to play an important role in garnering the necessary resources to support the continued development and implementation of REDD+ in Malawi.

Ultimately, this assessment will contribute to the creation of a roadmap for a national strategy for REDD+ implementation in Malawi, which will be drafted on the basis of the findings of all components of the UN-REDD Programme's technical support package and the Malawi country needs assessment. This includes a corruption risk assessment; an institutional and context analysis; a roadmap for the creation of a national forest monitoring system; and a land and resource tenure assessment. To the extent possible, this assessment has incorporated the findings of these other studies.

1.4 Scope of the assessment

Malawi faces a number of governance challenges as it progresses towards REDD+ implementation. Some of these challenges are directly related to the content of existing policies, laws and regulations, while others relate more to the capacity and political will to implement and enforce these instruments in an effective and accountable manner. This assessment therefore reviews the current legal frameworks related to REDD+ implementation, but also focuses on the critical issues of institutional arrangements and capacities for implementation and enforcement. It should be noted that the relevance of specific laws, policies or regulations can only be assumed, as decisions have yet to be made on which driver(s) or REDD+ activities the Government of Malawi will prioritize for implementation.

A critical aspect of REDD+ that has informed the scope of this assessment is the need for coordination and involvement of sectors beyond forestry and climate change. National level REDD+ policies, laws and institutional frameworks must address the drivers of deforestation and degradation in Malawi, which often emanate from other sectors, notably land use and tenure, agriculture, mining, environment, water and energy. National ownership and political sustainability are also key aspects of successful REDD+ programmes, and these require that REDD+ implementation contribute to (or at least does not conflict

with) national development objectives. Policy and legal coherence across sectors has thus been explored in this assessment along with the existing mechanisms for cross-sectoral coordination.

In addition to its statutory frameworks, Malawi has a body of customary laws and practices that are widely recognized as legitimate rules of society. The consultants have worked closely with stakeholders to identify where customary law is relevant for REDD+, particularly as it relates to land and resource tenure provisions. Malawi is also still completing the process of decentralizing authority for land, forest and natural resource management to the district and community levels. This assessment therefore identifies the relevant mandates and authorities at the subnational level, and how these are addressed in policy and legal frameworks.

While Malawi's legal framework will be the vehicle through which many of the international requirements for REDD+ will be translated into national requirements, the successful implementation of REDD+ will also depend on the country's ability to address its broader governance challenges, including pervasive corruption and lack of meaningful participation of stakeholders in many decision-making processes. Finding mechanisms to address these broader issues will be an important aspect of providing effective safeguards against the potentially negative social, environmental and economic impacts from REDD+ activities. The assessment thus situates the policy and legal frameworks for REDD+ in a broader governance context, drawing on the findings from the corruption risk assessment and the institutional and context analysis to shape realistic recommendations for achieving REDD+ goals and co-benefits.

Finally, Malawi is in a period of great transition with respect to its natural resource and land management policy and legal frameworks. Currently several policies and bills are in the process of being drafted and finalized, including the new National Forestry Policy, the National Climate Change Policy, the National Physical Planning Bill, the Environmental Management Bill, the Land Bill and the Customary Land Bill. This assessment is therefore taking place at an exciting time, when various windows of opportunity may be open to influence policy pathways and legal provisions to better facilitate and support the implementation of REDD+ activities. Accordingly, this assessment highlights specific issues of critical policy importance to take advantage of these windows of opportunity.

1.5 Analytical approach

In order to provide a comprehensive understanding of the legal and policy requirements for REDD+ readiness and implementation in Malawi, the consultants worked with the UN-REDD Programme to develop a two-pronged analytical approach that: (1) assesses Malawi's legal and policy frameworks for their alignment with the international legal requirements under the UNFCCC Warsaw Framework; and (2) draws on the experience of other countries as well as academic research on REDD+ governance to distil areas of policy and law that are likely to impact REDD+ implementation in Malawi. These two dimensions of legal preparedness are addressed in sections 2 and 3 of this assessment, respectively. The two-pronged approach to assessing Malawi's legal preparedness for REDD+ also takes into consideration Malawi's emphasis on adopting a "no regrets" strategy to REDD+. Finally, it highlights options for REDD+ readiness and implementation that could contribute to achieving broader development and ecosystem protection goals, and have the potential to provide co-benefits as REDD+ implementation moves forward.

Once the elements of legal preparedness were established, the consultants reviewed the institutional frameworks, policies, laws and regulations across sectors relevant to REDD+. Malawi's REDD+ institutional frameworks are described in section 4 of this report and policy and legal frameworks are outlined in section 5. Section 6 follows with an analysis of gaps, overlaps and potential conflicts among various policies, laws and institutional mandates. Finally, section 7 provides a summary of the options for action related to the identified gaps, overlaps and challenges.

1.6 Sources of information

A key aspect of this assessment is that it reflects a country-led approach. The consultants worked in close partnership with counterparts at the Department of Forestry who were assigned by the director of forestry to guide and inform the assessment, and who provided invaluable insights and guidance throughout the whole process. They included Mr. Teddie Kamoto, REDD+ Focal Point and Deputy Director for Policy; Ms. Stella Gama, former REDD+ Focal Point; Ms. Nyuma Mghogho, Deputy Director; and Ms. Patricia Masupayi, Chief Forestry Officer.

The data for the assessment was collected and analysed through the following four sets of activities: (1) literature review/desk study; (2) key informant interviews; (3) field visits; and (4) stakeholder workshops.

1.6.1 Literature review

In order to gain an overview of the overall context and 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 of relevant sectors in Malawi;
- documents of past and ongoing studies and programmes related to forestry, tenure and other relevant aspects of REDD+ governance in Malawi;
- grey literature relevant to the creation and implementation of forest and other resource policies in Malawi (e.g. internal reports, evaluations, etc.);
- guidance documents on forestry and REDD+ governance from international organizations such as the UN-REDD Programme, the UNFCCC and others;
- scholarship on legal and policy aspects of REDD+ and lessons learnt from legal and policy interventions for REDD+ in other countries.

A list of resources consulted for this assessment is included in Annex A.

1.6.2 Stakeholder interviews

The literature review was supplemented by a series of key informant interviews and three sets of field visits. The complete list of individuals who participated in interviews is included in Annex B.

1.6.3 Stakeholder workshops

Once the initial research phase was completed, an inception workshop was held on 28-29 July 2015 with over 40 participants representing the government, traditional leadership, research institutions and civil society. The feedback and recommendations generated by this workshop guided the remainder of the assessment and were incorporated into this final assessment report. The report from the inception workshop is attached as Annex C.

A preliminary validation workshop was held in December 2015 with members of the Policy and Governance Technical Working Group of the Malawi REDD+ Experts Group and selected additional stakeholders. The consultants shared the results of the assessment with the participants, and their feedback informed the final version of this report. The report from the preliminary validation workshop is provided as Annex D. An additional validation session was held with senior staff from the Department of Forestry in January 2016, and the final validation workshop took place on 23 February 2016. Feedback provided during those sessions is included in Annex E.

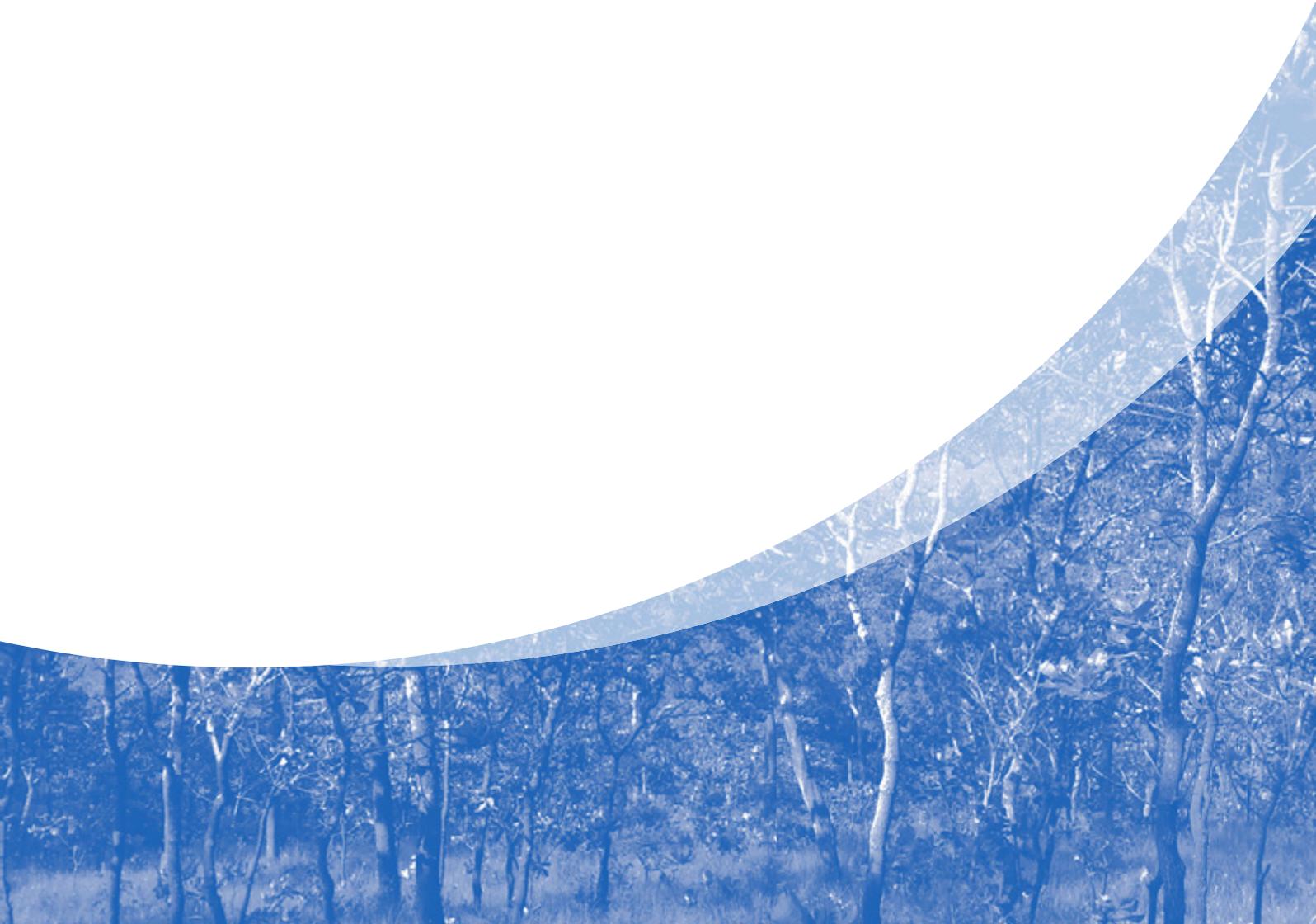
1.6.4 Field visits/focus groups

In addition to the key informant interviews, the consultants worked with DoF counterparts and MRRP to identify three sites for field visits. The consultants developed a set of criteria for the selection of sites, which 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;
- representative mix of the tenure regimes present in Malawi (matrilineal and patrilineal, as well as areas that blend the two) to inform the analysis of how tenure can be addressed to uncover the gender dynamics related to land and forest ownership and management; and
- representative mix of various levels of decentralized forest management, including sites where community-based forestry institutions have been legally formed and are functioning versus sites at other stages of the decentralization process.

Given these criteria, the timing and funding constraints of the assessment project, and the recommendations of individuals consulted in the inception workshop, the following sites were selected:

- Ntchisi (PERFORM site and forest reserve)
- Dzalanyama (forest reserve with high rates of deforestation)
- areas of customary forest land surrounding Lilongwe
- Zomba (forest reserve with several community-based projects)
- Mulanje (protected area)
- Mwanza (site of a community-based forest programme).



International legal frameworks for REDD+

REDD+ is a voluntary initiative established under the United Nations Framework Convention on Climate Change (UNFCCC) with a number of operationally significant but non-legally binding decisions that have been adopted by the Conference of the Parties (COP). Despite the fact that the decisions are non-binding, it is clear that the requirements flowing out of these decisions do have some normative force. Ultimately, the framework developed under the UNFCCC provides the requirements that developing countries are expected to meet in order to qualify for results-based payments under an international REDD+ mechanism. Thus, in practice, these obligations determine which countries are able to access funds and provide a strong incentive for compliance.

There are also programmes supported by other international institutions, including the Forest Carbon Partnership Facility (FCPF) and the Forest Investment Program (FIP). These have their own requirements for countries pursuing REDD+ that wish to access assistance or finance under their mechanisms. The focus in this assessment is on the UNFCCC requirements, as Malawi is not currently receiving support for REDD+ readiness under FCPF or FIP.

The overall framework under which REDD+ is to be implemented is guided by the decisions of the COP to the UNFCCC. As noted above, these decisions are not legally binding, focusing instead on voluntary operational requirements for REDD+ implementation.³³ The decisions provide the architecture for what developing countries must have in place to qualify for results-based payments under REDD+ when undertaking REDD+ activities.

REDD+ activities under the UNFCCC include:

- reducing emissions from deforestation;
- reducing emissions from forest degradation;
- conservation of forest carbon stocks;
- sustainable management of forests; and
- enhancement of forest carbon stocks.

REDD+ activities have considerable potential to provide substantial benefits both locally and globally. Forest ecosystems provide a range of services, including support to livelihoods and food security. In addition, these ecosystems are home to rich biodiversity, help maintain watershed health, and provide numerous products that contribute to sustaining livelihoods and enabling economic growth. REDD+ activities can contribute to the protection or enhancement of these services, but they can also pose environmental and social risks if not undertaken appropriately. In recognition of these risks, the UNFCCC COP has agreed to seven safeguards that countries are meant to promote and support in developing and implementing REDD+ activities, in order to maximize opportunities for multiple benefits while reducing the risk of adverse social or environmental outcomes. These safeguards are described in section 2.1.3 below.

At COP 19 in 2013, seven decisions were taken on institutional arrangements, methodological guidance and REDD+ finance to guide the implementation of REDD+ at the domestic level. Taken together, these decisions are now commonly known as the Warsaw Framework on REDD+.³⁴ The Warsaw Framework also recognizes four “pillars” of readiness for REDD+ implementation, as outlined in the following text box:

³³ UNEP, 2015.

³⁴ UNEP, 2015.

Four pillars of REDD+ readiness under the Warsaw Framework

- 1 national strategy or action plan for REDD+;
- 2 mechanisms for promoting and supporting the Cancun Safeguards and establishing a safeguards information system for monitoring and reporting on compliance with the safeguards;
- 3 national forest monitoring system, including measures for complying with requirements on measurement, verification and reporting; and
- 4 national forest reference emission level and/or forest reference level.

In addition to the four pillars listed above, the Warsaw Framework also recognizes the need to establish effective institutional arrangements for implementing REDD+ and to address the drivers of deforestation and forest degradation in order to reduce emissions and enhance forest carbon stocks through sustainable forest management.³⁵ The following sub-sections describe briefly the various elements of the Warsaw Framework.

2.1 National REDD+ strategy or action plan

While there are no detailed prescriptions for what a national strategy or an action plan must contain, UNFCCC Decision 1/CP.16 requests that, when developing and implementing their national strategies or action plans, developing country parties address:

- drivers of deforestation and forest degradation
- land tenure issues
- forest governance issues
- gender considerations
- the Cancun Safeguards
- mechanisms for ensuring the full and effective participation of relevant stakeholders, including indigenous peoples and local communities.

The quality of the content of a national strategy/action plan also relies greatly on a sound, cross-sectoral and multi-stakeholder design process.³⁶ The development of a national strategy/action plan provides a unique opportunity to garner political, financial and stakeholder support for its implementation. In addition, the national strategy/action plan is a living document that will need to respond to changes in policies, laws and institutional mandates over time. Thus, the UNFCCC supports an iterative approach that expands as REDD+ evolves, and such an approach should be reflected in the national strategy/action plan design process.³⁷ Taking such a stepwise approach in Malawi will facilitate the transition from sub-national REDD+ implementation through pilot projects to a full-fledged national REDD+ programme.

Another important aspect of the development of a national strategy/action plan is a critical analysis and prioritization of the drivers of deforestation and forest degradation (and the barriers to “+ activities”) to identify appropriate policies and measures for implementation. Broadly, this assessment will provide the necessary background on the policy and legal issues to be addressed in structuring the national strategy planning process, and the types of policies and measures that can be undertaken to address governance challenges that contribute to or underlie the drivers of deforestation and forest degradation in Malawi.

³⁵ UNFCCC Decision 1/CP.16; *Climate Law & Policy*, 2015.

³⁶ UN-REDD Programme, 2015a (available here).

³⁷ UNFCCC Decision 1/CP.16.

2.2 Measurement, reporting and verification

In order to obtain results-based financing, countries must be able to measure, report and verify “anthropogenic forest-related emissions by sources and removals by sinks, forest carbon stocks, and forest carbon stock and area changes”.³⁸ Countries must use the most recent guidance from the International Panel on Climate Change (IPCC) as the basis for estimating forest related emissions, removals, forest carbon stocks and forest area changes.³⁹ This includes using data that is transparent and consistent over time, with an established forest reference emission level and/or a forest reference level, to undertake monitoring as part of a national forest monitoring system (NFMS). Countries must submit the data as part of their biennial update report.⁴⁰ Moreover, in order to qualify for payments, countries must have data verified by a team of technical experts to ensure the accuracy, consistency, completeness and transparency of the results.⁴¹

2.2.1 Forest reference emission level and forest reference level

In order to access results-based payments, developing countries undertaking REDD+ activities must develop a national forest reference emission level and/or a forest reference level in a transparent manner, taking into account historical data, and update it periodically.⁴² Malawi is in the process of gathering data to set its reference levels.

2.2.2 National forest monitoring system

The Warsaw Framework builds on past COP decisions in requiring countries to establish a robust and transparent national forest monitoring system (NFMS). Methodological guidance for this was adopted at COP 15, requiring countries to utilize remote sensing and ground-based carbon inventory approaches for estimating emissions, removals and forest area changes.⁴³ A country's NFMS should build on existing systems, enable assessments of different types of forests, be flexible, allow for improvements over time and reflect the phased approach to REDD+ implementation. As part of the technical support package provided to Malawi, the Food and Agriculture Organization of the United Nations (FAO) has been working closely with a national consultant and national stakeholders to develop a roadmap for the development of NFMS in Malawi.

2.3 Safeguards

The Warsaw Framework recognizes the Cancun Safeguards adopted at COP 16 as the central part of the REDD+ structure that all countries must strive to promote and support. Indeed, regardless of the source of funding, all REDD+ activities should be consistent with the Cancun Safeguards, which are outlined on the following page.⁴⁴ Developing countries are also required to develop a system for providing information on how they are addressing and respecting the safeguards. This safeguards information system (SIS) should be documented and reported on to access results-based payments.

38 UNFCCC Decision 2/CP.17, para. 64; UNFCCC Decision 9/CP.19, para. 3.

39 UNFCCC Decision 4/CP.15, para. 1(c).

40 UNFCCC Decision 14/CP.19.

41 UNFCCC Decision 14/CP.19, para. 11.

42 UNFCCC Decision 12/CP.17.

43 UNFCCC Decision 4/CP.15.

44 UNFCCC Decision 2/CP.17, para. 63.

UNFCCC REDD+ safeguards: the Cancun Safeguards

- a REDD+ actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements.
- b Transparent and effective national forest governance structures, taking into account national legislation and sovereignty.
- c Respect for the knowledge and rights of indigenous peoples and local communities.
- d Full and effective participation of relevant stakeholders, in particular indigenous peoples and local communities.
- e Actions are consistent with the conservation of natural forests and biological diversity, ensuring that REDD+ actions do not result in the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits.
- f Actions to address the risk of reversals ('permanence').
- g Actions to reduce displacement of emissions ('leakage').

2.4 Drivers of deforestation and forest degradation

Countries are encouraged to address the drivers of deforestation and forest degradation with a view to reducing emissions and enhancing forest carbon stocks through the sustainable management of forests. This is in line with decisions taken at COP 13 in Bali and subsequent work by the Subsidiary Body for Scientific and Technical Advice on identifying land use, land use change and forestry activities linked to various drivers. A preliminary qualitative study on drivers in Malawi was recently completed by LTS International and the results of the study informed this assessment.

2.5 Institutional arrangements for implementing REDD+

In order to effectively implement and oversee REDD+ activities, the Warsaw Framework requires that certain institutional arrangements be implemented at the national level. Specifically, countries are required to set up a national REDD+ entity and/or designate a REDD+ focal point to serve as a liaison with the UNFCCC Secretariat and other relevant bodies under the UNFCCC for matters relating to REDD+ activities. The institutional arrangements for implementing REDD+ in Malawi are addressed in section 4.

Domestic legal frameworks for REDD+

Domestic governance frameworks – defined here as the policies, laws, regulations, institutions and processes required for implementation and enforcement – set the “rules of the game” for REDD+ implementation. Policies set forth goals and objectives, laws create mandates and grant authority to execute those mandates, and institutional frameworks create the enabling environment for implementation and enforcement. In the context of REDD+, Malawi’s policy and legal frameworks will be the vehicle through which many of the international requirements for REDD+ will be translated into tangible and specific national prerequisites.⁴⁵ The successful implementation of REDD+ will also depend on the existence of legal and policy frameworks that address broader governance challenges, such as corruption and the lack of meaningful stakeholder participation. These broader enabling frameworks will safeguard against potential negative social, environmental and economic impacts of REDD+. Moreover, well-designed legal frameworks for REDD+ have the potential to produce co-benefits in other sectors by creating more effective, accountable and equitable governance approaches to natural resource management and promoting sustainable ecosystem-based strategies.

While REDD+ is still in its formative stages in most countries, there is an increasing wealth of experience in assessing the types of governance challenges and opportunities that are associated with REDD+ implementation. The UN-REDD Programme and the Forest Carbon Partnership Facility have gathered much of this information in their partner countries and independent scholarship has also documented the challenges and options for addressing them. Taken together, these national experiences of addressing the legal aspects of REDD+ point to specific areas of domestic law that are relevant to REDD+ implementation.⁴⁶ These areas are introduced below and then analysed in the Malawian context in section 5 of this report.

3.1 Legal definition of forests and REDD+ terminology

How forests and other forest-related concepts are defined in national laws, regulations and policies is central to the operation of effective REDD+ programmes.⁴⁷ Depending on how such terms are framed, forest loss and conversion may not officially be considered deforestation, and effective monitoring of forest loss and conversion can be undermined. Malawi must therefore examine its legal frameworks and determine whether existing legal definitions are adequate, or whether revision or harmonization is required.

3.2 Stakeholder engagement and free, prior and informed consent

A critical question in REDD+ initiatives is how the rights of forest-affected communities and other stakeholders will be protected. In order to understand how their rights might be affected, it is necessary for there to be meaningful mechanisms for engaging stakeholders in decision-making around structuring and implementation of a REDD+ programme. Stakeholders are defined as those individuals and organizations having a “stake” or interest in forests and/or REDD+ and who may be positively or negatively affected by REDD+ decisions or activities. This includes government agencies, forest-dependent communities, private sector entities, civil society, research institutions and others.

⁴⁵ Denier, Korwin, Leggett & MacFarquhar, 2014.

⁴⁶ These areas of domestic law were drawn from a review of a number of scholarly papers on national experiences, as well as the following guidance documents: Costenbader, ed., 2009; UN-REDD Programme, 2013b; Denier, Korwin, Leggett & MacFarquhar, 2014; UNEP, 2015.

⁴⁷ UNEP, 2015.

The costs and benefits of REDD+ will likely be felt most strongly by forest-dependent communities who rely on forests and related resources for their subsistence and livelihoods. In Malawi, where poverty and resource dependence are pervasive and interlinked, forest-dependent communities must be allowed to actively participate in the decisions that will impact their rights to access and use forest resources, and to shape the mechanisms employed so they may share the benefits that may accrue from REDD+.

The move to integrate stakeholders into forest resource management reflects a broader international recognition of the public's fundamental right to be involved in decisions 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 outlined what have become the three "pillars" of stakeholder or public engagement in environmental decision-making: access to information, access to decision-making and access to justice. The three pillars of public engagement 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 also 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.

In recognition of the rights of access outlined above, the UNFCCC Cancun Safeguards specifically emphasize the need to respect the knowledge and rights of local communities and to promote and support the "full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities."⁴⁸ In certain circumstances, the UNFCCC stipulates that countries go beyond engagement to require that communities have the right not only to participate in decision-making but also to consent to, or withhold consent for, a proposed action.⁴⁹ Free, prior and informed consent (FPIC) applies to REDD+ when decisions relate to resource uses that could significantly impact the rights of indigenous people and, where relevant, other forest-dependent communities.

Although there is no universally accepted definition of FPIC, the concept is fairly straightforward. FPIC is the right to make free and informed choices about the development and management of people's land and resources. The basic principles of FPIC are to ensure that indigenous peoples and communities are not coerced or intimidated, that their consent is sought and freely given prior to the authorization or start of any activities, that they have access to information about the scope and impacts of any proposed developments, and that their choices to give or withhold consent are ultimately respected.⁵⁰

FPIC has been defined and elaborated in multiple international and regional legal instruments, but its application has mainly been restricted to indigenous populations. While the Government of Malawi (GoM) does not consider its population to be indigenous, the impacts of REDD+ on the rights and interests of Malawi's forest-dependent communities may rise to the threshold of requiring FPIC. The UN-REDD Programme advises that states undertake a careful, rights-based evaluation of the circumstances and nature of their forest-dependent communities to determine whether FPIC should be applied to REDD+ decision-making in such communities.⁵¹ Such an analysis is outside the scope of this assessment, but the GoM should consider this approach as part of its REDD+ readiness programme.

48 UNFCCC, Cancun Decision 1/CP.16.

49 UNFCCC, Cancun Decision 1/CP.16.

50 Ward, 2011.

51 UN-REDD Programme, 2013a.

3.3 Benefit sharing

The concept of benefit sharing in natural resource management was first introduced under the Convention on Biological Diversity in 1992. The concept has since evolved not only to encompass financial benefits, but also broader forms of social accountability and responsibility.⁵² In the REDD+ context, benefit sharing includes: (1) benefits from the implementation of a REDD+ project, programme or policy (financial benefits); (2) benefits from changes in forest use (improved ecosystem services); and (3) indirect and non-monetary benefits from REDD+ implementation, such as improved forest governance, tenure security or enhanced participation in forest management.⁵³ Benefit sharing mechanisms for REDD+ are meant to address compensation for the foregone opportunity costs of deforestation and provide incentives for positive choices or behaviour by individuals and communities implementing REDD+ activities.⁵⁴

Conditional payments may be made under REDD+ to national governments on verification of reduced emissions, and these payments are often used to fund the stakeholders (sub-national governments, communities, NGOs) who are undertaking actions to reduce emissions or who demonstrate sustainable forest management practices. Alternatively, payments may be made directly to projects or communities undertaking the management activities or land use changes.

Approaches for benefit sharing in REDD+ countries tend to build on existing mechanisms, which can reduce costs and enhance political willingness to accept the arrangements. However, the equity, efficiency and effectiveness of these approaches rely on the accountability and transparency of the state, all of which are challenges in Malawi. Both the vertical (from central to local stakeholders) and horizontal (across sectors or local stakeholders) aspects of a REDD+ benefit sharing mechanism need to be designed to: 1) maximize equity among the stakeholders responsible for the reduction of deforestation and forest degradation; 2) improve the effectiveness of forest management; and 3) increase the efficiency of national and sub-national programmes (largely by minimizing transaction and implementation costs).⁵⁵ This, in turn, requires a careful balancing of interests and expectations in structuring the requirements for REDD+ benefit sharing.

3.4 Forest, land and carbon tenure

Clearly defined and secure tenure rights to land, forests and carbon are critical enabling conditions for REDD+ readiness. Tenure systems determine who can access and use which resources, under what conditions and for how long.⁵⁶ Poorly defined forest tenure can undermine incentives for protection of forest resources and drive their over-exploitation.⁵⁷ Moreover, the quality of tenure rights – whether they are contested, enforceable and long-lasting – influences incentives for the sustainable management of forest landscapes.⁵⁸

REDD+ is premised on providing benefits to those who maintain or enhance forest carbon stocks in order to compensate for lost opportunities and incentivize good forest stewardship. This requires a clear understanding of who owns the land and resources in question (including carbon) and the ability of

52 Pham *et al.*, 2013.

53 Pham *et al.*, 2013.

54 Pham *et al.*, 2013.

55 Pham *et al.*, 2013.

56 FAO, 2012.

57 Bolin, Lawrence & Leggett, 2013.

58 USAID, 2012a (available here).

rights holders to exclude others from accessing and changing forest cover.⁵⁹ Rights holders must be held accountable when they fail to fulfil the obligations under this results-based payment system. Moreover, a clear understanding of who holds which right is the only way to ensure that all legitimate rights holders are included in REDD+ decision-making processes. If tenure is insecure, unclear or in conflict, there is a real risk that powerful actors will usurp the rights and the resulting benefits. This is of particular concern on customary lands, where informal rights holders can be accidentally or deliberately overlooked, or convinced to cede their rights without a full understanding of the consequences. In Malawi, between 65–75 percent of land and 50 percent of remaining forests fall under customary jurisdiction. The clarity and security of customary tenure systems, and how they relate to statutory provisions regulating tenure, are therefore key issues that will shape the structure and implementation of REDD+.⁶⁰

Conversely, where REDD+ policies clarify, promote and support improvements in forest tenure and forest management institutions, they can complement and enforce ongoing national reform processes for more sustainable and equitable outcomes for REDD+. 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.⁶¹

3.5 Participatory forest management and REDD+

In Malawi, as in many other African countries, the vast majority of land is held in public ownership. This is a colonial legacy of nationalized forest ownership that enabled regulation of commercial and subsistence uses and alienated communities from forests of strategic economic value. The post-colonial era did little to transform this system of ownership and focused instead on command and control of what governments believed to be poor local stewardship practices. Over the years, in line with a growing recognition of the potential of decentralized forest management to simultaneously realize community resource rights and improve forest sustainability, Malawian government policy has come to support the devolution of forest management to local government in partnership with communities.

More than three decades of implementing participatory forest management (PFM) approaches worldwide have shown that, on balance, forests under community ownership and management have better ecological outcomes than state-managed forests.⁶² Livelihood outcomes are also generally more positive under community ownership, but the correlation is less definitive.⁶³

Despite past and ongoing efforts to decentralize forest management, the majority of forest communities in Malawi still lack formal ownership rights or secure use and access rights to their forests. The findings of positive correlation between successful decentralization and devolution of forest management and sustainable forest management outcomes indicate that REDD+ efforts in Malawi must explore how local institutional and management architecture for community-based forest management can be nested in national REDD+ governance structures. Further, it will be important to understand where and how PFM has succeeded and what challenges need to be addressed for effective and equitable implementation of REDD+ at the local level. Malawi's experiences with PFM are analysed in this report, and recommendations for how to strengthen implementation in light of REDD+ are provided in section 6.2.5.

It is also important to note that REDD+ presents a potential incentive for government to recentralize forests in order to control and maintain total access to the results-based payments. While this would require a major reversal of national policy in Malawi, it is something to consider in terms of the underlying

59 Larson *et al.*, 2013.

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

61 Bluffstone & Robinson, 2015.

62 USAID, 2012b.

63 USAID, 2012b.

motivation to effectuate existing decentralization and PFM on the ground. Conversely, REDD+ could provide Malawi with the financial and political resources necessary to support appropriate tenure and institutional reforms.⁶⁴

3.6 Cross-cutting governance challenges

3.6.1 Transparency, accountability and corruption

While the success of REDD+ implementation will depend in part on the legal and policy mechanisms specific to the REDD+ programme, it will also require legal frameworks that can address broader governance challenges related to the rule of law and democratic representation. Malawi's Democratic Governance Sector Strategy highlights the challenging governance context within which forestry management is taking place. Specifically, it mentions the following issues: limited technical and financial capacity of government institutions to execute their mandates; weak stakeholder engagement in policy development and implementation; overall weaknesses in policy coherence and implementation; and the need for strengthening the rule of law throughout the government.

Well-designed legal frameworks for REDD+ can facilitate the equitable and effective implementation of REDD+ activities, as well as contribute significantly to improved governance across multiple sectors and improve the integration and coordination of policies and planning among those sectors.⁶⁵ There are many synergies to be derived from a "landscape approach" that seeks to identify and balance competing demands and trade-offs, as well as potential synergies across relevant sectors such as water, agriculture, energy and mining.⁶⁶ Such an approach could both support effective REDD+ implementation and incorporate other co-benefits of integrated planning, such as water or biodiversity-related ecosystem services.

3.6.2 Intersectoral coordination and policy coherence

At the national and the local levels, successful coordination between forestry and other sectors is a critical component of REDD+ programming. Many of the drivers of deforestation and forest degradation emanate from sectors outside of forestry, including agriculture, mining, climate, environment, energy and land management. Additionally, these and other sectors all have planning requirements and activities that could significantly impact land use, land cover and the success of REDD+ activities. The lack of an effective mechanism for coordination and integration across resource-based sectors leads to overlapping mandates in policies and laws, inconsistent planning requirements, and the proliferation of local institutions for various aspects of resource management. For REDD+ to succeed in Malawi, it will need to address these issues and to make a concerted effort to raise awareness and participation of sectors relevant to REDD+ in the planning and implementation of a national REDD+ strategy and REDD+ activities. This is critical for ensuring that policies and laws of sectors outside of forestry are supportive of REDD+ initiatives.

3.6.3 Compliance and enforcement

The success of REDD+ implementation is contingent on the ability of the relevant sectors to enforce the legal and regulatory requirements that form the governance basis for REDD+ activities, in order to avoid leakage and risks of reversal. This includes, for example, the capacity and political will to enforce protected forest areas and other regulatory requirements, to ensure compliance with community-based forest

⁶⁴ Cotula & Mayers, 2009.

⁶⁵ Denier, Korwin, Leggett & MacFarquhar, 2014.

⁶⁶ Denier, Korwin, Leggett & MacFarquhar, 2014.

management agreements, and to enforce legitimate tenure rights. Moreover, it requires the capacity of other sectors to enforce land use regulations.

Compliance and enforcement are critical challenges in Malawi. This is due not only to technical and financial capacity constraints, but also to the lack of sufficient guidance and specificity within the legal frameworks to ensure accountability of enforcement actions. Additionally, there are serious issues of corruption that prevent effective enforcement.⁶⁷ This cross-cutting issue is addressed throughout this assessment and recommendations are provided for improving the legal frameworks and increasing the capacity for compliance and enforcement.

⁶⁷ For a detailed analysis of corruption risks of REDD+ in Malawi, see Tessa & Sibale, 2016.

Institutional frameworks pertaining to REDD+ in Malawi

To date, REDD+ efforts in Malawi have resulted in the establishment of the REDD+ focal point and the Malawi REDD+ Programme (MRP), whose secretariat is housed within the Department of Forestry (DoF), which sits under the Ministry of Natural Resources, Energy and Mining (MNREM). Currently, the MRP and its secretariat do not have official legal status within the Government of Malawi (GoM), although its management arrangements are integrated into the GoM's National Climate Change Programme (NCCP). The Department of Forestry has clearly stated that it intends to maintain oversight of REDD+, at least until the conclusion of a national REDD+ strategy (personal communication with the director of forestry). One key question the GoM must answer is whether there is a need for legally formalizing the existing REDD+ institutional structures to facilitate more effective uptake and mainstreaming of REDD+ into the national climate change and development agendas.

A concern regarding such formalization is related not only to the need for more effective mainstreaming of REDD+ in national development and climate change planning, but also to the proposed reforms under the draft Environmental Management Bill, which may necessitate a restructuring of the REDD+ institutional framework. It remains to be seen, however, whether the Environmental Management Bill passes in its current form and how long it will take to implement the reforms it proposes. In the meantime, it appears that for practical purposes REDD+ will continue to be managed from within DoF, with continued support provided under the USAID-funded PERFORM project to facilitate better understanding of REDD+ as well as more effective coordination with other relevant sectors, particularly environment (including climate change) and land management.

Section 4 provides an overview of the institutional frameworks that are relevant to REDD+ in Malawi. This includes not only the REDD+ management structures, but also the institutions within the sectors that will have an impact on the feasibility and effective implementation of REDD+, including forestry, climate change, natural resources, mining, agriculture, energy and finance and development.

Key institutional challenges for REDD+ in Malawi:

- lack of engagement of all relevant sectors in REDD+ and ineffective intersectoral coordination;
- unclear and/or overlapping institutional mandates;
- lack of legislative basis for some institutions;
- failures in implementing community-based institutional frameworks for forest management; and
- technical and resource (including personnel) capacity gaps.

4.1 Forestry sector institutions

4.1.1 Department of Forestry and REDD+ management arrangements

The primary responsibility for managing and protecting Malawi's forests lies with the Department of Forestry (DoF), which sits within the Ministry of Natural Resources, Energy and Mining. DoF is the designated REDD+ focal point under the UNFCCC. The Forestry Act, which is described in detail in section 5.1.2,

grants the director of forestry the authority to oversee several areas of forest management and administration relevant to the implementation of REDD+, including: planning and policymaking; creation of forest inventories and management plans; promotion of community-based forest management; management of government forest reserves; and coordination of forestry-related activities. The director also oversees the implementation of the subsidiary regulations to the Forestry Act, including the Forest Rules and the Forestry (Community Participation) Rules.

REDD+ is not included in the 1996 National Forest Policy or in the Forestry Act and its regulations. Thus, the mandate for overseeing the creation and implementation of a REDD+ strategy and a national programme has been inferred from the existing authority granted to DoF under the Forestry Act. The new National Forestry Policy, which is currently being finalized, recognizes REDD+ as an “emerging climate change issue” but does not integrate it specifically into any policy goals or objectives, nor does it specify any mandate for overseeing strategy development or oversight of REDD+.⁶⁸ However, there are indications that DoF will move to establish a climate change management section to be responsible for mainstreaming climate change and carbon management activities in the forestry sector’s planning, implementation and monitoring processes, and to promote strategic engagement of key stakeholders.⁶⁹ If legally constituted, this might provide a mechanism for formalizing the department’s mandate for REDD+ oversight.

The current management structure created to support and facilitate REDD+ readiness is comprised of the following:

REDD+ Secretariat: The secretariat sits in DoF and is made up of the REDD+ focal point and two embedded advisors funded by the United States Government. The U.S. Forest Service funded the positions until 2015, when the agency’s support ended and the USAID-funded PERFORM project began to provide funding support. The REDD+ focal point is appointed by the director of forestry and the position is currently held by the deputy director for policy.

REDD+ Experts Group (RExG): This group of experts has a membership roster numbering more than 100 people, including representatives from the government, civil society, the donor community and the private sector, both resident in Malawi and abroad. These experts were identified through a series of workshops supported by the Malawi REDD+ Readiness Programme (MRRP) in 2012 and they meet regularly.

Technical Working Groups (TWGs): Three TWGs function under RExG – Communications and Awareness TWG, Governance and Policy TWG and Science and Technology TWG. Chairs of these working groups were elected by RExG. In general terms, the technical 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.

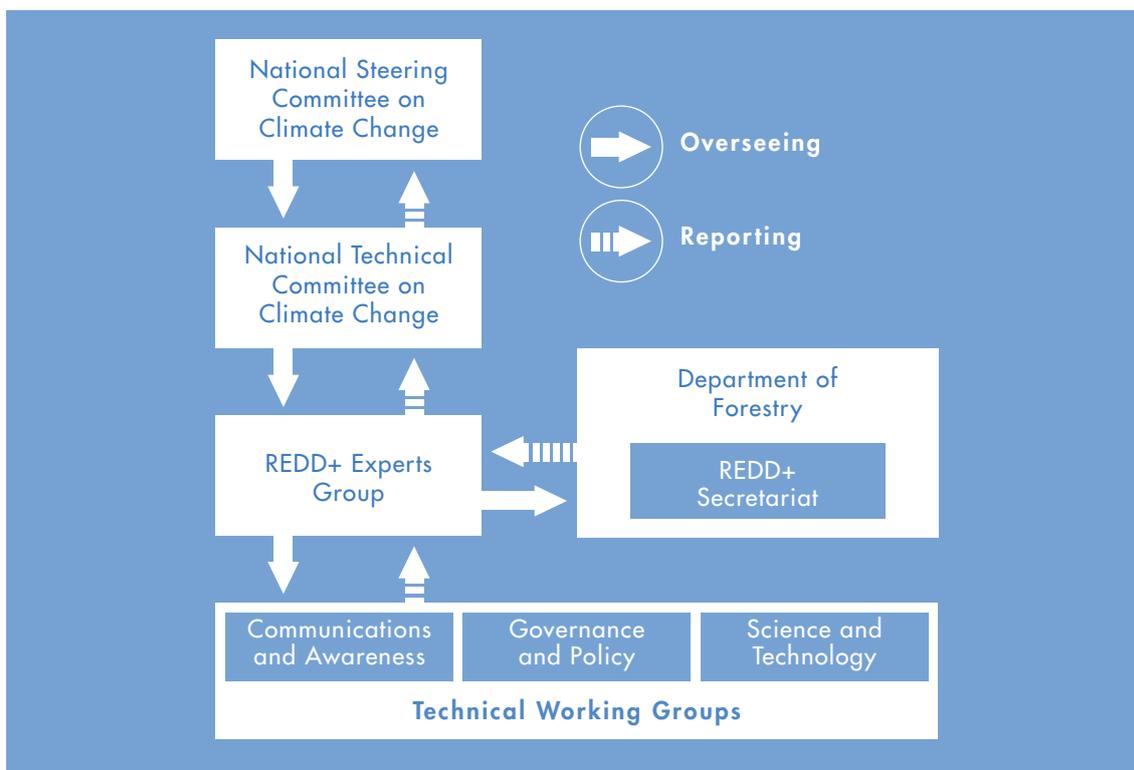
The draft Government of Malawi REDD+ Action Plan 2014-2019 specifies that RExG is to allocate responsibility and make requests to the REDD+ Secretariat and TWGs. The secretariat and TWGs, in turn, are to report to RExG, which itself reports to the National Technical Committee on Climate Change (NTCCC). NTCCC and the National Steering Committee on Climate Change (NSCCC) are part of the National Climate Change Programme, and they are currently the only official means by which the development of the Malawi REDD+ Programme (MRP) is communicated to higher levels of government for harmonization and integration into the larger national climate change agenda.⁷⁰

68 GoM. 2014. *Draft National Forestry Policy*.

69 Neeff, Mataya & Kadzuwa, 2015.

70 USAID, 2016.

Figure 2: Management arrangement for the Malawi REDD+ Programme



In reality, the REDD+ Secretariat has been the driving force behind MRP and it has been responsible for thought leadership and implementation of MRP activities. The REDD+ Secretariat developed initial drafts of the national REDD+ action plan, identified targets and prioritized key activities, and also led efforts to draft the terms of reference for the UN-REDD Programme's targeted assistance and other technical support. While this was an expedient way to move MRP forward, it has also raised questions of how well decisions were integrated into the overall DoF management structure. This has, in turn, raised the issue of whether technical and policy decisions made within MRP are effectively advocated for by DoF in national climate change governance structures (further detail on this is provided below).⁷¹

The lack of legal status of MRP has meant that there are no formal linkages between the REDD+ Secretariat and the Department of Forestry's decision-making and management structure. There are thus no formal mechanisms for integrating REDD+ plans, policies and strategies into DoF and other governmental planning and implementation processes. Currently, the PERFORM project is supporting an initiative to review the terms of reference for the secretariat, RExG and TWGs; refine their mandates to ensure they can support the progress of REDD+; and build their capacity to fulfil their mandates in line with the current status of REDD+ readiness in Malawi.⁷² It is expected that this will result in a more active role for TWGs and the creation of a broader multi-stakeholder forum from the existing RExG. The secretariat will continue to support REDD+ readiness, but it will take a more active direction from TWGs, which together will constitute the REDD+ Experts Group.

71 USAID, 2016.

72 These decisions are the outcome of an RExG Governance and Policy TWG meeting held at the Golden Peacock Hotel in Lilongwe, Malawi on 4 February 2016.

4.1.2 Additional national forest sector institutions relevant to REDD+

In addition to creating the Department of Forestry, the Forestry Act also created the Forest Management Board, which is comprised of the principal secretaries of eight government agencies, representatives of the National Herbarium and the Electricity Supply Company of Malawi, and the directors of forestry and national parks and wildlife. Additional members are appointed by the minister of natural resources to represent various stakeholder constituencies. The role of the board is to provide advice to the minister on all matters related to forest and tree management. While it was conceived as a multi-stakeholder mechanism for oversight and coordination, the board has met only rarely since its establishment, although recently it has begun to re-engage around issues of finance through the Forest Management and Development Fund.

The Forest Research Institute of Malawi (FRIM) conducts forestry research to generate usable technologies and provide information for sustainable management, conservation and utilization of forests/trees in order to contribute to improving the welfare of the people of Malawi. FRIM sits under DoF but is located in Zomba, where it can carry out stakeholder-oriented research on sustainable management, utilization and conservation of trees and forests in Malawi, and promote awareness about sustainable management and utilization of forest resources among local communities and other stakeholders. FRIM is likely to play a key role in setting Malawi's national forest reference level, guiding MRV activities, and conducting other research relevant to REDD+.

A number of institutions in Malawi have some capacity in geographic information systems and remote sensing, including the Department of Surveys, the Land Resources Conservation Department and the Department of Forestry and its research arm, FRIM. The Department of Surveys is the national clearing-house for spatial data and is the institution responsible for developing national spatial data standards. The Government of Malawi REDD+ Action Plan 2014-2019 includes actions through which these institutions will together delineate responsibilities for spatial data management.⁷³ FRIM will likely be involved in Malawi's nascent national forest monitoring system, particularly in activities related to forest inventories.

4.1.3 District and local forestry institutions

In 1998, Malawi adopted the National Decentralization Policy and the Local Government Act, which devolved administration and political authority to the district level and integrated government agencies at the district and local levels into one administrative unit. The overall goal of the National Decentralization Policy is 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". Its aims are to eliminate dual administrations, improve public service efficacy and efficiency, and promote accountability and good governance at the local level.⁷⁴

The Local Government Act designates 28 districts, each governed by a district council comprised of elected ward councillors, traditional authorities and sub-traditional authorities from the local government area as defined in the act, members of Parliament from the constituencies falling within the district (as non-voting, *ex officio* members of the district council), and five additional, non-voting members who are appointed by elected members to represent special interests from within the district.⁷⁵ The functions of the district council include making policy and taking decisions on local governance and development in the district; consolidating and promoting local democratic institutions and participation; promoting

⁷³ Alegria & Matthews, 2014.

⁷⁴ GoM. 1998. *National Decentralization Policy*.

⁷⁵ GoM. 1998. *Local Government Act*, part II (5).

economic development through the creation and implementation of district development plans; mobilizing resources for governance and development of the district; and making by-laws for good governance of the district.⁷⁶ The executive head of a district council is a district commissioner, whose office operates as a secretariat for the district council.

At the technical level, the district commissioner is guided by a district executive committee (DEC), which comprises technical personnel from the district council, sectoral departments and civil society organizations. DEC provides policy and programming guidance to the district commissioner and the district assembly. It has subcommittees, which include the district environment subcommittee (DESC). DESC membership consists of sectoral district officers, including district forestry officers. These are meant to:

- assess and analyse the state of the environment and produce district environmental action plans;
- provide technical advice to the district council on issues related to natural resource and environmental management;
- raise awareness of natural resource and environmental management issues; and
- develop capacity for sustainable resource management at the community level and integrate resource issues into local planning and development.

The Department of Forestry has three regional forestry offices as part of the central government structure. The regional forestry offices guide the forestry devolution process as envisaged under the Local Government Act 1998. Their main task is to support and advise the district commissioners and other sector partners on planning and conservation on customary land forests, and to promote community management on customary land forests and collaborative management on state forests.

District forestry offices (DFOs) fall within the local government structure of district councils and are responsible for implementation of forestry activities within their jurisdiction. DFOs are meant to support traditional leaders, civil society and community groups and institutions, while also implementing and enforcing forestry provisions under the Forestry Act and the Environment Management Act.

4.1.4 Traditional authority

At the level of the traditional authority, area development committees (ADCs) help to identify and prioritize environmental and natural resource issues that need attention, facilitate the formation of environmental working groups within village development committees (VDCs), and collate and approve VDC environmental action plans. ADCs are comprised of the traditional authority, village headpersons, sub-traditional authorities, members of Parliament, councillors and district council representatives.

At the level of the group village headperson, VDCs are responsible for organizing meetings to address village-level resource issues and lead environmental action planning at that level. They coordinate resource management projects with the ADC and act as liaisons with their communities. They are nominally charged with facilitating natural resource management projects at the VDC level, and are meant to mobilize community resources for such projects.

4.1.5 Local forest management institutions

At the community and village level, the Forestry Act designated village natural resource management committees (VNRMCs) as the institutional mechanism for managing village forest areas (VFAs). These are areas of customary land delineated by the relevant district forestry office and traditional authority for use and maintenance by the community, and they were introduced following independence as a way of

⁷⁶ GoM. 1998. *Local Government Act*, part II (6).

enabling communities to establish and maintain their own supplies of fuelwood and timber. Over time, a more centralized approach to forest management has resulted in the reduction of these areas, and the number of active VFAs dropped significantly, from 5,108 in 1963 to only 1,182 in 1994.⁷⁷

VNRMCs are committees elected by the community that were either established prior to the passage of the Forestry Act or delineated by a village headperson (traditional authority) in consultation with the director of forestry.⁷⁸ For the “proper management” of VFAs, according to the act, the director of forestry “may” enter into a management agreement with a “management authority” to specify: (1) the nature of forestry practices to be followed; (2) the type and manner of assistance to be provided by DoF; (3) provision for the use and disposition of revenues; (4) allocation of land to individuals and families for afforestation; and (5) formation of VNRMCs for the purpose of managing and utilizing VFAs. There is a lack of legal clarity on whether a VNRMC can exist without a VFA. A management agreement can be terminated by either party for failure to perform obligations under the agreement, giving broad discretion to DoF to take away any usufruct rights granted under the agreement without specifying the criteria or the process for doing so. Any VFA without a management agreement falls under the management authority of DoF.

Within forest reserves, forestry management plans are prepared by DoF technical staff and include identification and mapping of zones that would be suitable for productive management of indigenous forests or the establishment of plantations under a co-management regime. Where co-management is designated, communities adjacent to a forest reserve elect representatives for each management “block” within the reserve. Similar to VNRMCs, these block management committees (BMCs) represent the interests of and are accountable to the community, and they are meant to oversee forest planning, management and administration. BMCs function as subcommittees of village development committees and work on the basis of a constitution, developed in partnership with DoF, that sets forth their objectives and responsibilities. A local forest management board (LFMB) is elected to monitor, coordinate and manage conflicts among blocks throughout a reserve. LFMBs are composed of elected reserve-wide community representatives, appointed government representatives and private citizens, and they operate at the district level.

During the implementation of the EU-funded Integrated Forest Management and Sustainable Livelihoods Programme (IFMSP), a slightly different institutional structure was introduced for participatory forest management. Instead of VNRMCs, in some areas IFMSP instituted more targeted organizations focused solely on forestry issues. These local forestry organizations (LFOs) were defined as “a group of individuals, households, families or communities who have come together with a common interest of managing trees, forests and forest resources.” Department of Forestry staff consulted during this assessment indicated that the establishment of LFOs was based on provisions found in section 5 of the Forestry (Community Participation) Rules (2001), under which a community may, for the proper management of its affairs, form such committees as the community deems appropriate.⁷⁹

None of the institutions outside of VNRMCs are created through legislation, but through guidelines that are not legally enforceable. This has the potential to undermine the consistency and accountability in their establishment and functioning. This is discussed further in section 5 on legal frameworks for REDD+.

⁷⁷ Kamoto, Dorward & Shepherd, 2008 (available here).

⁷⁸ GoM. 1997. *Forestry Act*, sec. 30.

⁷⁹ The rules define “community” as including VNRMCs, local authorities by whatever name called, NGOs and the private sector. Section 7 further allows that communities may work with the director of forestry to establish a management plan for the purpose of ensuring sustainable management, conservation and utilization of forests. LFOs thus have the same legal status as VNRMCs once a management plan has been completed and signed.

4.2 Natural resource and climate change management

The ministry responsible for the environment (currently the Ministry of Natural Resources, Energy and Mining or MNREM) has overall authority, pursuant to the Environmental Management Act (EMA) to, *inter alia*:

- formulate and implement national policy on the protection and management of the environment and sustainable use of natural resources;
- coordinate and monitor all activities concerning protection and management of the environment and sustainable use of natural resources; and
- prepare plans, strategies, regulations and standards for the protection and management of the environment and natural resources, and facilitate cooperation among government agencies, local government and the public.⁸⁰

EMA also established the National Council for the Environment (NCE), which is comprised of all principal secretaries of government institutions, as well as other public agencies and NGOs with functions related to the environment and natural resources management.⁸¹ NCE is meant to act as an advisory body to the minister on integration of environmental considerations into economic planning and development, as well as harmonization of the activities, plans and policies of all lead agencies. Thus, the act envisioned NCE as a coordination mechanism that enables harmonization across natural resource sectors.⁸² Unfortunately, stakeholders have consistently raised concerns that the council has not performed as expected.

The Environmental Affairs Department (EAD) under MNREM has primary responsibility for supervision and coordination of matters relating to the environment pursuant to the National Environmental Policy and the Environment Management Act. The director of EAD is responsible to the minister for the implementation of policy and for reporting to NCE. The Environmental Affairs Department is thus charged with coordination of environmental activities in order to promote the sustainable management of the environment and utilization of natural resources. The department's long-term vision is to provide excellent services in cross-sectoral coordination, monitoring, overseeing compliance and facilitating integration of environmental concerns into sectoral policies, plans and programmes to ensure sustainable development. EAD has district offices that oversee implementation of environmental and natural resource programmes at district and sub-district levels. These offices are staffed by environmental district officers who are supported by the district environmental subcommittee, a subcommittee of the district executive committee.

The Department of National Parks and Wildlife has primary responsibility for forests within national parks and wildlife reserves. The National Parks and Wildlife Act (1992), as amended in 2004, stipulates the functions of the director of national parks and wildlife to include the management and control of all national parks and wildlife reserves in Malawi.⁸³ The director has enforcement powers supported with armed rangers and has, in comparison with DoF, achieved a measure of protection for these protected areas. The National Parks and Wildlife Act provides space for co-management as well as involvement of non-state actors in wildlife management. Recently, the wildlife concessions for the management of Majete Wildlife Reserve, Nkhotakhota Wildlife Reserve and Liwonde National Parks have created partnerships to improve wildlife management in Malawi. These new partnerships have the potential for facilitating REDD+ activities as well as addressing challenges in legal arrangements by ensuring that any agreements concerning REDD+ activities are consistent with existing concession agreements.

The Department of Meteorological Services and Climate Change, formerly known as the Department for Meteorological Services, was recently given the responsibility for climate change management. The

80 GoM. 1996. *Environmental Management Act*, part III (8)(1).

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

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

83 GoM. 1992. *National Parks and Wildlife Act*, part II.

department is now the secretariat for the National Technical Committee on Climate Change (NTCCC), which provides technical advice and reports to the National Steering Committee on Climate Change (NSCCC). NSCCC is a forum for negotiation, policy dialogue and reaching agreement on sub-sectoral plans and budgets for stakeholders from various sectors concerned with climate matters.⁸⁴

As noted above, NTCCC operates under and reports to the NSCCC. The technical committee consists of subject matter specialists from various ministries, departments, donor organizations and civil society. It is an advisory body to NSCCC, as well as a forum for information exchange and knowledge transfer, and it is charged with the development of strategies to link climate change programmes with national development planning.

Thus far, NTCCC has focused on updating the inventory of existing networks, institutions and initiatives dealing with climate change in order to ensure better coordination. The Department of Forestry is represented on this committee by the REDD+ focal point.

In general, the institutional arrangements for climate change have been haphazard, sometimes driven by specific institutional interests. Some informants have observed that institutional arrangements for the management of climate change impacts at the national level have so far been inappropriate and inadequate, resulting in a lack of coordination and synergy in supporting vulnerable communities. Although the government has been keen to raise the profile of climate change issues and mainstreaming them in national planning, there is a lack of clarity on roles and responsibilities amongst the various agencies involved. Key ones include the Ministry of Finance and Development Planning, the Environmental Affairs Department and the Department of Climate Change and Meteorological Services.

The Cabinet Committee on Natural Resources is the highest-level government body focused on environmental and natural resource issues. As of April 2016, this committee is considering for approval the Draft National Climate Change Policy and the Draft National Climate Change Investment Plan. Within the legislature, the Parliamentary Committee on Natural Resources provides scrutiny of GoM actions on environmental issues. The Draft National Climate Change Policy recommends that both the Cabinet Committee on Natural Resources and the Parliamentary Committee on Natural Resources explicitly expand their remit and become the Cabinet and Parliamentary Committees on Natural Resources and Climate Change.⁸⁵

The institutional context analysis completed as part of the UN-REDD Programme's targeted support to Malawi has found that members of the aforementioned committees believe that environmental issues have not had a high profile in the Parliament, but have taken a backseat to agriculture and food security issues, resulting in low budgetary allocations to environmental sectors, including forestry.⁸⁶ It was also noted that MPs generally have limited knowledge on the linkages between natural resource management issues and development priorities. Often development programmes are promoted without appropriate consideration of environmental impacts or sustainable resource use.⁸⁷ At the highest level then, there is an ongoing struggle to maintain political will and allocate sufficient resources to the protection and management of natural resources. This is highlighted by the fact that the fiscal allocation for the environment and natural resource sectors is equivalent to only 0.96 percent of GDP (or 3.15 percent of the national budget).⁸⁸ Further, only 1 percent of this is spent at the district level for implementation.⁸⁹

84 GoM. 2013. *National Climate Change Investment Plan* (available here).

85 GoM. 2013. *Draft National Climate Change Policy*.

86 Kafakoma, 2016.

87 Kafakoma, 2016.

88 UNPEI, 2015 (available here).

89 UNPEI, 2015.

4.2.1 Proposed institutional reforms pertinent to REDD+

The Environmental Management Bill (EMB) proposes to reform the institutional framework for natural resource and climate change governance in Malawi. Specifically, the bill creates the National Environmental Protection Authority (NEPA), which will act as the principal agency in Malawi for the protection of the environment and sustainable utilization of natural resources.⁹⁰

NEPA would replace the Environmental Affairs Department under MNREM and would be an independent body (separate from the ministry) with the mandate to coordinate, monitor and supervise all activities related to environmental and natural resource protection and management. NEPA would be run by a board of directors appointed by the president and would thus take policy direction straight from the Office of the President. It would advise the relevant ministers on policy matters related to the environment and natural resources, and initiate legislative proposals, standards and guidelines pursuant to the law.⁹¹ It would also have monitoring and enforcement authority with respect to lead agencies (including forestry) and provide advice and technical support to sectoral agencies and stakeholders to enable them to carry out their functions.⁹²

EMB proposes that technical advice to NEPA be provided by several committees including committees on climate change, community-based natural resource management, soil and water conservation and biodiversity.⁹³ NEPA would be required to facilitate intersectoral coordination among agencies by issuing guidelines for the elimination of gaps, conflicts, inconsistencies and duplications in environmental and natural resources policies and legislation.

With respect to REDD+, if these reforms take place, they will raise the question of whether REDD+ should be managed from its current position in DoF, or whether it should become a committee under NEPA (or a subcommittee under climate change). This is a key issue that will need to be taken up by the national REDD+ strategy.

EMB also recognizes the need to streamline resource management institutions and mandates at the local level through the establishment of local environment and natural resources committees (LENRCs), “with special recognition of the roles and responsibilities of traditional leaders and the need to integrate traditional knowledge in environmental and natural resource management strategies, plans and programmes.”⁹⁴ These committees would: (1) prepare local environmental action plans; (2) undertake public education and awareness raising; (3) mobilize local communities; and (4) provide guidance to local communities on how to improve implementation and enforcement of environmental and natural resources related policies and legislation. The committees would also be required to establish sectoral environment and natural resource subcommittees with responsibilities to promote local participation in the management of various sectors of the environment, including forestry.

This movement towards integration would certainly address some of the issues related to overlap and “participation fatigue” of local level stakeholders who are faced with multiple institutions working on natural resource issues. It could also ensure that investments (including investments in capacity building)

90 GoM. 2015. *Environmental Management Bill* (hereinafter referred to as GoM, EMB. 2015), art. 7.

91 GoM, EMB. 2015, art. 12.

92 Pursuant to (draft) article 14 of EMB, the Authority “may after giving reasonable notice to do so, direct any lead agency to perform, within such time and such manner as the Authority shall specify, any of the duties imposed on the lead agency by or under this Act or by any written law relating to environment and natural resources related matters and if the lead agency fails or neglects to comply with such directions, the Authority may itself perform or cause to be performed the duties in question, and the expense incurred by it in so doing shall be a civil debt recoverable by the Authority from the lead agency.”

93 GoM, EMB. 2015, art. 18.

94 GoM, EMB. 2015, art. 22(2).

would be targeted more effectively and not duplicated across subsectors. There are several provisions in EMB to align sectoral agencies under the proposed NEPA, which would provide guidelines on elimination of gaps, conflicts, inconsistencies and duplications in environmental and natural resource policies and legislation, and their implementation and enforcement. Additionally, EMB states that inconsistencies in other natural resource laws would be void if they contradict provisions in the proposed law.⁹⁵ Ultimately, this type of integration would help to identify both the risks and co-benefits that might accompany REDD+ activities, and enable more efficient and effective planning, implementation and enforcement at the local level.

Bringing together the various institutions that have been established for natural resource management at the local and district levels will require substantial investment in a process that can identify what has and has not worked at the local level, and incorporate such lessons in adapting existing institutions and practices. If EMB passes, the laws that establish local institutions for governing forests, water and other resource subsectors at the village and district levels will need to be amended to come into line with the framework legislation.

Regardless of how the laws and their required institutional structures are harmonized, the practical aspects of integrating local institutions of varying capacities and levels of functionality will be quite challenging. Resources allocated at the local level for such activities (outside donor-assisted projects) are extremely low (less than 1 percent of the environment and natural resource budget goes to the district level). This would require unprecedented cross-sectoral integration and considerable investment of resources and capacity building. REDD+ finance may focus on improving existing institutions and streamlining across sectors to facilitate more integrated management approaches from the village to the national levels.

4.3 Agriculture

The Ministry of Agriculture, Irrigation and Water Development oversees agricultural development and management in Malawi. Land clearance for agriculture is one of the key drivers of deforestation, which means that agriculture policies have considerable influence on sustainable forest management. In particular, the Draft National Agriculture Policy recognizes the limits placed by population pressure on increasing farm production through farmland expansion. The draft policy also specifically advocates for sustainable management of land resources and conservation of the country's biodiversity. Nevertheless, the task of balancing the short-term needs of food security and long-term aspirations of sustainable land and biodiversity management poses serious policy challenges that could affect the government's ability to ensure sustainable forest management.

4.4 Water management

The National Water Policy, the Water Resources Act, the National Irrigation Policy and Development Strategy, and the Irrigation Act give the Ministry of Agriculture, Irrigation and Water Development the mandate for ensuring sustainable utilization of Malawi's water resources; development and implementation of integrated catchment management strategies; and the organization, facilitation and management of irrigation infrastructure and services.

The Water Resources Act established the National Water Resources Authority (NWRA), which has yet to be operationalized. NWRA is meant to, *inter alia*, monitor and assess national water policy and manage and protect water catchments. Under the act, catchment is defined as the area from which any rainfall

⁹⁵ GoM, EMB. 2015, art. 6.

will drain into a watercourse or part of a watercourse through surface flow to a common point. As noted earlier, the vegetation and forests within a catchment are critical to its sustainability, thus implying a role for the minister of agriculture, irrigation and water development – pursuant to the Water Resources Act – in relation to the forests located within catchments.

To manage catchment areas, the Water Resources Act established catchment management committees (CMCs) at the level of a catchment or a subcatchment to provide a multi-stakeholder mechanism for decision-making on resource and participatory management.⁹⁶ Section 25 of the act states that CMCs are to act in an advisory capacity to NRWA on the conservation, use and allocation of water resources; licensing under the act; and “any other matters pertinent to the proper management of water resources.” CMCs are mandated with facilitating the establishment and operation of associations of water users (AWUs) at the village or subcatchment level. They are also meant to manage, distribute and conserve water from a shared resource, acquire and operate any necessary licenses, resolve conflicts among members, and collect user fees. VNRMCs can register as AWUs, or the associations can have broader membership.

4.5 Land

The Department of Lands and Valuation within the Ministry of Lands, Housing and Urban Development is charged with policy direction, allocation of land, resettlement and registration of land; physical planning services; and land and hydrographic surveying, mapping services and quality assurance of map products to the country, among other responsibilities. Under the National Land Policy the goals of the department are to ensure equitable access to land and tenure security in order to encourage sustainable social and economic development.

Within the Ministry of Lands, Housing and Urban Development the Legal Services Section is charged with overseeing deeds and title registration, government land acquisition, settlement of land disputes, reviewing policies on land administration and enforcement. The Legal Services Section has been engaged in the drafting of the two proposed Land Bills (see section 5.4).

4.6 Infrastructure

The Ministry of Transport and Public Works oversees infrastructure development and maintenance in Malawi. The construction of roads, dams and related infrastructure is a direct driver of deforestation. Although almost all proposed infrastructure projects are required to undergo environmental impact assessment in accordance with the Environment Management Act, that framework does not specifically address REDD+ issues, nor does it link infrastructure development to forestry impacts specifically.

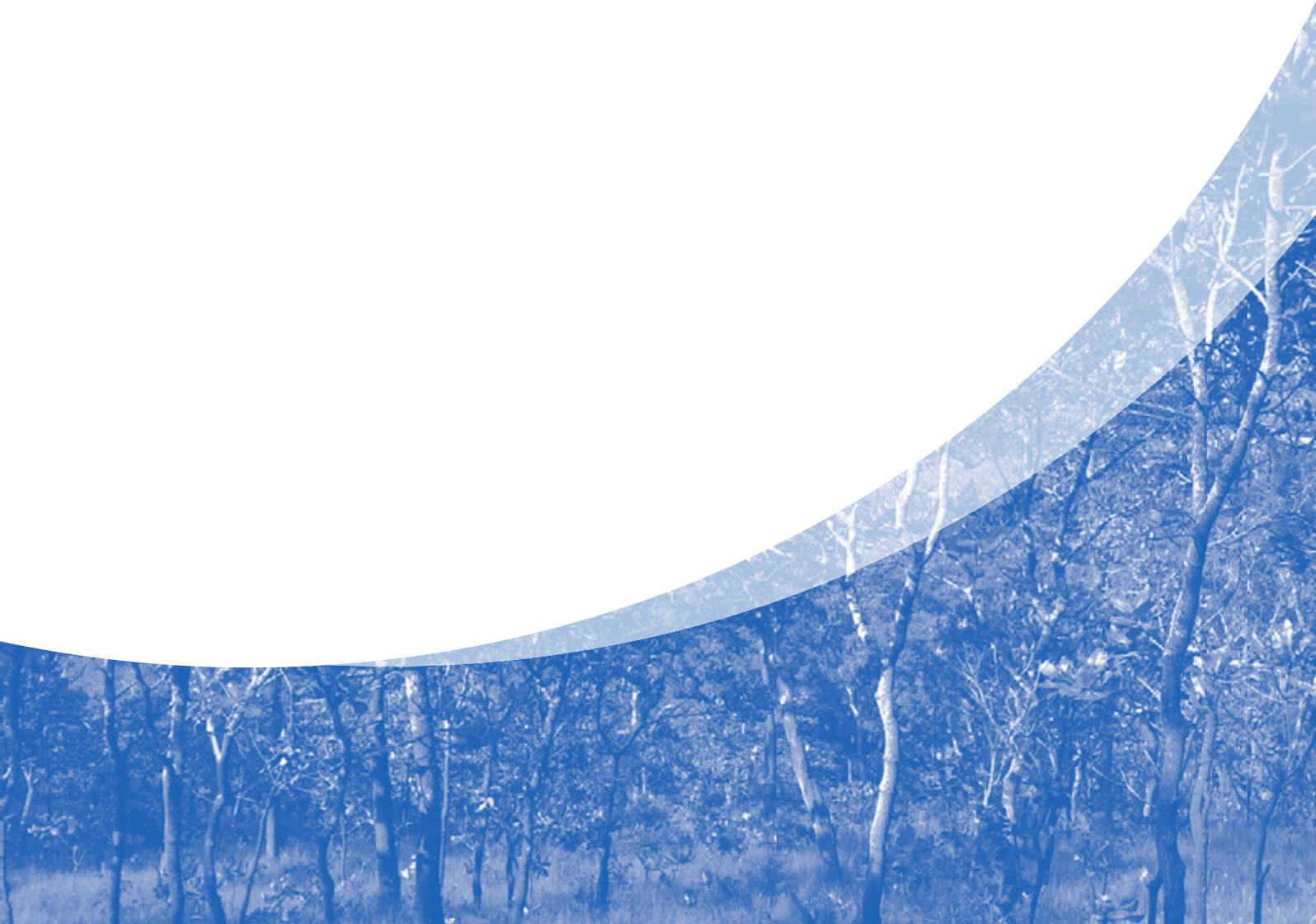
The construction and regulation of roads is provided for under the Public Roads Act. This act does not make provisions for any environmental considerations relating to forests. Similarly, the Electricity Act grants authority to an electricity supply licensee to cut trees or any undergrowth along the way leave, without any environmental considerations. No specific forest management provisions are provided for in these two acts, which means that the only safeguards with respect to infrastructure development under Malawian domestic law are the environmental impact assessment provisions embedded in the Environment Management Act.

⁹⁶ GoM. 2013. *Water Resources Act*, part III.

4.7 Finance and development

The Ministry of Finance, Economic Planning and Development oversees the economic and fiscal policies of the Government of Malawi with the aim of achieving sustainable economic growth and poverty reduction.

Within the Ministry of Finance, the Department of Economic Planning and Development (DEPD) is responsible for formulating development policy and, as such, has considerable influence on climate change and natural resource issues. DEPD is the lead institution for the formulation of the Malawi Growth and Development Strategy (MGDS), the key development policy for Malawi. MGDS II (2011-2016) includes priority areas on environment management and climate change. Furthermore, the Department of Economic Planning and Development chairs the National Steering Committee on Climate Change in order to coordinate climate change issues and ensure that these are mainstreamed in development planning and policy. The Environmental Affairs Department is the secretariat for the committee.



Policy and legislation related to REDD+ in Malawi

A critical aspect of REDD+ is the need for the involvement and coordination of sectors beyond forestry and climate change. National level REDD+ policies, laws and institutional frameworks must address the drivers of deforestation and degradation, and many of these drivers emanate from other land use and development sectors, notably land, energy, environment, water and agriculture. National ownership and political sustainability are also key aspects of successful REDD+ programmes, and these require that the implementation of REDD+ supports (or at least does not conflict with) a country's development objectives.

This section provides an overview of the policy and legal frameworks that govern the related sectors in Malawi. Specifically, we focus on forestry, land, environment (including climate change), agriculture and energy, as well as the broader development policies within which the sector-specific policies are to be implemented. This is followed by a more detailed analysis of how these policy and legal frameworks support REDD+ readiness under the Warsaw Framework requirements, and how well they meet the legal readiness prerequisites for REDD+ implementation at the domestic level.

5.1 Forest sector policy and legislation

5.1.1 National Forest Policy

The stated goal of the National Forest Policy 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.”⁹⁷ The general policy objectives stress the need for striking a balance between conservation of forest ecosystems and meeting the diverse needs of the people of Malawi in relation to forests and their products and the contribution they make to poverty alleviation. To achieve this balance, the policy focuses on the need for an enabling framework to promote the participation of communities and the private sector in forest conservation and management.⁹⁸ The policy recognizes the need to create incentives to enable the sustainable use of forest resources for poverty alleviation while balancing these needs with effective protection of catchments and biodiversity.⁹⁹ Specifically, the policy calls for 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 [the local community] requirements are considered.”¹⁰⁰

With respect to the drivers of deforestation and forest degradation, the National Forest Policy acknowledges the negative impacts of high fuelwood demand and states that alternative energy sources must complement forest management initiatives and the incentives for the expansion of industrial fuelwood plantations. Importantly, the policy also recognizes the cross-sectoral nature of forest management and prioritizes efforts to address fragmentation, overlaps and gaps among relevant sectors.¹⁰¹ Specifically, the policy calls for: (1) joint development of natural resource management plans with other agencies in the natural resource sector; (2) collaborative planning for extension services and agroforestry with the ministry responsible for agriculture; (3) policy harmonization with continuous

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

98 GoM, NFP. 1996, sec. 2.3.1-2.

99 GoM, NFP. 1996, sec. 2.2.3.

100 GoM, NFP. 1996, sec. 2.3.5.1.

101 GoM, NFP. 1996, sec. 2.4.1.

review to ensure harmonized approaches among sectoral policies; and (4) harmonization of any forest laws with the laws of other sectors that have a bearing on forests and trees.¹⁰² Additionally, mechanisms are to be put in place to: (1) encourage communities, NGOs and the private sector to form partnerships for the protection of water catchment areas, riverbanks and biodiversity reserves in order to enable a broad approach to forest management; and (2) establish incentives to involve communities in the planning, management and benefit use derived from these protected areas. In sum, the policy promotes a landscape, or an ecosystem-based approach to management that envisions ecosystem services as critical benefits flowing from effective forest stewardship.

With respect to stakeholder engagement, in addition to the focus on direct participation of communities and the private sector in forest decision-making and management, the National Forest Policy also encourages the engagement of NGOs in policymaking, planning and management activities.¹⁰³ Gender issues are also addressed, requiring that women's role in forest and tree resource use and management "receives due attention" and that women's participation in management be promoted.¹⁰⁴

5.1.2 Forestry Act

The 1997 Forestry Act provides the main legislative framework for forest management in Malawi. In line with the National Forest Policy, the objectives of the Forestry Act balance conservation and protection of forest resources with the sustainable and productive use of forests and their products for economic growth and development. The act emphasizes the role of communities, through the establishment of village natural resource management committees (VNRMCs), in the conservation and management of forests on customary land and in reserves. It also provides for capacity building of forest sector institutions and personnel and establishes a forest administration responsible for the implementation and enforcement of the act. Other provisions relevant to REDD+ are discussed below.

5.1.2.1 Forest tenure

Section 34 of the Forestry Act states that "any person or community" that "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." What constitutes protection or sustainable harvest is not defined in the act.

This provision for tree tenure appears to conflict with the process for accessing community rights to forests on village forest areas (VFAs). For communities to gain tenure over the trees in VFAs, they must first form a VNRMC, develop a forest management plan and complete a forest management agreement (FMA), which is signed by the director of forestry. Until a management agreement is signed, the Department of Forestry maintains authority over VFA resources. Section 34 appears to confer these rights on anyone who "protects" or manages the resource without needing to establish the formal participatory forest management structures envisioned in sections 30-31 of the act.

Notably absent from the Forestry Act is any reference to the relationship between land and forest tenure, or any clear indication of the tenure rights that devolve to communities who complete management agreements to undertake co-management or community-based management of forest land. The lack of clarity of forest tenure rights presents a real challenge in determining which stakeholders possess legitimate rights to participate in the planning and implementation of REDD+ activities and who should be entitled to benefit under these activities.

¹⁰² GoM, NFP. 1996, sec. 2.3.4 and 2.8.1.1.

¹⁰³ GoM, NFP. 1996, sec. 2.4.10-13.

¹⁰⁴ GoM, NFP. 1996, sec. 2.5.1.

5.1.2.2 Participatory forest management

Under the Forestry Act, two types of participatory forest management (PFM) are envisioned: (1) community-based management on customary forest land; and (2) co-management arrangements with communities bordering forest reserves. Pursuant to the Forestry Act, the director of forestry has the authority to initiate the establishment of VNRMCs as the institutional mechanism for PFM on customary land and to enter into management agreements to specify: (1) the nature of forestry practices to be followed; (2) the assistance to be provided by DoF; (3) provisions for the use and disposition of revenues; (4) allocation of land to individuals and families for afforestation; and (5) formation of VNRMCs for the purpose of managing and utilizing village forest areas. Such management agreements can be terminated by either party for failure to perform obligations under the agreement.

Table 2: Forest tenure under current forest and land laws (2016)

Forest area type	Legal status	Tenure rights
Forest reserve / protected area	Public land	Rights held by the state; Co-management enables usufruct under a management agreement; Concessions to private entities under contract
Village forest area	Customary land	Customary tenure under control of traditional authority / oversight by the minister of lands Managed by VNRMCs under management plan with Department of Forestry oversight
Woodlot / trees on allocated customary land	Customary land	Allocated by traditional authority / inheritable
Forest on unallocated customary land	Customary land	Held by traditional authority in trust
Private woodlot	Private land	Owner of land

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 they must be constituted; (3) what procedural mechanisms and criteria should guide their formation; (4) the process and criteria for completing (or revoking) a management plan and its required contents; and (5) what forest or tree tenure rights (if any) are devolved to individuals or communities once the process has been completed.

Over time, the Government of Malawi has recognized that these gaps have been a serious impediment to implementing effective participatory forest management. In 2003, the government published the *Community Based Forest Management: A Supplement to the National Forest Policy* as a “supplementary policy document” to clarify roles and responsibilities related to participatory forest management.¹⁰⁵ Significantly, the supplement document 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 take place through the establishment of community-based management institutions and through the “sharing of management and use rights” with boundary communities in the case of forest reserves.¹⁰⁶ Thus, the policy document clearly states that a transfer of tenure rights should form the basis of participatory forest management in Malawi.

¹⁰⁵ GoM. 2003. *Community Based Forestry: A Supplement to the National Forest Policy (1996)*.

¹⁰⁶ GoM. 2003. *Community Based Forestry: A Supplement to the National Forest Policy (1996)*.

The supplementary policy document further details the requirements for forest management plans (FMPs) and what the management rules should require at a minimum. To avoid confusion and ensure that this process is seen as a prerequisite to realizing the benefits of forest tenure rights, the supplementary policy document 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 village forest areas or that have not yet concluded forest management agreements, the government maintains management authority. The government's goal should be, however, to eventually transfer this authority to the community.

For co-management of reserves, the envisioned goal is that of 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. The supplementary policy document provides detailed guidance on what provisions should be included in their management plans.

While the supplementary policy document goes a long way towards clarifying the goals and, in particular, the tenure rights that should be devolved in participatory forest management, it remains a policy document and has no legal enforceability. It can therefore be seen only as guidance for interpreting the process, not as a set of requirements. The fact that none of the recommended legal amendments outlined in the supplementary policy document have yet been enacted underscores this issue. Despite ongoing efforts to clarify and support implementation of participatory forest management, many of these issues will continue to remain until the processes and mandates are enshrined in a legal instrument – either as an amendment to the Forestry Act or as a new subsidiary regulation.

5.1.2.3 Intersectoral coordination under the Forestry Act

As noted above, the National Forest Policy envisions the following: (1) joint development of natural resource management plans with other agencies in the natural resource sector; (2) collaborative planning for extension services and agroforestry with the ministry responsible for agriculture; (3) policy harmonization with continuous review to ensure harmonized approaches among sectoral policies; and (4) harmonization among forest laws and the laws of sectors with a bearing on forests and trees.¹⁰⁷

The Forestry Act gives the director of forestry the mandate to encourage and promote “proper coordination of forestry related activities carried out by other organizations.”¹⁰⁸ Additionally, the act established the Forest Management Board to provide a multi-stakeholder forum for discussion and debate on critical issues that have intersectoral implications. Despite these provisions, and perhaps due to the lack of detailed requirements about interagency consultation and coordination in the act, the high level of integration envisioned in the National Forest Policy has not taken place.

5.1.2.4 Access to information and stakeholder engagement

Stakeholder engagement and public participation in forest decision-making and management are emphasized by the government to the extent that a participatory forest management structure is set forth in the Forestry Act, as described above. Designation of forest reserves and protected forest areas (and revocation of their declaration) as well as fire areas is to be published in the *Malawi Government Gazette*. Beyond this, there are no provisions within the Forestry Act to enable stakeholders or the public to access forest-related information.

There are no requirements for forest policy-making or rule-making to be subject to notice and comment by the public or stakeholders, although the Forest Rules (2001) do require that all subsidiary legislation and any regulations related to forestry management and use shall require community consultation “except

107 GoM. 2006. *National Forest Policy*.

108 GoM. 1997. *Forestry Act*, sec. 5(h).

where it is unnecessary or impractical to do so.”¹⁰⁹ While this certainly expands the minimal scope of stakeholder engagement provided for in the Forestry Act, it does not specify procedural requirements, nor does it elaborate on what constitutes “unnecessary or impractical” circumstances for consultation, thus leaving stakeholder engagement to the discretion of the minister.

Dispute resolution and access to justice are provided for as they relate to issues between communities and the Department of Forestry regarding forest management agreements. These are to be referred to the minister and are appealable in a court. No further provisions for appeal of decisions are made in the Forestry Act.

5.1.2.5 Benefit sharing

Section 31 of the Forestry Act provides guidelines on what should be included in a forest management agreement, including provisions for the use and disposition of forest produce and the revenues derived from it. Additionally, the minister is granted authority under the Forestry Act to make regulations regarding benefit sharing under participatory forest management arrangements. Any rules made by VNRMCs on this matter are subject to approval by the minister. The supplement to the National Forest Policy provides that these arrangements are to be made on a case-by-case basis and they become part of co-management plans and forest management agreements.¹¹⁰

5.1.2.6 Finance mechanisms

Article IX of the Forestry Act established the Forest Development and Management Fund to promote and support conservation, augmentation and management of Malawi’s forest resources and forest land. The fund may be used to support: (1) promotion of multiple use management as well as promotion of sustainability in forest management; (2) provision of an enabling environment for community participation in forest management and conservation; (3) maintenance, equipment and record management; and (4) any projects approved by the minister as supporting the management of forest reserves or meeting the objectives of the fund.

The fund consists of financial resources appropriated by the Parliament, voluntary contributions, levies for felled or extracted timber and donations to the fund. The accounts of the fund are subject to auditing by the auditor general pursuant to the Finance and Audit Act, and must be reported on annually to the auditor general and the National Assembly.

5.1.3 New National Forestry Policy

In recognition of implementation failures of the 1996 National Forest Policy and the emergence of critical issues requiring policy guidance, a new National Forestry Policy is in the final stages of development. The new draft National Forestry Policy specifically highlights REDD+ as an “emerging climate issue” that requires recognition and integration into the national forestry policy. The overarching goal of the draft policy is to “improve provision of forest goods and services to contribute towards sustainable development of Malawi through protection and conservation of forest resources...[and] promotion of strategies that contribute to increased forest cover and sustainable management of existing forest resources.”¹¹¹ The draft policy recognizes the past failure to create an enabling environment for participation of diverse stakeholders in the management of forest resources, and the need to enhance cooperation in forestry-related issues to

109 GoM. 2001. *Forest (Community Participation) Rules*, Government Notice No. 29.

110 GoM. 2003. *Community Based Forestry: A Supplement to the National Forest Policy (1996)*, sec. 5.6.2.

111 GoM. 2015. *Draft National Forestry Policy*.

maximize resources and information flows into the forestry sector and to improve regulation and enforcement. These are stressed as overall policy objectives along with the sustainable management of forests for the protection of the environment, conservation of biodiversity and climate change management, and the development of initiatives for adequate and sustainable financing for the sector. The draft policy states that there are strong linkages with other sectoral policies, but it does not provide any guidance on how to address such linkages, coordinate among sectors to ensure synergies, or avoid overlaps or conflicts.

A policy implementation strategy has been developed for the draft National Forestry Policy, the implementation of which is to be coordinated by the Department of Forestry. Additional responsibilities for other sectoral institutions are also set forth in the draft policy, highlighting the roles of various agencies and stakeholders and their responsibilities to ensure consistency with the forestry policy and to mainstream forestry issues as appropriate. Specific roles of importance include those of: traditional authorities (to mobilize communities to participate in forestry programmes, develop and enforce forestry by-laws, and implement forestry activities); city and district councils (to develop and enforce forestry by-laws); and the Parliamentary Committees on Agriculture and Natural Resources (to advocate for the implementation of the policy and to lobby for increased budget allocation to the sector). The Ministry of Natural Resources, Energy and Mining, through the Department of Forestry, has the overarching responsibility for coordinating issues of forestry management with all the institutions involved in the implementation of the policy.

Ten policy priorities of the new draft National Forestry Policy (2015)

- 1 improved community-based forest management;
- 2 improved ecosystem-based management;
- 3 expanded forest plantations and improved estate management;
- 4 improved enforcement and regulatory frameworks;
- 5 expanded forestry knowledge acquisition and management;
- 6 expanded capacity development;
- 7 biomass energy development;
- 8 development of forest-based industries;
- 9 improved regional and international cooperation; and
- 10 expanded financing mechanisms.

A five-year implementation, monitoring and evaluation plan has been developed for the draft policy. The plan includes a number of outcomes and proposed targets related to REDD+, including increased funding for REDD+ channelled to communities, creation of appropriate incentives for community engagement in participatory forest management, increased number of VNRMCs established, and increased forest cover. Additionally, the implementation plan indicates that there will be a legislative review process to update the 1997 Forestry Act, which will provide an opportunity for addressing some of the legislative issues associated with REDD+ that have been identified in this assessment.

5.2 Environmental policy and legislation framework

5.2.1 Environment Management Act

The 1996 Environment Management Act (EMA)¹¹² is the overarching legislation governing environmental protection and the sustainable use and management of natural resources, including forests. EMA specifically states that it should not be interpreted to divest any lead agency (such as the Department of Forestry) of its powers, functions, responsibilities or duties as conferred in other legislation. However, any conflicting provisions in other laws with respect to the protection and management of the environment or the conservation and sustainable use of natural resources would be invalid pursuant to EMA article 7. The act assigns broad oversight over these issues to the responsible minister, including oversight for policymaking, planning and creating strategies for the protection and management of the environment and the conservation and sustainable utilization of natural resources.¹¹³

5.2.1.1 Coordination with other sectors

Pursuant to the Environment Management Act, it is the duty of the responsible minister to coordinate and monitor all activities concerning the protection and management of the environment and the conservation and sustainable utilization of natural resources.¹¹⁴ In discharging duties under EMA, the minister is also required to consult “where appropriate” any minister responsible for any segment of the environment.¹¹⁵ No specific criteria for this consultation are provided and the act does not further define which ministries are included in this requirement.

Under the act, the minister is responsible for drafting the five-year National Environmental Action Plan (NEAP) to promote and facilitate the integration of strategies and measures for the protection and management of the environment and natural resources into plans and programmes for social and economic development.¹¹⁶ The last NEAP was published in 2003. District governments are expected to prepare similar plans at their level of jurisdiction in line with NEAP, and all development activities and projects are to be in accordance with the district plans. Guidelines on this process were developed by the Ministry of Local Government and Rural Development in 2012 as part of the district development planning system. This document was updated from earlier versions on the basis of guidance to address the fact that cross-cutting issues such as climate change were not being effectively addressed in the district development planning process.¹¹⁷

EMA also established the National Council for the Environment (NCE), which is comprised of all principal secretaries of government institutions, other public agencies and NGOs whose functions are related to the environment and natural resource management.¹¹⁸ NCE is meant to act as an advisory body, as well as a coordination mechanism to enable harmonization of activities, plans and policies of lead agencies and NGOs on matters related to the environment and natural resources.¹¹⁹ As noted earlier in this assessment report, stakeholders have consistently raised concerns that NCE has not performed as expected due to a lack of effective participation by senior level officials.

112 GoM. 1996. *Environment Management Act* (hereinafter GoM, EMA. 1996).

113 GoM, EMA. 1996, art. 8(2).

114 GoM, EMA. 1996, art. 8(2).

115 GoM, EMA. 1996, art. 8(3).

116 GoM, EMA. 1996, arts. 21-2.

117 GoM. 2012. *Revised Decentralized Environmental Management Guidelines*.

118 GoM, EMA. 1996, sec. 10.

119 GoM, EMA. 1996, part III, sec. 12.

5.2.1.2 Biodiversity

The minister overseeing EMA, with advice from the National Council for the Environment, has the mandate to develop national strategies, plans and programmes for the conservation of Malawi's biodiversity. This includes taking actions that promote land use methods compatible with biodiversity protection, setting aside specific areas for conservation, and identifying and promoting integration of traditional knowledge into conservation and sustainable use of biodiversity.

In February 2015, Malawi published its second National Biodiversity Strategy and Action Plan (NBSAP II) as required under the Convention on Biological Diversity, which Malawi ratified in 1994. NBSAP II recognizes the existence of conflicting and overlapping policies and legislation, and promotes an integrated approach to forest, biodiversity, land and water management through the streamlining and harmonization of policies and laws across sectors.

5.2.1.3 Stakeholder engagement

Under the general principles of EMA, all public officials with duties related to the environment and natural resources are required to "take such steps and measures as are necessary for... promoting public awareness and participation in the formulation and implementation of environmental and conservation policies of the government."¹²⁰ Included in the duties of the minister is the requirement to facilitate cooperation among public and other stakeholders and to coordinate the promotion of public awareness of the protection and management of the environment and sustainable utilization of natural resources.¹²¹

With respect to access to information, all persons have the right to access any information submitted to the director of the Environmental Affairs Department or any lead agency (including the Department of Forestry) relating to the implementation of provisions under EMA or any other legislation related to the protection and management of the environment and the conservation and sustainable utilization of natural resources.¹²² Exceptions are made for access to proprietary information.

More specific requirements for stakeholder engagement are provided in the section on environmental impact assessments (EIAs). The director of the Environmental Affairs Department must publish all EIA reports and invite comments (written or oral). The director "may" conduct public hearings "at such places as the director deems necessary for purposes of assessing public opinion," and direct the developer to take public comments into account in any redesign or response to the input.¹²³ Thus, aside from notice and comment requirements, public participation is left largely to the discretion of the director of the Environmental Affairs Department.

There are also administrative and judicial appeal processes enabled under EMA, allowing citizens to access remedies if their substantive rights are infringed. Moreover, the act establishes the Environmental Appeals Tribunal to consider appeals against administrative decisions and actions made by the minister, director or an inspector acting under EMA.¹²⁴ However, the tribunal has not been operationalized since the act was passed.

¹²⁰ GoM, EMA. 1996, part II(3)(2)(d).

¹²¹ GoM, EMA. 1996, part III(8)(2).

¹²² GoM, EMA. 1996, part IX(52).

¹²³ GoM, EMA. 1996, part V(26).

¹²⁴ GoM, EMA. 1996, part XII(70).

5.2.2 National Environmental Policy

The National Environmental Policy (NEP) of 2004 replaced the environmental policy passed in 1996 that provided the basis for the passing of the Environment Management Act in the same year.

NEP focuses on the central challenge of balancing the need to stop resource degradation with the equally pressing priority of economic development for poverty alleviation. Among other issues of direct relevance to REDD+, NEP focuses on creating an enabling policy and legal framework for cross-sector coordination; participation of non-state actors; effective decentralization of natural resource management and governance; and improved enforcement. It is an overarching framework instrument, structured to reinforce other sectoral powers and responsibilities in order to ensure effective implementation and enforcement of natural resource management in Malawi. In relation to forestry, climate and REDD+, NEP seeks to:

- promote sustainable utilization of natural resources and encourage self-sufficiency in wood and energy requirements;
- restore, maintain and enhance ecosystems and their functions through an ecosystem-based management approach;
- enhance public awareness of and participation in environmental issues;
- integrate sustainable natural resource management into the decentralized governance system; and
- facilitate conflict management in natural resource sectors.

NEP also sets out a number of cross-sectoral policy objectives, principles and strategies that have a direct bearing on the structure and implementation of REDD+ in Malawi. The policy stresses the need to facilitate and strengthen local environmental management institutions (village, area and district environmental committees) to ensure co-ordination at the local level and effective public participation in natural resource decision-making and implementation.

With respect to the forestry sector, NEP's overall objective is to sustainably manage forestry resources so as to maximize benefits to the nation. This is in line with both the existing and the new draft National Forestry Policy. NEP's guiding principles as they relate to the forest sector include promotion of the participation of the private sector, NGOs and communities in forest management; privatization of forest plantations and promotion of private forestry; promotion of community-based participation in the management of forest reserves and forests on customary land; sharing of benefits with local communities; effective forest inventory and monitoring; and broad promotion of an ecosystem approach to forestry management. These principles are not in conflict with the existing National Forest Policy, although their inclusion in two policy frameworks is somewhat confusing. It is not clear why a separate forest policy section is required in NEP, and a clear statement of the role and authority of the Environmental Affairs Department versus that of the Department of Forestry is needed to avoid duplication and overlap.

5.2.3 Environmental Management Bill

To realize the objectives of the National Environmental Policy adopted in 2004, the Environmental Management Bill (EMB) was drafted in 2006 to replace the Environment Management Act of 1996. A decade later, the bill is expected to be tabled before the Parliament of Malawi in November 2016. The specific aspects of the bill that are relevant to REDD+ are discussed below.

5.2.3.1 Institutional arrangements

A major development under the proposed EMB is the creation of the National Environmental Protection Authority (NEPA), which will be the principal body in Malawi for the protection of the environment and the sustainable utilization of natural resources. The proposed institutional reforms are described in section 4.2.1.

5.2.3.2 Forestry provisions

At the district level, each district environmental subcommittee (DESC) will be required to identify certain areas at risk for environmental degradation to be targeted for afforestation or reforestation. In addition, each DESC will be required to encourage – through community self-help – the planting of trees and other vegetation in at-risk areas that are not on allocated customary or private land. Where the at-risk areas fall on allocated customary or private (including leasehold) land, the holder of the land right will be responsible for taking measures to plant trees and other vegetation in those areas. If the holder of the right fails to comply, DESCs may intervene to afforest or reforest, and recover the costs from the holder of the right. This appears to overlap directly with the current responsibilities of the district forest offices (DFOs), and the role of DFOs on DESCs requires more clarification.

Moreover, DESCs will have the mandate to assist in the development and formulation of by-laws, provide technical advice relating to natural resources at the local level, assist local natural resource management committees in the performance of their functions, and oversee their coordination. Thus, DESCs will take on the primary role of supporting local forest organizations and VNRMCs, as well as provide regulatory oversight through their linkages to the National Environmental Protection Authority.

5.2.3.3 Stakeholder engagement and public participation

The Environmental Management Bill pays considerable attention to improving public participation in environmental decision-making and management. It requires NEPA to promote:

- the right to access environmental information and ensure that lead natural resource management agencies provide such information in a timely manner;
- the right to participate in environmental decision-making processes directly or through representative bodies (requiring lead agencies to develop mechanisms for effective direct and indirect public participation); and
- the right to an adequate and effective administrative or judicial remedy for harmful or adverse effects resulting from acts or omissions affecting the environment and natural resources.

To ensure the realization and implementation of these rights, EMB requires that NEPA establish guidelines and, where necessary, promulgate regulations. Additionally, specific “notice and comment” procedures are required for both environmental impact assessments and strategic environmental assessments, both of which apply to forestry projects with potential major environmental impacts and thus to REDD+ policies, plans and activities.

5.2.3.4 Financial mechanisms

The Environmental Management Bill establishes the Environment Fund, which is to be funded with appropriations from the Parliament, levies, donations, penalties and license fees.¹²⁵ The fund will be vested in the National Environmental Protection Authority and, subject to the Public Finance Management Act, it will be administered under NEPA’s direction, which will include prescribed operational guidelines for the distribution and monitoring of fund utilization. The Environment Fund will be used for NEPA’s operational costs and expenses and for “the protection and management of the environment and the conservation and sustainable utilization of natural resources.”¹²⁶ This includes research and training and any scheme the authority considers to be in the interest of the goals of the Environment Fund, which could conceivably include REDD+ activities.

125 GoM. 2015. *Environmental Management Bill*, art. 101.

126 GoM. 2015. *Environmental Management Bill*, art. 96.

5.3 Climate change

5.3.1 National Climate Change Policy

To date, the Government of Malawi has operated without a national policy on climate change issues. To remedy this, the Environmental Affairs Department is finalizing the draft National Climate Change Policy with an overarching goal to “promote climate change adaptation and mitigation for sustainable livelihoods through measures that increase levels of knowledge and understanding and improve human well-being and social equity, while pursuing economic development that significantly reduces environmental risks and ecological scarcities.” This is very much in line with the overarching requirements under the UNFCCC and its safeguards policies.

The policy sets forth seven desired policy outcomes, including controlled net greenhouse gas emissions, increased awareness of adaptation and mitigation measures, improved social and ecological resilience, and improved policy coordination and harmonization.¹²⁷ The policy envisions the creation of a national strategic plan to guide its implementation. Policy priority areas that are relevant to REDD+ include:

Adaptation: The draft National Climate Change Policy defines adaptation as reducing vulnerabilities and promoting community and ecosystem resilience to the impacts of climate change. REDD+ activities would directly contribute to meeting these objectives by maintaining and enhancing the ecosystem services of Malawi’s forests. The policy also promotes agricultural intensification while maintaining ecosystem integrity and services, which would assist in addressing a key driver of deforestation and degradation. In this regard, REDD+ is specifically mentioned as a payment mechanism for ecosystem services.¹²⁸ Inclusion of all stakeholders, including vulnerable groups, is also specified as part of the adaptation policy.

Mitigation: REDD+ is noted as a key mechanism for achieving Malawi’s mitigation goals. The draft policy notes that a legal framework to govern REDD+ is currently lacking, as is awareness about opportunities from REDD+ and the technical and institutional capacity required for REDD+ project identification, design and implementation.¹²⁹ The draft policy also explicitly recognizes agricultural pressures, high biomass dependency and low access to electricity as key drivers of deforestation. The policy identifies the following specific actions: (1) control of deforestation through afforestation, stronger legislation for sustainable abstraction, marking and export of timber, and reduction of dependence on fuelwood by promoting sustainable alternatives; (2) promotion of commercialization and use of renewable, energy efficient and low carbon technologies; (3) improvement of land use practices for sustainable intensification of agriculture and the development of a human settlement policy; (4) enhancement of awareness and capacity in mitigation activities; and (5) inclusion of vulnerable groups in mitigation activities.

Financing mechanisms: The draft policy strives to increase investment and budgetary allocation for climate adaptation and mitigation. This includes proactively supporting NGOs and the government in seeking bilateral and multilateral support, which could include REDD+ finance, as well as increasing knowledge and skills to access such finance and promote private sector investment.

Institutional coordination: The draft policy highlights the need to address overlapping sectoral mandates that do not clearly define the roles and responsibilities of stakeholders involved in climate change adaptation and mitigation, and the resulting lack of coordination in implementation of natural resource management. It also notes the poor linkages between central government and local government institutions and inadequate stakeholder consultation and engagement in policy development,

127 GoM. 2014. *Draft National Climate Change Policy* (hereinafter GoM, DNCCP. 2014), sec. 2.2.

128 GoM, DNCCP. 2014, sec. 3.1 (viii).

129 GoM, DNCCP. 2014, sec. 3.2.

implementation and monitoring. The draft policy strives to overcome these barriers by setting up mechanisms for effective integration and coordination with clear mandates, roles and responsibilities across sectors.

Research, technology and systematic observation: This priority area recognizes the current lack of systematic data collection, which is necessary to support climate change management. The draft policy specifies a number of actions to remedy this situation, including encouraging and supporting new research; supporting documentation and validation of indigenous knowledge and its integration into policies; effective monitoring and evaluation; enhanced collaboration among stakeholders to make better use of research findings; and the creation of a national research agenda for climate change.

Cross-cutting issues and disadvantaged groups: The draft policy specifies that vulnerable groups such as women, children, the elderly and people with physical and mental disabilities must be included in adaptation and mitigation programmes and policies. Consideration of how to effectively engage these groups should be given in all planning, institutional development and implementation.

The draft policy also sets forth a proposed institutional arrangement for governing climate change that addresses the need for coordination and leadership across sectors. At the central government level the proposed arrangement would expand the mandates of the Cabinet Committee on Natural Resources and the Parliamentary Committee on Natural Resources to incorporate climate change, with the aim of facilitating coordination and policy coherence at the highest political levels.

In order to ensure broad stakeholder engagement in climate matters, the draft policy proposes the National Partnership Forum on Climate Change, which would include representatives from the Parliamentary Committee on Natural Resources, civil society, the private sector, academia, media and development partners. The forum would be convened and supported by a secretariat based at the Ministry of Natural Resources, Energy and Mining and chaired by the vice-president. It would establish technical working groups and be complemented by district level forums that would have similar, multi-stakeholder representation, supported by secretariats within district councils. It is envisioned that the National Partnership Forum on Climate Change would be formally linked with the National Council for the Environment.

5.3.2 National Climate Change Investment Plan

In 2013, the Environmental Affairs Department developed the National Climate Change Investment Plan (NCCIP) to guide increased investments in climate mitigation and adaptation for Malawi.¹³⁰ The investment plan identifies four key areas to promote climate change management: (1) adaptation; (2) mitigation; (3) climate change research, technology development and transfer; and (4) capacity building. Under the programme on mitigation investments, NCCIP specifies REDD+ as a key investment priority. The specific objectives of REDD+ as outlined in NCCIP are: (1) increase area under afforestation and reforestation; (2) reduce area under bush fires to curb emissions and avoid degradation; (3) improve livelihoods of forest-dependent communities; and (4) promote and regulate REDD+ activities.

130 GoM. 2013. *National Climate Change Investment Plan* (available here).

5.4 Land

5.4.1 Land Act and Customary Land (Development) Act

At independence in 1964, Malawi inherited a colonial system of land administration that divided land into three categories: (1) private freehold,¹³¹ (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 such as tea, sugar and tobacco. Given the importance of export crops for national trade revenues, estates continued to be favoured in agricultural policy and resulted in large tracts of land being set aside for plantations, while Malawi's smallholder farmers were restricted to producing crops for local consumption.¹³² This, combined with Malawi's rapid population growth and subsequent subdivision of cultivable plots among families, has resulted in the fact that by the year 2000 more than 55 percent of small farm families had less than one cultivable hectare.¹³³

The Land Act defines customary land as a type of public land, subsuming customary allocation and management practices under government control. This has led to expropriation of customary land without compensation and created a great deal of mistrust of the government with respect to land transactions.¹³⁴ An attempt at reform was made in 1967 with the passage of the Registered Land Act and the Customary Land (Development) Act, both of which tried to secure customary land rights through a registration and titling process. Implementation of these acts was limited to Lilongwe West, however, and it did not progress to a national reform process.

5.4.2 National Land Policy

Following the democratic elections of 1994, the Government of Malawi established the Presidential Commission of Inquiry on Land Reform and the findings of this commission formed the basis of the Malawi National Land Policy adopted in 2002. The Malawi National Land Policy recognizes the need to promote tenure reforms that guarantee security and instil confidence in land transactions without gender bias; promote decentralized and transparent land administration to guarantee that existing rights to land (particularly customary land) are recognized, clarified and ultimately protected in law; and enhance conservation and community management of local resources, promoting participatory management to enhance stewardship.¹³⁵ To achieve this, the policy sets 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."¹³⁶

Subsequent efforts to develop an enabling land administration system to implement the Malawi National Land Policy are still in process with 11 bills under consideration, including the Land Bill and the Customary Land Bill, which are both pending before the Parliament.

131 A freehold estate is an interest in real property (immovable or fixed) that grants absolute 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 may have declining value toward the end of a long-term lease (such as the 99-year variety).

132 USAID, 2010 (available here).

133 USAID, 2010.

134 GoM. 2002. *Malawi National Land Policy* (hereinafter GoM, MNLP. 2002).

135 GoM, MNLP. 2002.

136 GoM, MNLP. 2002, sec. 1.4.1.

5.4.3 Land Bill

The Land Bill and the Customary Land Bill, both pending before the Parliament, set forth a new land administration system that would greatly impact land and resource tenure in Malawi – if and when they enter into force. The Land Bill focuses on the establishment of new categories of land and on setting up the Land Commission to oversee their administration.

Under the Land Bill, all land is vested in the Republic of Malawi as a trustee for the people of Malawi. The bill reduces the categories of land from three (in the 1965 Land Act) 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 directed by the Malawi National Land Policy, customary estates comprise customary land that is to be owned, held or occupied as private land within a traditional land management area and registered under the Registered Land Act as private land. Radical title to the land on these estates remains with the community of the traditional land management area, however, and so if it is leased, the land does not become public land.

The Land Bill notably lacks any principles to guide the allocation of land and to prevent the concentration of land in any one sector. It focuses instead on reclassification of land and the creation and operationalization of the land administration system. There are no substantive provisions, outside the integration of planning with the relevant planning committees, for effectuating the Malawi National Land Policy's requirements for balancing different land uses and promoting equitable access to land and land-based resources.

5.4.4 Customary Land Bill

As opposed to the Land Bill, the proposed Customary Land Bill includes the policies that should guide its implementation, although a comprehensive set of principles is still lacking. Specifically, the Customary Land Bill formalizes the powers and duties of traditional leaders in land administration through the creation of institutions for land allocation, adjudication and management, and for the settlement of customary land disputes. The bill also aims to address the challenges of tenure security on customary land, with special consideration to the most vulnerable populations, including women.

The Customary Land Bill sets up a decentralized and 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 a traditional authority.¹³⁷ For each TLMA, a democratically elected customary land committee (CLC) is to be established, headed by the traditional authority (group village headperson). These committees are meant to act as trustees of customary land and must have regard for “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.”¹³⁸ In order to do this, CLCs 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.”¹³⁹ This would include the Department of Forestry and the Environmental Affairs Department as well as local government authorities. No specific triggers or process for this consultation are provided in the Customary Land Bill.

It is envisioned that a national process of demarcation and planning will take place on all customary land when the Customary Land Bill enters into force, followed by the allocation of customary estates to provide tenure security on customary land. The bill requires customary estate holders to abide by any by-laws

137 TLMA is defined under the Land Bill (2015).

138 GoM. 2015. *Customary Land Bill*, art. 6(2).

139 GoM. 2015. *Customary Land Bill*, art. II(5)(3)(b).

applicable to the land, which may include those related to a village forest area or access to a forest reserve. A customary land committee may also choose to place additional forestry-related restrictions within the grant of an estate, given the requirement of the Customary Land Bill 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) resources located thereon.

In the Customary Land Bill, customary land committees are granted the specific authority to determine “the portions of customary land to be set aside as communal customary land and the intended uses of any such portion.”¹⁴⁰ This appears to overlap with the authority granted to traditional authorities under the Forestry Act to set aside customary land as village forest areas in cooperation with the director of forestry. The contradiction may be mitigated by the fact that the traditional authority is to act as chair of the customary land committee, but it requires clarification.

Customary land committees are also mandated with adjudicating disputes in traditional land management areas. Disputes that cannot be resolved at this level will be referred to newly established customary land tribunals chaired by relevant traditional authorities. District land tribunals will be established to hear appeals from customary land tribunals, and appeals from the district level will be referred to the Central Land Board. All institutions are required to be gender-balanced.

A provision that may be of relevance to REDD+ implementation is the ability of the responsible minister to transfer customary land to government or reserve land for a public interest (which might include REDD+). Notice must be provided to the relevant CLC and, through the committee, to the community, and the committee 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 reserve status require notice only in the *Malawi Government Gazette*, with no further procedural requirements. According to the authors' personal communication with Luke Malembo from PERFORM, the latter is a potential issue of concern for traditional authorities and local communities, who have expressed mistrust based on a history of the government's alienation of customary land.

5.5 Agriculture

Agriculture is by far the most important economic sector in Malawi. It accounts for approximately 30 percent of the GDP, employs about 65 percent of the Malawian workforce, generates over 80 percent of national export earnings, and contributes to national and household food security and nutrition.

Land clearance for agriculture is a key driver of deforestation and forest degradation in Malawi.¹⁴¹ Hence, it is critical to ensure that agricultural policies and programmes are aligned with REDD+ objectives, and that there is a mechanism for ongoing cross-sectoral planning and decision-making to enable this alignment. Stakeholders interviewed for this assessment noted that there are often conflicts between resource conservation policies and agricultural policies. An example was given of agriculture extension workers pushing farmers into riparian buffer zones, which are meant to protect trees and vegetation along the banks of streams and rivers.¹⁴² Additionally, the long-term focus of the agricultural sector on maize production has undermined the ability to successfully achieve agroforestry on any real scale, or to curb many of the poor land use practices that drive people into marginal and forested areas. Incentives need to be more carefully aligned with an agro-ecosystem based zoning approach, such as that proposed as the basis for planning under the Malawi National Land Policy, and with the focus on sustainable intensification of agriculture as outlined in the draft National Climate Change Policy.

¹⁴⁰ GoM. 2015. *Customary Land Bill*, art. 14.

¹⁴¹ LTS International, 2015.

¹⁴² LTS International, 2015.

5.5.1 National Agriculture Policy

The Ministry of Agriculture, Irrigation and Water Development is currently developing Malawi's first National Agriculture Policy (NAP). Until now, the sector has relied on disparate subsector policies such as those addressing crop production, livestock production and irrigation, among others, and this has limited the developmental impacts of the implemented programmes.

The draft NAP seeks to facilitate farmer-led transformation and commercialization of agriculture aimed at treating farming as a business. The draft policy proposes four priority areas: (1) promotion of sustainable agricultural production and productivity; (2) strengthened marketing systems; (3) improved food security and nutrition and enhanced risk management; and (4) institutional development, coordination and capacity strengthening. Of these four priority areas, the focus on sustainable agricultural productivity addresses the need to improve the natural resource base on which agriculture is dependent, while promoting cross-sector coordination with ministries responsible for land and natural resources. Consequently, the draft NAP recognizes the need to design and implement policies that will enhance natural resources. The draft policy does not specifically address the key concern of land clearance for agriculture, which promotes deforestation, but it does promote agroforestry. The reference to improving the natural resource base for agriculture could provide a sound base from which to argue for better integration of forest management concerns, and a good starting point for collaboration with other ministries.

5.6 Water policy and law

Water is important to REDD+ as a critical component of any forest ecosystem. Additionally, degradation of catchment areas through deforestation has undermined the ecological integrity of Malawi's aquatic ecosystems. This, in turn, has led to degradation and flooding of cropland and food insecurity. Catchment management is therefore a critical component of REDD+ for Malawi.

5.6.1 National Water Policy

The overarching goal of Malawi's 2005 National Water Policy is the sustainable management and utilization of water resources to provide water to the people of Malawi and to support the health of the ecosystem. Sector-specific goals include the effective participation of the forestry sector in water resource catchment protection, conservation and management. The policy thus recognizes the need for an integrated approach across sectors to address ecosystem sustainability and implement integrated water resource management, thus seeking to manage water resources from a cross-sectoral and multi-stakeholder perspective. It also promotes management at the level of a catchment, which entails taking an ecosystem approach. The National Water Policy also supports a decentralized and participatory approach to water management, and promotes equitable allocation and apportionment of water to all sectors of socio-economic production and services, including forestry.

5.6.2 Water Resources Act

Among the objectives of the 2013 Water Resources Act are the promotion of the rational management and use of water through the coordination, allocation and delegation of responsibilities among the ministers and public authorities responsible for the investigation, use, control, protection, management or administration of water resources.¹⁴³ All water resources are vested in the state, and the minister is charged with promoting the investigation, conservation and proper use of water.

143 GoM. 2013. *Water Resources Act*.

To manage catchment areas, the Water Resources Act established catchment management committees (CMCs) at the level of a catchment or subcatchment to provide a multi-stakeholder mechanism for resource decision-making and participatory management.¹⁴⁴ Section 25 of the act states that CMCs are to function in an advisory capacity to the National Water Resources Authority – at the appropriate regional level – on water resource conservation, use and allocation, licensing under the Water Resources Act, and any other matters pertinent to the proper management of water resources. CMCs are mandated with facilitating the establishment and operation of associations of water users (AWUs) at the village or subcatchment level, and these are meant to manage, distribute and conserve water from a shared resource, acquire and operate any necessary licenses, resolve conflicts among members, and collect user fees. Village natural resource management committees (VNRMCs) can register as AWUs, or they can have broader membership.

Integrated catchment planning is being developed and piloted as a mechanism for an ecosystem-based approach to resource management by the Shire Basin Management Programme, a World Bank-funded initiative in the Shire Basin, which covers one-third of Malawi. According to the Procedural Catchment Management Guidelines developed by the GoM under this programme, the planning process should include forest experts on the core team along with soil, agriculture and water experts. As catchments do not necessarily line up with political borders, CMCs may overlap villages, traditional authority jurisdictions and even districts. This requires “nesting” of the VDCs and VNRMCs (or other established AWUs) within each catchment to ensure integration across planning scales. Each CMC will oversee implementation of the catchment management plan at the catchment level. To facilitate this, institutional mapping is meant to form an integral part of the catchment management planning process.¹⁴⁵ This will describe the policy and legal environment in the catchment and will fully outline the institutional environment and the arrangements and rules of engagement among different actors. This analysis could prove extremely useful in guiding the institutional integration process envisioned in the proposed Environmental Management Bill, as well as informing efforts to improve community-based forest management to achieve ecosystem health at the catchment level. There is an urgent need to integrate forest management planning into this process to achieve broader policy goals (as outlined in the Water Resources Act, the Forestry Act, the Environment Management Act and the proposed Environmental Management Bill) of ecosystem sustainability, livelihoods protection and food security. Moreover, this integration is necessary to ensure that linkages between sectoral initiatives are synergized while minimizing overlaps in their processes in order to avoid wasting resources and undermining effective implementation.

5.7 Energy policy and law

5.7.1 National Energy Policy

The National Energy Policy of Malawi specifically calls for the Department of Energy to “work closely with the Department of Forestry in designing measures for improving the security and reliability of biomass supply...while recognizing that a more sustainable and realistic solution to the wood fuel crisis, which is strongly linked to poverty, lies in finding affordable alternative sources of energy.”¹⁴⁶ The policy states that the Government of Malawi will promote the use of affordable alternative energy sources for all fuelwood users through capital subsidies, tax breaks and technical and institutional support for market priming activities involving renewable energy target (RET) industries.

There is a new energy policy under development, but it has not yet been made public. Discussions with

¹⁴⁴ GoM. 2013. *Water Resources Act*, part III.

¹⁴⁵ GoM. 2014. *Procedural Catchment Management Guidelines*, p. 27.

¹⁴⁶ GoM. 2003. *National Energy Policy for Malawi*, objective 2.

stakeholders have intimated, however, that the new policy will have an increased focus on energy-climate linkages in Malawi and broader support for environmentally “benign” energy development.

5.7.2 Energy Regulation Act

The 2004 Energy Regulation Act established the Malawi Energy Regulatory Authority (MERA), which regulates the activities of the energy industry in accordance with the Energy Regulation Act and other energy laws, including the Electricity Act, the Rural Electrification Act and the Liquid Fuels and Gas (Production and Supply) Act. The Forestry Act is not classified as an energy law in terms of the Energy Regulation Act, despite the fact that over 90 percent of Malawians depend on biomass for their energy needs. Section 9 of the Energy Regulation Act stipulates the powers and functions of MERA to include:

- promoting the integrity and sustainability of energy undertakings; and
- in conjunction with other relevant agencies, formulating measures to minimize the environmental impact of the exploitation, production, transportation, storage, supply and use of energy, and enforce such measures by the inclusion of appropriate conditions to licences held by energy undertakings.

While the act recognizes the potential environmental impacts of various energy sources, MERA was established as a regulatory body with little direct mandate for implementing policies on sustainable energy. Further, the failure to recognize the critical role of forestry in energy production stands in the way of effective coordination between these sectors.

5.8 Mining policies and laws

5.8.1 Mines and Minerals Act and Petroleum (Exploration and Productions) Act

Both the 1981 Mines and Minerals Act and the 1983 Petroleum (Exploration and Productions) Act require all mining licensees to take into account the protection of natural resources on the land where the minerals or petroleum are explored or exploited.¹⁴⁷ They also require environmental impact assessments to be undertaken in accordance with the Environment Management Act, under which mining-specific guidelines were developed. Access to land for mining purposes further requires consent by the occupier before land is accessed as well as reasonable and fair compensation.¹⁴⁸

5.8.2 Mines and Minerals Policy

The 2013 Mines and Minerals Policy provides guidelines for environmental considerations to be followed during mining operations in order to ensure that mining-related activities are sustainable. In particular, the policy recognizes the need for mining to minimize disruption of the environment during mining operations and maximize rehabilitation and closure measures after operations end.¹⁴⁹ However, the policy does not comprehensively address issues of rehabilitation, access to land or compensation.

5.8.3 New Mines and Minerals Act

A new draft Mines and Minerals Act to replace the Mines and Minerals Act of 1981 has been prepared and will be tabled in the National Assembly. One provision of concern in the draft act is the granting of

147 GoM. 1981. *Mines and Minerals Act*, part VII.

148 GoM. 1981. *Mines and Minerals Act*, part VII.

149 GoM. 2005. *Mines and Minerals Policy of Malawi*.

authority to the minister in charge of mining to order access to land where s/he believes consent by the landholder has been unreasonably withheld. It is unclear in the draft act how access can be forced without compulsory acquisition of such land, and no reference is made to linkages with the Ministry of Lands, Housing and Urban Development, nor the pending Land Bill and the Customary Land Bill.

The draft Mines and Minerals Act does incorporate broad environmental protection measures, requiring the official charged with approving any mineral tenement to consider: (1) the environmental protection and management principles set out in the Environment Management Act; (2) the principles of sustainable development to ensure that exploitation of mineral resources serves present and future generations; and (3) the effects on human health and the environment. Environmental impact assessments (EIAs) must be conducted as required under the Environment Management Act and mining activities cannot commence without authorization on the conclusion of an EIA from the minister in charge of environment.¹⁵⁰

In some instances, the lack of clear legal guidance on how to incorporate questions of land and tree tenure as part of mining licence approval has resulted in licences being granted without consulting either the Department of Forestry or the local forest institutions (VNRMC or block committee) charged with managing forest resources on allocated land.¹⁵¹ The Forestry Act (section 46) stipulates that licences are required for mining within forest reserves and protected areas, and sectoral agreements between the commissioner for mines and minerals and the director of forestry permit exploitation in reserves by private mining interests. However, there is no specific procedural guidance on who must be consulted and how, and a recent study on the Perekezi Forest Reserve pointed out several instances where licences were granted within forest reserves without the knowledge of the Department of Forestry or the relevant community organization(s).¹⁵² This is not only an issue related to the current and proposed mining legislation, but also to the lack of legal clarity over tree and forest tenure under the Forestry Act and Land Acts, as well as the management arrangements concluded under co-management agreements.

There is no deliberate joint monitoring between the Department of Forestry and the ministry responsible for mining once a mining license is issued.¹⁵³ Even district forestry offices are only informed of the decision to proceed with mining after a licence has been issued and the office is asked to facilitate entrance to a reserve. When local government and community forest organizations are not aware of licencing, it is impossible for them to identify when illegal mining is taking place, further undermining enforcement capacity and the protection of forested areas.

150 GoM. 2015. *Draft Mines and Minerals Act*, art. 270.

151 PERFORM, 2016.

152 PERFORM, 2016.

153 PERFORM, 2016.

Policy, law and regulation gap analysis

6.1 International legal requirements for REDD+: Malawi's legal preparedness

As described in section 2 of this assessment report, the overall framework under which REDD+ will be implemented is guided by the decisions of the Conference of the Parties to the United Nations Framework Convention on Climate Change. These decisions provide the architecture for what developing countries must have in place to qualify for results-based payments under REDD+. Specifically, the Warsaw Framework on REDD+ prescribes the operational elements that member states must have in place, including:

- 1 national strategy or action plan for REDD+;
- 2 mechanisms for promoting and supporting the Cancun Safeguards and establishing a safeguards information system for monitoring and reporting on compliance with the safeguards;
- 3 national forest monitoring system, including measures for complying with requirements on measurement, verification and reporting; and
- 4 national forest reference emission level and/or forest reference level.

Additionally, countries need to have effective institutional arrangements for implementing REDD+ in order to address the drivers of deforestation and forest degradation with a view to reducing emissions and enhancing forest carbon stocks through sustainable forest management.¹⁵⁴ Below is an assessment of Malawi's policy and legal preparedness for each of these required elements.

6.1.1 National REDD+ strategy

Malawi is committed to developing a national REDD+ strategy and to using the input from this and other assessments supported by the UN-REDD Programme to guide the strategy development process. Ultimately, these assessments will form the basis for developing a roadmap for completing the national strategy.

There are no detailed prescriptions for what a strategy or action plan must contain, but UNFCCC Decision 1/CP.16 requests that, when developing and implementing their strategies/action plans, developing countries address:

- drivers of deforestation and forest degradation;
- land tenure issues;
- forest governance issues;
- gender considerations;
- the Cancun Safeguards; and
- mechanisms for ensuring the full and effective participation of relevant stakeholders, including indigenous peoples and local communities.

The quality of Malawi's national strategy will rely greatly on the process that is undertaken for its development, and engagement across key sectors will be essential. While the existing structures for REDD+, including the REDD+ Secretariat and RExG, have made great progress in terms of laying the foundations for the strategy development process, there are still numerous stakeholders within and outside the government who lack an understanding of the concept of REDD+ and the cross-sectoral requirements for its planning and implementation. The Department of Forestry will require significant support in convening such a process and building the political will across various government departments to participate actively in

¹⁵⁴ UNFCCC Decision 1/CP.16; *Climate Law & Policy*, 2015 (available here).

the drafting of the REDD+ strategy. The ongoing process to refine the terms of reference of existing REDD+ governance mechanisms, as well as the recommendations of this assessment to expand the intersectoral management aspects of these mechanisms (see section 6.1.3), could help build some of this support – at least among key sectors.

While the UN-REDD Programme’s country needs assessment and technical support have helped to identify gaps and priorities that must be addressed in the national REDD+ strategy, additional efforts will be required to define: (1) the scale and scope of REDD+ activities in Malawi and their relationship with the various identified drivers; (2) the capacity and political will to implement priority policies and measures derived from this and other assessments; and (3) the mechanisms for ensuring that safeguards are addressed, either through existing or new measures. Broadly, this assessment helps to frame the background on the policy and legal issues to be addressed in structuring the national strategy planning process, and on the types of policies and measures that can be undertaken to address governance challenges that contribute to or underlie the drivers of deforestation and forest degradation in Malawi.

6.1.2 Drivers of deforestation and forest degradation

In 2015, LTS International carried out a qualitative study of the drivers of deforestation and forest degradation in Malawi.¹⁵⁵ The results of their research are summarized in the figure below.

Figure 3: Proximate and underlying drivers of deforestation and forest degradation (D&D) in Malawi

Proximate drivers of D&D	Fuelwood demand <ul style="list-style-type: none"> Charcoal production Household energy use Tobacco curing Brick making Fish smoking 	Agriculture <ul style="list-style-type: none"> Agricultural expansion (tobacco, maize) Slash and burn agriculture (shifting cultivation) 	Wood extraction <ul style="list-style-type: none"> Timber (local and export markets) Construction (poles) 	Infrastructure <ul style="list-style-type: none"> Settlements (in/around forest reserves) Road building Urban expansion
	Bushfires			
Underlying causes of D&D	Socio-economic <ul style="list-style-type: none"> Lack of alternative revenue-generating activities Lack of employment Dependence on subsistence agriculture 	Demographic <ul style="list-style-type: none"> Population growth and density Urbanization in four major cities (Lilongwe, Blantyre, Zomba, Mzuzu) has changed demand from fuelwood to charcoal 	Governance <ul style="list-style-type: none"> Lack of law enforcement Lack of political will Lack of tenure security Corruption 	Infrastructure & Technology <ul style="list-style-type: none"> Linear infrastructure (roads, power lines, possible railway lines) Increased access to demand centres for wood products Agricultural production methods

155 LTS International, 2015. The study carried out by LTS International was a preliminary qualitative assessment of the drivers in Malawi. Further work will be required to quantify and prioritize the drivers in preparation for or in concert with the development of the national strategy.

The legal and policy challenges that contribute to the drivers of deforestation and forest degradation in Malawi are addressed throughout this assessment. Most of these are broader issues facing the land, forest and natural resource management sectors, including lack of policy coherence, lack of enforcement and the need for clarity in legislation, among others. For example, fuelwood demand and charcoal production are complex and politically charged issues in Malawi.¹⁵⁶ Underlying the unsustainable levels of the demand for fuelwood are the lack of alternative energy sources, lack of alternative livelihoods to support purchasing power (dependence on subsistence agriculture), population growth rates and urbanization. Taken together, these issues can only be addressed fully by a comprehensive development approach. Part of this approach is the operationalization of community-based and co-management strategies that provide adequate benefits to enable the sustainable production and use of wood and charcoal. Other aspects include improved transparency and accountability of concessions and licencing processes, as well as a supportive legal and regulatory framework for increased capacity in enforcement of illegal logging and extraction.

Ultimately, it is critical that Malawi's REDD+ strategy prioritizes and tailors its policy and legal interventions to effectively address the proximate and underlying drivers of deforestation and forest degradation. A more thorough, quantitative assessment of the drivers will need to inform this process. Once the drivers are more comprehensively identified and prioritized, the policy and legal reforms suggested in this assessment can then form the basis for the policies and measures that will address the drivers.

6.1.3 Institutional arrangements for REDD+

As described at length in section 4 of this assessment, the cross-sectoral nature of the drivers of deforestation and forest degradation in Malawi and the linkages between forest ecosystems and agriculture, biodiversity, water and other sectors, implicate several institutions for both REDD+ planning and implementation. Issues related to cross-sectoral coordination, policy coherence and multi-level governance among these sectors will be critical for REDD+ implementation, and they are discussed in section 6.2.9. This section focuses specifically on the existing institutional arrangements for REDD+ management and what gaps and opportunities exist for strengthening these arrangements to enable Malawi to meet the requirements for REDD+ programming.

As outlined above, the proposed Environmental Management Bill creates an independent National Environmental Protection Authority (NEPA) that would have the mandate to coordinate, monitor and supervise all activities relating to the utilization and management of the environment and natural resources. The authority would be separate from the ministry responsible for the environment and would be tasked with advising the relevant minister on policy. It would oversee the planning and enforcement of activities affecting natural resources, as well as monitor the use and impacts of these activities, and it would thus have regulatory oversight over the Department of Forestry (DoF). Technical committees on climate change, biodiversity and community-based natural resource management would be appointed under NEPA to provide advice and to guide implementation of these cross-cutting issues.

Currently, the REDD+ Experts Group (RExG) is meant to take responsibility and make requests of the REDD+ Secretariat and the technical working groups (TWGs), and the REDD+ Secretariat and TWGs are to report to RExG. The REDD+ Secretariat and TWGs collaborate and share responsibilities (assumed to happen through coordination between the chairs and the REDD+ Secretariat personnel). In turn, RExG reports to the National Technical Committee on Climate Change (NTCCC); DoF is a member of the NTCCC.

¹⁵⁶ A national charcoal strategy is currently being developed under PERFORM. The strategy will analyse the specific policy and legal context for the entire charcoal supply chain and for the promotion of sustainable production.

The USAID-funded PERFORM project is providing support to the REDD+ Secretariat and RExG to clarify their roles; facilitate more strategic decision-making; raise the profile of REDD+ to both streamline and facilitate implementation of the Government of Malawi REDD+ Action Plan 2014-2019; and to support the necessary institutional architecture to draft and implement the national REDD+ strategy, which is being developed with support from the UN-REDD Programme. A governance assessment of the REDD+ management structure carried out by PERFORM has found that the REDD+ process in Malawi has thus far been largely driven by the secretariat, which has been externally supported and not well integrated into the larger decision-making structure at DoF. Additionally, the roles of the technical working groups and the REDD+ Experts Group have not been aligned to their original terms of reference. The assessment found that this is mainly the result of a lack of broad-based REDD+ expertise outside the secretariat, and it recommended capacity building as the foundation for moving forward. Additionally, the report raised the question of whether a REDD+ steering committee should be created with higher-level participation within DoF (at the level of department heads) to facilitate coordination as well as decision-making and allocation of resources to REDD+. More recently, RExG and the three TWGs met to discuss a streamlined structure in which TWGs would take on greater decision-making authority and act together as RExG, whereas the current RExG would become a multi-stakeholder forum for raising awareness and stakeholder engagement in REDD+ activities and decision-making.

The question arises whether the REDD+ management structure can and should be maintained within DoF once a national strategy is in place, or whether there needs to be another institutional arrangement more closely aligning REDD+ under the climate change structures envisioned in the Environmental Management Bill (EMB). Since the bill is not expected to pass until late 2016, for the near- to mid-term it is envisaged that REDD+ will remain within DoF, and that it will be expanded as necessary to take on tasks specific to REDD+ assessment and monitoring, among others. However, once the new structures proposed under EMB are in place, a decision will need to be made whether to move REDD+ under the National Environmental Protection Authority, which will be charged with cross-sectoral coordination and oversight as well as international environmental commitments, or to maintain it within DoF, where the bulk of the capacity and commitment has been focused.

If the Environmental Management Bill passes, from a legal standpoint it would be better to house REDD+ in a subcommittee under the climate change committee – one of the committees expected to provide technical advice to the National Environmental Protection Authority – so that REDD+ can sit within the same entity that will be responsible for monitoring and reporting on REDD+ and other climate-related activities. In addition, if REDD+ were placed under NEPA, it would no longer be responsible to a single ministry, enabling it to be seen not only as a forestry issue, but as a climate change issue with cross-sectoral implications housed under a regulatory institution that reports directly to the president. This could create the higher-level political authority and will that is required for moving REDD+ up the national agenda. Moreover, instead of having a REDD+ steering committee based in forestry, such steering committee could be created under NEPA with representation from the leadership of all of relevant NEPA technical committees (including biodiversity and community-based natural resource management) as well as from other government departments. This could facilitate closer collaboration and lead to more integrated, cross-sectoral planning.

While this arrangement makes sense from a structural and legal standpoint, most stakeholders consulted for this assessment agreed that the majority of both technical capacity and political and administrative support for REDD+ is held within DoF, and that relocating the institutional architecture for REDD+ would risk disrupting the institutional momentum that has been gained over the past five years. Additionally, REDD+ might actually have a lower profile under climate change, given the higher priority placed by the Government of Malawi on climate adaptation issues. What technical and administrative capacity exists for

REDD+ planning and implementation exists within DoF, and a great deal of effort and financial support has been provided to build that capacity. Ultimately, REDD+ is seen as a forestry issue in Malawi. Hence, it would likely be best served by maintaining its structure within DoF and focusing on building more effective cross-sectoral linkages for planning and implementation of the REDD+ components that will lie outside the department, to ensure that REDD+ ultimately addresses the cross-sectoral drivers of deforestation and forest degradation. There is no reason why REDD+ could not continue to be represented on the climate change committee envisaged under the National Environmental Protection Authority, just as it has been represented on NTCCC, nor why a steering committee could not mandate participation of the other cross-sectoral environment and natural resource committees as described above. This could help balance the need for integration with the need to maintain the existing momentum and avoid losing the capacity that already exists within DoF. This solution was endorsed by the director of forestry and members of the Governance and Policy TWG at an initial validation workshop for this assessment.

One disadvantage of this arrangement would be that the Department of Forestry would continue to suffer the same capacity and resource challenges described in this assessment, while the issues identified in the governance assessment carried out by the PERFORM project have not yet been addressed. As described earlier, the first steps towards addressing these issues are being undertaken with the support of PERFORM, and it remains to be seen what the future holds. Ideally this will entail careful consideration of the need to have substantial linkages to the process of establishing and operationalizing the new institutional and funding architecture under the National Environmental Protection Authority, and broaden the architecture to include a governing steering committee for REDD+ with participation from outside the Department of Forestry.

6.1.4 Measuring and monitoring against reference levels

In order to obtain results-based financing, countries must be able to measure, report and verify “anthropogenic forest-related emissions by sources and removals by sinks, forest carbon stocks, and forest carbon stock and area changes” resulting from the implementation of REDD+ activities.¹⁵⁷ This includes using data that is transparent and consistent over time with an established forest reference emission level and/or a forest reference level, undertaking monitoring as part of a national forest monitoring system (NFMS), and submitting the data as part of the country’s biennial update report.¹⁵⁸ Moreover, in order to qualify for payments, countries must have data verified by a team of technical experts to ensure the accuracy, consistency, completeness and transparency of the results.¹⁵⁹

As part of its technical support package to Malawi, FAO has worked closely with a national consultant and national stakeholders to develop a roadmap for the development of NFMS in Malawi. The draft NFMS roadmap identifies four components needed to create a successful NFMS for Malawi that would meet the requirements of the UNFCCC: (1) land monitoring; (2) field-based forest inventory; (3) national greenhouse gas inventory; and (4) reference level setting. In addition, the draft roadmap identifies the institutional roles and mandates required to implement the four components. This part of the assessment report considers the policy and legal context for the four NFMS components and the policy and legal issues that will need to be addressed to effectively implement REDD+ in Malawi.

Land monitoring: The Department of Lands and Valuation is currently responsible for land allocation, titling, recording and dispute resolution in accordance with the Malawi National Land Policy and the Land Act. The Department of Forestry is responsible for land use monitoring on forestry lands. However, several aspects of land use and management are also governed by various other departments, such as the Department of Surveys, the Land Resources Conservation Department and the Department of Physical

¹⁵⁷ Decision 2/CP.17, para. 64; Decision 9/CP.19, para. 3.

¹⁵⁸ Decision 14/CP.19.

¹⁵⁹ Decision 14/CP.19, para. 11.

Planning, each of which gets its mandate from a different policy and/or legal frameworks. For example, the Land Survey Act addresses survey mandates and requirements for the purposes of providing data for land titling as well as boundaries, the Town and Country Planning Act and the Physical Planning Bill provide the legal mandate for both rural and urban physical planning, including land use, by the Department of Physical Planning, while the National Land Use and Management Policy addresses agriculture-related land use mandates.

The NFMS roadmap highlights the challenge of how to integrate the mandates of these various departments and ensure that land use data collection is effectively coordinated and managed. None of the relevant policies or laws addresses the question of how best to coordinate data collection for land monitoring. The Environmental Management Bill does provide that the National Environmental Protection Authority (NEPA) shall monitor activities, plans and programmes of lead agencies to ensure that they conform to the strategies, plans and programmes under the National Environmental Action Plan (NEAP). If land monitoring is incorporated within NEAP, this could provide a mechanism for ensuring that various aspects of land use monitoring are coordinated under NEPA. Otherwise it will be necessary to establish a specific coordination mechanism either under a REDD+ provision within a revised Forestry Act, or via a regulation.

Field-based forest inventories: The Department of Forestry is responsible for undertaking forest inventories pursuant to the Forestry Act. Within the department, the Forest Research Institute of Malawi (FRIM) has the greatest capacity to undertake forest inventories. FRIM is the foremost forest research institution in Malawi and its existing relationship with other institutions involved in forest research and inventorying would facilitate good coordination, including coordination on decisions where the inventories would be undertaken in non-forest vegetation.

The mandate for conducting forest inventories and the procedural requirements for gathering, maintaining and sharing such data should be specified in an amendment or a regulation pursuant to the Forestry Act. This should include planning, quality control, archiving and other functions not addressed by the current legal framework. This can also provide for coordination with other institutions responsible for field-based inventories of non-forest vegetation.

Greenhouse gas inventory: The greenhouse gas (GHG) inventory is the responsibility of the Environmental Affairs Department (EAD), which also carries out the required communications on GHG emissions to the UNFCCC. This specific mandate is not currently reflected in the National Environmental Policy or the Environment Management Act. The mandate is essentially derived from the fact that EAD is the designated focal point for the UNFCCC. It is important that this mandate be specifically reflected in a legal or regulatory instrument to ensure that stakeholders have a frame of reference and can do their part in contributing to the expressed policy mandate. With the development of a new institutional framework under the proposed Environmental Management Bill, it may be most effective to designate specific responsibilities under the envisioned climate change committee, which will sit under the National Environmental Protection Authority that will replace the Environmental Affairs Department. As with many other components of REDD+, there will need to be an official institutional coordination mechanism between the climate change committee, NEPA and the REDD+ management institutions housed in the Department of Forestry.

Additional important responsibilities related to GHG inventory activities must also be clarified in terms of mandates and coordination. These include planning, quality control, data collection and dissemination. Operationally, EAD does not have the capacity to collect data for inventory activities and may therefore not exercise proper quality control, unless data collection is undertaken cooperatively with the responsible agency. Therefore, there is a need to develop collaboration arrangements in accordance with specific policy instruments. Under the proposed Environmental Management Bill, NEPA would have the mandate to oversee such integrated planning, as well as the specific mandate to “promote assessment and

monitoring of the potential impact of climate change on the functioning of ecosystems, vegetation sinks and net carbon sinks,¹⁶⁰ and to monitor the enforcement of any standards.

The Environmental Affairs Department carries out inventory functions in collaboration with the specific sector agencies that generate data, such as the Department of Energy, the Department of Transport and the Department of Forestry, among others, yet there is no existing legal mandate for these contributions. An interim measure to address these issues could take the form of an interagency memorandum of understanding. Ultimately, however, these coordination issues and mandates are part of the larger set of issues facing the forestry sector and could be addressed formally if and when the Forestry Act is amended.

Forest reference level setting: The task of setting a forest reference level is not explicitly assigned to any institution, but would likely fall under the general remit of DoF as the lead agency on forest management and regulation. Again, it will be important to clarify this responsibility as well as the need for interagency consultation and technical assistance, either as part of amended forest legislation or a subsidiary regulation.

Currently, DoF is finalizing a new definition of “forest,” which will lead to the compilation of a time series of land use / land cover (LULC) maps. Once the LULC maps are completed, data from the national forest inventory will be integrated to develop activity data, which will be used to set a forest reference level. According to Alinafe Chibwana, PERFORM Climate Change Officer, the PERFORM project will soon be piloting a forest inventory methodology to inform this process.

6.1.5 Financing

The Malawi REDD+ Programme will need to develop a REDD+ fund at the national level and to establish a unit to manage revenues. The unit will be responsible for disbursing funds to support the development and implementation of REDD+ policies, programmes and projects; instituting revenue policy measures; establishing a payment system to carbon rights holders; providing a legitimate benefit sharing system (see section 6.2.6 below); and establishing a transaction registry. There are four options for the national REDD+ funding structure, each with trade-offs with respect to governance, coordination, effectiveness, efficiency, equity and co-benefits. The options are:

- 1 project funding – payments from international sources (carbon market or fund) made directly to local project proponents or an institution set up for receiving such payments;
- 2 independent fund/trust fund – carbon payments made to an independent fund outside the government with independent administration and decision-making authority;
- 3 state-administered fund – payments made to a REDD+ fund located within the central government, and funds distributed through a government agency or a specifically constituted REDD+ fund management board; and
- 4 state agency budgets – payments made to existing government institutions (e.g. the Department of Forestry).

With project-based funding, payments from international sources are channelled directly to local projects. Project-based funding may have limited national political legitimacy or potential for improving governance, but it may be preferred by private investors who are concerned about managing their own risk and receiving tangible benefits. This was the option taken by Kulera, Malawi’s only functional carbon finance project, in which an independent entity was set up to accept and manage disbursement of funds to community-level institutions. This was meant to provide insulation from corruption, as the body was specifically mandated to manage the funds.

160 GoM. 2015. *Environmental Management Bill*, art. 58(2)(d).

While the project-based funding model may alleviate investor concerns, it does not account for national budgeting for REDD+ policymaking and oversight, and it can marginalize the role of the national government, undermining its ability to improve overall transparency, secure co-benefits and distribute benefits equitably. It also can pose problems in terms of leakage (if there is no assurance at the national level that individual projects will not lead to deforestation in another location) and it may result in high transaction costs for individual projects. Finally, the potential for corruption still exists, though its extent would be limited to a particular project.

Another option would be to use the existing Forest Development and Management Fund (FDMF), which was set up under the Forestry Act and is managed and controlled by the minister responsible for forestry. The objective of this fund is the conservation, augmentation and management of forest resources and forest land, which can also be applied to a broad range of activities compatible with REDD+.¹⁶¹ Sources of funding to FDMF include levies, appropriations from the Parliament and contributions from outside funders and donors. The fund is one of the few statutory funds that have been operationalized through legislation related to the environment and natural resources management.¹⁶² A Treasury instrument was adopted for the management of FDMF under which the Treasury advances revenues from forestry levies to be utilized by the Department of Forestry. Consultations with DoF and the chairman of FDMF confirmed that the fund has been receiving financial resources from the Treasury and disbursing them to forest related activities. However, challenges remain in ensuring that the resources are utilized only for intended purposes. A suggestion was made that if FDMF were used as an umbrella for a REDD+ fund, a separate accounting system would need to be set up to prevent the siphoning of funds for other purposes.

One major concern with housing a REDD+ fund within FDMF is that FDMF is ultimately controlled by the Treasury under the Public Finance Management Act.¹⁶³ This may undermine the trust of development partners and investors. There is also the potential for a conflict of interest in terms of equitable sharing of benefits if DoF has oversight of all REDD+ funding. The Department of Forestry is notoriously underfunded and it would be difficult to ensure that central-level priorities for REDD+ oversight and management are not prioritized over local activities in support of the Malawi REDD+ Programme.

A slightly different option would be to place the REDD+ funding mechanism under the Environment Fund envisioned in the Environmental Management Bill. This would face some of the same challenges as FDMF, as it would also fall under the Treasury. However, it would be controlled by the National Environmental Protection Authority, which would have some political independence from the line ministries, and this could insulate the REDD+ fund from the pressure that has been exerted on FDMF to allocate funding elsewhere.

Although payments made to state-held funds or state agency budgets may provide greater national legitimacy and stronger likelihood that the government will improve forest governance through the Malawi REDD+ Programme, there is the countervailing concern of accountability as well as ineffective implementation as seen with the Forest Development and Management Fund. However, there will be greater authority to deal with potential leakage with REDD+ funds, and transaction costs for individual projects will be reduced as the programme grows. Furthermore, if adequate safeguards are instituted, equitable sharing of benefits will be more likely under a national funding structure. An independent fund or a state-run fund would also be more likely to secure co-benefits as a component of a wider set of policies.

161 GoM. 1997. *Forestry Act*, sec. 59.

162 Other funds were established under the Environment Management Act (EMA) and the National Parks and Wildlife Act. The fund established under EMA operated briefly with donor funds but it is not operational now.

163 GoM. 2003. *Public Finance Management Act*, part V.

State-administered funds and payments to state agency budgets may allow for stronger coordination among governmental and nongovernmental organizations. Under a state budget structure, for example, REDD+ resources could be used to improve governance by providing funding for more effective implementation of forestry policies. However, there must be a way to ensure that revenues are used to compensate communities and not to balance state budgets.

Another option would be the establishment of a REDD+ trust fund to which both the government and development partners would contribute, and through which they could jointly manage and control REDD+ activities. This could be framed as an environmental or a conservation trust fund that would be responsible for managing and disbursing REDD+ funds as well as monitoring and evaluating the use of such funds. The core business of a REDD+ trust fund would be to mobilize resources from diverse sources and to direct them in the form of grants to REDD+ programmes and projects through NGOs, CBOs or governmental agencies. The trust fund would be established under Malawi's Trustees Incorporation Act, which requires that the majority of trustees be from outside the government (to help ensure that the assets of the trust could not be used by the government for other purposes). A broader forestry trust fund is envisioned under the new draft National Forestry Policy; REDD+ could be folded into the forestry trust fund once it is established.

While an independent trust fund would require additional staffing and resources, it would likely address many of the major accountability concerns related to funding through the government. For example, a trust fund should have a clear policy and rules on avoiding conflicts of interest, and these should be acknowledged and agreed to in writing by all trustees and senior staff of the trust (so that donors and the public can have confidence that the trust will only be used for its intended purposes). Clear terms of reference and annual performance reviews could also ensure high levels of performance. Independent auditing based on internationally accepted accounting standards would be required in order to ensure transparency and confidence among donors and the public. The trust should be required by its founding legal document (whether this be called a constitution, charter, deed of trust, etc.) to publish an annual report that includes an audited financial statement and lists the amount, beneficiary and purpose of each grant made by the trust in order to ensure transparency and confidence among donors and the public. Successful examples of trusts in Malawi include the Mulanje Mountain Conservation Trust and the Malawi Environmental Endowment Trust.

Ultimately, the shape of the Malawi REDD+ Programme will need to inform the decision of which funding mechanism is most appropriate. A comprehensive analysis of the options for setting up a REDD+ funding mechanism can be undertaken only after the shape of the programme is known.

6.1.6 Safeguards

Safeguards can be broadly understood as policies and measures that aim to address both direct and indirect impacts on communities and ecosystems by identifying, analysing and ultimately working to manage risks and opportunities.¹⁶⁴ If designed and implemented appropriately, safeguards can help REDD+ initiatives to provide a suite of multiple benefits. While safeguards can be viewed as the "do no harm" principle, multiple benefits can accrue beyond the status quo when undertaking REDD+ activities with good safeguards in place.

REDD+ safeguards establish norms for social and environmental outcomes, as opposed to governance rules. They are agreed upon by the majority of stakeholders, but failure to adhere to them does not result in sanctions, as there is a range of options for implementation at the national level. The Cancun Agreement

¹⁶⁴ Murphy, 2011 (available here).

states that safeguards must be “promoted and supported” in the implementation of REDD+ activities.¹⁶⁵ It is important to note that safeguards will not necessarily create new obligations; rather, they will reflect Malawi’s existing obligations under many international legal frameworks, both normative and customary. These include obligations to protect and sustain biodiversity and ecosystem health under the Convention on Biological Diversity (CBD), as well as obligations under various human rights and international environmental multilateral agreements (including CBD) to ensure effective and meaningful stakeholder and public engagement in environmental decision-making.

With respect to biodiversity and REDD+, the CBD Secretariat has also been exploring how to support net positive impacts on biodiversity from REDD+ activities. The CBD “Aichi Targets”, which are to be achieved by 2020, include a number of targets relevant to REDD+. Notably, parties to CBD (including Malawi) have committed themselves to achieve the following:

- by 2020, the rate of loss of all natural habitats, including forests, is at least halved and where feasible brought close to zero, and degradation and fragmentation is significantly reduced (target 5);
- by 2020, areas under forestry are managed sustainably, ensuring conservation of biodiversity (target 7);
- by 2020, at least 17 percent of terrestrial areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved (target 11);
- by 2020, ecosystem resilience and the contribution of biodiversity to carbon stocks has been enhanced, through conservation and restoration, including restoration of at least 15 percent of degraded ecosystems, thereby contributing to climate change mitigation and adaptation and to combating desertification (target 15).

REDD+ could have both positive and negative impacts on biodiversity and ecosystem services. Similarly, biodiversity plays an important role in effective and long-term carbon storage in forests. The potential to simultaneously address the biodiversity crisis and climate change must be leveraged through effective cross-sectoral integration of efforts and alignment of policies, including alignment between the Malawi National Biodiversity Strategy and Action Plan II (NBSAP II) and the national REDD+ strategy and pursuant policies or regulations. It will also require effective integration of various planning processes and scaling them to catchment or landscape levels to ensure that biodiversity benefits are effectively identified and promoted.

Strategic environmental assessments (SEA), which are required under the proposed Environmental Management Bill, will be an important tool for ensuring that REDD+ policies and projects are in line with the agreed upon safeguards. A strategic environmental assessment broadens the scope of an environmental impact assessment (EIA) by applying the impact assessment methodology to policies, plans and programmes. This enables consideration of the broader governance context and focuses attention on social and environmental concerns. As with EIA, SEA is meant to be a broadly participatory process, further supporting the ability of decision-makers to capitalize on a broader set of knowledge, identify potentially conflicting priorities, and mitigate conflicts where possible. If undertaken effectively, SEA can be a tool for broader policy learning by providing a mechanism for information sharing among stakeholders. Such a process could be tailored to incorporate the consideration of safeguards in relation to proposed REDD+ policies, programmes and plans. Of concern currently is the lack of a specific requirement to include potential social impacts as part of an SEA, which could leave a whole category of safeguard-related issues unaddressed (e.g. involuntary resettlement, inclusion of marginalized stakeholders, etc.).

Safeguards not only protect against the risks of potentially adverse social or environmental impacts of REDD+ initiatives, they also promote the achievement of social and environmental “co-benefits” in

¹⁶⁵ UNFCCC, Decision 1/CP.16, para. 69; Decision 2/CP.17, para. 63.

REDD+ implementation. These can include improvements in the legitimacy and accountability of forest governance, sustained access to improved ecosystem services, more effective stakeholder engagement, improved gender equity and much more. As such, the realization of the agreed upon safeguards is partially embedded in many of the other legal and policy areas discussed throughout this assessment, and their guarantee is dependent on addressing the challenges already identified in this document. In particular, there is a pressing need to strengthen the legal requirements for stakeholder engagement in the forestry and related sectors. This has been recognized in the proposed Environmental Management Bill, but it remains to be implemented. Coupled with the proposals to strengthen participatory forest management (see 6.2.5), these reforms are necessary to achieve Cancun Safeguards (b), (c), and (d) (see 2.3).

Additional safeguard requirements include actions to address the risk of reversals ('permanence')¹⁶⁶ and to reduce displacement of emissions ('leakage').¹⁶⁷ With respect to both permanence and leakage, a key governance issue will be the enforcement of forestry requirements, including management agreements under participatory governance arrangements, and enforcement in areas outside of REDD+ activities. The challenges around enforcement are discussed in detail in section 6.2.8. Another key strategy for avoiding these risks is the clarification and security of forest tenure. If rights are or become threatened and people are unsure of the benefits of REDD+, there is a greater risk that they will not support REDD+ activities, or continue with deforestation or degradation in other areas. A related issue is the creation of equitable benefit sharing mechanisms to ensure that incentives for participants in REDD+ are sufficient to ensure compliance. Finally, Malawi will have to take a long-term planning view to avoid reversal in the national REDD+ strategy, and to consider how drivers will be impacted across geographic areas to avoid leakage.

A comprehensive approach to safeguard identification at the national and local levels will be necessary once Malawi determines the specific types of REDD+ activities it will prioritize and at what levels these will be implemented. This must include the development of an effective safeguards information system (SIS) to report on how the safeguards are being achieved. The UN-REDD Programme has developed a specific tool for undertaking this process, the Benefits and Risks Tool, which breaks down the safeguards into sets of key issues and provides guiding questions to identify the potential benefits and risks associated with REDD+ activities. The tool could form the basis for a national participatory process for the identification of safeguards and the development of SIS as required under the Warsaw Framework.

6.2 Domestic legal requirements for REDD+: Malawi's legal preparedness

6.2.1 Legal definitions

How forests are defined in national policies, laws and regulations is of critical importance to the effective operation of REDD+ programmes. In many countries forest loss and conversion are not officially considered to be deforestation, and so Malawi must carefully consider whether existing definitions are sufficient to support REDD+ goals.

Malawi's Forestry Act provides a very general definition of forests:¹⁶⁸

"Forest" means an area of land proclaimed to be forest under this Act or unproclaimed land with trees on it; ... "Tree" means a woody perennial plant having a single well-defined stem

166 Cancun Safeguard (f).

167 Cancun Safeguard (g).

168 GoM. 1997. *Forestry Act*.

and a more or less defined crown and includes palm, shrubs, bush, climber, seedling, sapling and re-shoots of all ages and of all kinds and any part thereof.

This definition does not account for the density or diversity of tree species, nor does it allow for measuring changes to the structural composition of a forest. As it stands, the definition precludes the possibility of classifying forest land into subtypes based on physical attributes and species composition, as well as rigorous monitoring and measurement of changes to forest land across management types. While the UNFCCC has not provided a definition of “forest” or related concepts, there are a number of definitions that have considered the need to track and account for forest conversion. The Intergovernmental Panel on Climate Change (IPCC) guidance¹⁶⁹ on reporting national greenhouse gas inventories provides a description of “forest land” that includes three thresholds:

- 1 minimum crown cover (expressed in percentage);
- 2 minimum tree height (expressed in metres);
- 3 minimum area (expressed in hectares).

These thresholds will inform an assessment of what constitutes forest cover and forest area change, and the identification of REDD+ activities that are appropriate to be implemented nationally.¹⁷⁰ When determining a national definition of what constitutes a forest, it is also important to consider the availability and access to consistent and comparable data and the capacity to monitor small forest changes.

In 2014, the Malawi REDD+ Readiness Programme supported a technical cooperation initiative with the U. S. Forest Service to develop a set of recommendations for land use/land cover (LULC) standards for Malawi.¹⁷¹ These recommendations were finalized in February 2015 and include a definition of forest as well as several subcategories of forests, both managed and unmanaged. Specifically, the proposed LULC definition for “forest land” is “land with woody vegetation consistent with thresholds use to define forest land. These thresholds are minimum mapping area or unit, minimum crown closure at maturity, minimum height, and minimum width of linear features.” The LULC study made recommendations for minimum mapping area of 0.5 hectare, minimum 10 percent crown closure, minimum height of 5 metres, and minimum linear width of 20 metres.¹⁷² This meets the IPCC guidelines and, once approved, will provide a much more workable definition for the purposes of REDD+ implementation. Whether this definition will need to be incorporated into the Forestry Act through an amendment, or stipulated through a regulation or as a standard, has not yet been determined by the Department of Forestry. However, a legal basis for the definition would provide a more secure base for ensuring effective measurement, reporting and verification of REDD+ activities.

6.2.2 Land and forest tenure

As described in section 4.5, significant land tenure reforms are underway in Malawi, but the legal backing for these reforms has been hindered by a number of political challenges to the existing and proposed land legislation.

Under the current legislation – the 1965 Land Act – customary land and resource tenure is administered under the traditional authority system, but the government has unlimited rights to convert and lease customary land. This has led to alienation of over 1 million hectares of customary land and increasing the perception of tenure insecurity on customary land, which covers between 65-75 percent of Malawi.¹⁷³ In practice, under customary tenure, traditional leaders (village headpersons and group village headpersons) have the authority to allocate customary land and regulate land and resource use on customary land.

169 IPCC, 2006.

170 UN-REDD Programme, 2015b.

171 MRRP, 2015.

172 MRRP, 2015.

173 MRRP, 2015.

Rights acquired are usufruct (user rights) and cannot be alienated (leased or sold). Once land is allocated to a family or an individual, it is then inheritable according to the applicable kinship-based inheritance system prevailing for that community. As land has become increasingly scarce, most allocation now takes place through inheritance or alienation of land rights. While leasing customary land is technically not legal, an informal land market has evolved and is expanding, providing additional tenure insecurity to individuals who are leasing land extra-legally.

Tenure security is also closely connected to the gender-based inheritance systems prevalent in Malawi. Under both matrilineal and patrilineal systems, the spouse who marries into a village has little or no security of tenure over the shared land. However, women face much greater levels of discrimination and disempowerment in relation to tenure security than men do, because even in matrilineal cultures men are regarded as the decision-makers and so they control the use and investments in land.¹⁷⁴ 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.¹⁷⁵ 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.¹⁷⁶

The existing legal definition of forest tenure (under the Forestry Act) is vague and in conflict with the requirements for assigning tenure rights to communities under the two forms of participatory forest management allowed under the act. Policy documents have advised the revision of this definition, but no steps have been taken to implement this recommendation.

The Malawi National Land Policy highlights the need for clarity, security and equity of tenure, as well as the need for integrating land use and management and other natural resource management policies and practices, including forestry. The policy specifically sets out to develop coordination mechanisms among agencies responsible for land-based resources, requiring all of them to “perform their statutory duties in consonant (sic) with the policy objectives of the Ministry responsible for lands.”¹⁷⁷ Despite this stated commitment, the authors of this assessment report have identified the following key policy and legal challenges related to tenure:¹⁷⁸

No clear legal basis for secure customary forest tenure rights: Neither the Forestry Act nor the proposed Land Bill or the Customary Land Bill make a clear statement regarding the specific forest tenure rights that accrue under participatory management arrangements. 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.” This vague provision for tree tenure appears to conflict with the provisions that require the establishment of a representative management institution and the development of a management plan in order to transfer access, use and management rights under community-based management on customary lands or co-management in forest reserves.

Similarly, under the proposed land legislation, there is no clear statement of how forest resource rights relate to the different categories of land tenure and how that might impact their use and management. Under the Customary Land Bill, authority is given to customary land committees to determine areas of customary land for communal use and their intended uses. This appears to grant the customary land committee the right to declare community forestry areas and oversee their intended uses. No reference

174 OECD Development Centre, 2014 (available here).

175 Matthiasen *et al.*, 2007.

176 Ngwira, 2003 (available here).

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

178 For a detailed analysis of the tenure policy and legal issues relating to REDD+ in Malawi, see Troell and Banda, 2016a and 2016b.

is made to consultation with the Department of Forestry or a village natural resource management committee. This begs the question of how pre-existing village forest areas and management agreements will be incorporated into traditional land management agreements and whether they will continue to be managed by the community institutions formed for such purposes.

There is thus a clear need to clarify forest and tree tenure under both existing and proposed land tenure and forestry legislation.

Lack of legal basis for granting tenure under participatory forest management: Broadly speaking, there is a lack of legal clarity related to: (1) when and how participatory forest management (PFM) (both co-management and community-based management) institutions should be created; (2) how they must be constituted; (3) what procedural mechanisms and criteria should guide their formation; (4) the process and criteria for completing (or revoking) a management plan and its required contents; and (5) what forest or tree tenure rights (if any) are devolved to individuals or communities once the process has been completed.

While considerable efforts have been made to entrench PFM in Malawi, these legal gaps undermine the effectiveness of its implementation. Without a demonstrated ability to successfully manage forests and without the capacity to enforce against those who would undermine sustainable management, REDD+ will not be an option for forest communities.

Lack of clarity about the relationship between customary and legislative tenure rights: The Malawi National Land Policy recognizes that many existing tenure rights have been allocated and are protected under customary law, which is defined 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.”¹⁷⁹ The proposed Customary Land Bill refers to the application of customary law in making allocation and dispute resolution decisions, but neither the Land Bill nor the Customary Land Bill provides 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 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. Further, where customary law includes discriminatory practices, there are no provisions specifying how to reconcile those practices with the Malawi National Land Policy’s objective of securing tenure without gender bias or discrimination against any citizen of Malawi.

A related issue is the role of traditional authorities in land administration as the proposed legislation gets implemented. During consultations for an assessment of tenure in Malawi carried out by the authors,¹⁸⁰ many stakeholders noted that if the traditional authority is empowered and respected, the relevant individual can use the authority to convene community members to actively participate in forest management and ensure compliance with forest management and other resource-related rules. However, in some areas where projects have used village headpersons as the intermediaries between the project and the people, experience has shown that some village headpersons do not pass information to the villagers. There were also cases noted of village headpersons engaging in bribery and participating in illegal activities such as encroachment, timber sawing and charcoal burning. The Malawi National Land Policy explicitly sets out to address issues of opacity and lack of accountability in land transactions. It is therefore important to ensure that a balance is struck between increased accountability and transparency of traditional leadership and their decision-making and activities, and leveraging legitimate authority where it exists.

¹⁷⁹ GoM. 2002. *Malawi National Land Policy*, sec. 4.5.2.

¹⁸⁰ Troell & Banda, 2016a.

Need for legal protection of all legitimate rights holders: The Malawi National Land Policy recognizes that many existing customs regarding the administration of land foster prejudice and fail to represent vulnerable populations, in particular women. The proposed Land Bill fails to provide any principles to guide the implementation of the provisions contained within the bill, including any statements on the need for non-discrimination in land administration. The bill does state, however, that it aims to address the challenges of security of tenure with regard to customary land, especially for the most vulnerable members of the community, which includes women. Despite this promising statement, there are few proactive mechanisms within either the Land Bill or the Customary Land Bill to ensure priority access to land by vulnerable groups. Realistically, given the existing discrepancies in literacy and access to resources, ensuring equity in tenure will require significant awareness raising and capacity building efforts so that vulnerable populations both understand and are able to exercise their rights. Without a pro-active approach to meaningfully engage all stakeholders, it is likely that registration will be granted to those with more power and resources in the community and further marginalize those who are landless, preventing them from benefitting from REDD+ arrangements.

6.2.3 Carbon tenure

To date, Malawi has not defined carbon rights separately from land and tree tenure. The rights to benefits from REDD+ under the current legal system would therefore depend on forest and land tenure rights, which are surrounded by the challenges described above. However, it is possible that Malawi may consider a more specific legal definition of a carbon right as a property right in a forest ecosystem that has value pursuant to REDD+ markets. This would require elucidating the nature of the property right and the derivative rights associated with trading carbon – or how individual or community rights are integrated into the national REDD+ regime, and the processes and responsibilities that are associated with the right to access benefits from carbon trading.

Options for legally defining carbon:

- sequestered carbon, or the commodity of carbon itself;
- carbon sinks, or the reservoirs in which carbon is stored, to be regulated by property rights; and
- carbon sequestration potential, or the bundle of rights allowing an entity to explore and exploit the potential of land and forests to store carbon, such as the right to manage land and trees.

Malawi will need to determine how to assign these rights in order to determine who is eligible for benefits under REDD+ activities. This could be done by defining – through a legal amendment or a regulation – carbon rights as inseparable from the resources in which they are found and then letting the resource and property rights regimes that stand dictate who has carbon rights. Alternatively, carbon rights could be defined as separate from the reservoir in which they are stored and then they would need to be defined clearly. In some countries carbon rights are defined as an ecosystem service or a natural resource in and of itself. There may also be usufruct rights separate from the established tree or forest tenure rights. Clarification of the land and forest tenure issues described above and the level at which REDD+ activities will take place will inform the decision of what approach is most appropriate for Malawi.

Broadly speaking, defining carbon rights (and thus the benefits from REDD+) as permanently attached to forest resources is a more straightforward proposal, as opportunity costs are more easily identified with the one person or community holding the rights. If carbon rights are severed and vested in a number of different individuals, it becomes more difficult to align incentives and to ensure that benefits are allocated effectively and equitably. The transaction costs associated with separating carbon rights make it unlikely to

be an effective solution for Malawi. Regardless, it is still necessary to legally define who is eligible to acquire forest carbon rights, a question that is tied up in the uncertainties around land and forest tenure discussed above.

If Malawi fails to clarify rights to carbon, it is possible to secure those rights under contracts, which could be in the form of concessions or by recognizing management plans as binding contracts granting rights. As long as the contract does not contradict existing law, this provides an immediate mechanism for concluding REDD+ agreements. However, a more permanent and integrated legal solution would be desirable to avoid granting these rights to parties with information and power. Allocating carbon rights pursuant to a comprehensive policy on REDD+ would more likely support equitable and just REDD+ arrangements.

6.2.4 Stakeholder engagement and free, prior and informed consent

REDD+ has the potential to impact a broad cross-section of stakeholders in Malawi, including government agencies, forest-dependent communities, private sector entities, civil society and academic and research institutions. To ensure that these stakeholders have access to the decisions that will directly impact their rights, the UNFCCC Cancun Safeguards specifically emphasize the need to respect the “full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities.”¹⁸¹

UN-REDD principles on stakeholder engagement in REDD+:

- Engagement practices should follow a human rights-based approach and uphold the principles of free, prior and informed consent.
- Consultation should include a broad range of relevant stakeholders at the national and local levels; in particular the voices of forest-dependent and vulnerable groups should be heard.
- Consultations should be premised on transparency and timely access to information as prerequisites to a meaningful dialogue.
- Consultations should facilitate dialogue, exchange of information, and consensus building so that broad community support can be garnered for final decisions.
- Consultations should be voluntary and decisions requiring the giving or withholding of consent should comply with the UN-REDD Programme guidance on free, prior and informed consent.
- Special emphasis should be given to issues of land and resource tenure, contributing to clarification of the rights of access and use (see discussion on tenure in sections 6.2.2 and 6.2.3).
- Impartial, accessible and fair mechanisms for grievance, conflict resolution and redress should be established and available during the consultation process and throughout the implementation of REDD+.

While Malawi’s environmental and forest 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 in the decision-making process. For example, there are no stakeholder or public consultation requirements specific to the licensing process, the declaration (or revocation) of forest reserves or forest protected areas, the demarcation of village forest areas, or the development of forest management agreements. 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 decision-making not only provides the stakeholders with a mechanism for understanding and protecting their rights, it also provides a forum for identifying and mitigating conflicts and concerns that may otherwise derail implementation and enforcement.

181 UNFCCC, Cancun Decision 1/CP.16.

This policy and regulatory gap was acknowledged as a weakness by all stakeholders interviewed for this assessment, and is reflected in the uneven levels of engagement at various levels of decision-making and implementation – from the formation of forest and related policies to the creation of local forest institutions. As noted earlier, the proposed 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 UNFCCC, but also to achieve the policy goals of more effective community-based natural resource management, improved enforcement and intersectoral coordination. The likely prospect of legislative amendments to the Forestry Act provides an ideal window of opportunity to formalize these requirements and align them with the forthcoming regulatory requirements under the proposed Environmental Management Bill.

At the national level, the REDD+ Experts Group 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, the experts group could be redefined as a permanent stakeholder engagement platform at the national level.

Much of the community-level engagement in REDD+ will revolve around community-based forest management institutions and processes set up for participatory forest management on customary lands and co-management in forest reserves. The challenges that have been faced in operationalizing PFM and co-management are detailed in the next section.

6.2.5 Participatory forest management

While participatory forest management (PFM) – both in the form of community-based management on customary forest areas and co-management with communities in the buffer zones surrounding forest reserves – is broadly supported by policy and legislative frameworks, there have been issues in operationalizing the PFM approach, and forest degradation and deforestation continue apace. The Draft National Forestry Policy states that “the implementation of community-based forest management is facing challenges that need to be addressed. Issues of low participation of communities in forest management, poor governance structures and a lack of knowledge on land tenure and tree ownership have led to widespread destruction of forest resources.”¹⁸²

Implementation has depended in great part on the availability of resources from projects to assist in the development of management agreements and the formal establishment and capacity building of village natural resource management committees (VNRMCs). A 2012 survey of existing village forest areas (VFAs) showed that in districts where the existence of management plans was assessed, on average less than half of VFAs had a management plan in place, and in some districts almost no VFAs had agreements in place.¹⁸³ Thus, in reality, most VFAs remain under the control of both the customary leadership and the Department of Forestry. The government maintains the authority to regulate any customary land outside of protected

182 GoM. 2015. *Draft National Forestry Policy*, sec. 3.1.

183 In Chikwawa 32 of 77 VFAs had management plans; in Chiradzulu only 1 of 51; in Balaka 15 of 34; in Nsanje 3 had draft plans and of the remaining 51, 32 had management plans; in Thyolo 16 of 84; in Zomba 17 of 104; in Kasungu 32 of 192 (with 30 of those having been established under an EU-funded project); in Ntchisi 5 of 85; in Ntcheu 11 of 26 (only 3 were approved); in Chitipa 22 of 132; in Karonga 12 of 43; and in Dowa none of the 60 had management agreements. The rest of the districts were not surveyed for existence of management plans.

forest areas and forest reserves. This includes the authority to set regulations that “facilitate the establishment and management of forests by VNRMCs for the benefit of local communities.” The breadth of this power gives the Department of Forestry wide discretion with respect to allowable activities where no management agreement exists.

PERFORM’s 2015 governance assessment and the interviews and focus group discussions conducted for this assessment support the findings of the 2012 survey – there remain major challenges in establishing and operationalizing PFM institutions. While communities for the most part felt they were engaged in the process of developing co-management and VFA management plans, it was largely perceived to be a government-driven process. Whether community interests were sufficiently reflected in a management plan varied from site to site. Furthermore, where management plans were concluded, they were not available in the local languages, making it difficult for people to participate effectively in their development and implementation. This has naturally led to confusion over the roles and responsibilities as set forth in the plans. Finally, even where roles and responsibilities are clearly outlined in writing, they are often not followed in practice and illegal activities continue.

A key institutional issue that has emerged is the role of traditional authorities in relation to VNRMCs and block management committees (BMCs). Many traditional authorities have expressed frustration that their role in resource and land allocation and management has been usurped by these institutions, and in some cases traditional authorities have actively tried to undermine the efforts of VNRMCs and BMCs. In other areas traditional authorities have taken a more active role, but the legal uncertainty about their position with respect to decision-making presents an ongoing issue in many areas.

Much of this issue stems at least in part from a lack of clarity of the legal procedural requirements for establishing VNRMCs and BMCs and their ultimate legal status. The Forestry Act provides only generally for the establishment of VNRMCs and for co-management arrangements. The details have been mostly elaborated through a series of standards and guidance documents that were developed under the EU-funded Integrated Forest Management and Sustainable Livelihoods Programme, but none of these documents have legal status. There also appears to be a lack of awareness among district forest officers and other agency staff of the work that has been done to date, resulting in failure to use the guidance that does exist. The PERFORM governance assessment found that “there is a need to revisit the institutional arrangements for co-management with an emphasis on defining clear lines of accountability between relevant institutions and stakeholder groups, as well as to ensure that roles are aligned with the power and capacity of actors to implement them.”¹⁸⁴ Given the legislative developments described earlier, there is a need to identify how best to operationalize this recommendation as part of the legal frameworks governing forestry and natural resource management, rather than leaving it to the discretion of the officers charged with implementing the broad guidelines currently in the law.

6.2.6 Benefit sharing

Approaches for benefit sharing in REDD+ countries tend to build on existing mechanisms, which can reduce costs and enhance political will to accept the arrangements. However, the degree to which these approaches are equitable, efficient and effective relies on the accountability and transparency of the state, which is weak in the case of Malawi. Both the vertical (from central to local actors) and horizontal (across sectors or local actors) aspects of a REDD+ benefit sharing mechanism need to: (1) maximize equity among the actors responsible for the reduction of deforestation and forest degradation; (2) improve the effectiveness of forest management; and (3) increase the efficiency of national and sub-national

184 PERFORM, 2015.

programmes (largely by minimising transaction and implementation costs). This in turn requires a careful balancing of interests and expectations in structuring the requirements for REDD+ benefit sharing.

Benefit sharing arrangements can also be influenced by the specific implementation stage of a REDD+ programme in a given country. In early stages benefits are more likely to go to setting up the structures and providing the “inputs” for successful REDD+ implementation, including governance improvements. This is tied to performance-based arrangements rather than results-based measures, which will come into play once REDD+ projects are under way. All of these considerations are relevant to Malawi, which has so far structured percentage-based benefit sharing arrangements in the forestry sector, the equity of which has been repeatedly questioned by communities.¹⁸⁵

As Malawi proceeds with defining the scope of REDD+ activities, it will be paramount to also clearly delineate the rationale for which stakeholders are eligible to benefit from REDD+ and how these benefits will be targeted or shared. Lutrell *et al.* have identified six rationales for determining benefit sharing approaches in REDD+ programmes; these are outlined in the text box below.¹⁸⁶

Six rationales for determining benefit sharing approaches in REDD+:

- benefits should accrue to those with legal rights (i.e. tenure);
- benefits should accrue to those who are reducing emissions;
- benefits should accrue to those who are stewards of low emissions forests;
- benefits should be used to offset the costs of REDD+ implementation;
- benefits should accrue to REDD+ facilitators; and
- benefits should accrue to the poorest.

The pros and cons of each of the different benefit sharing mechanisms should be carefully assessed. For example, if benefits are to accrue to those who reduce emissions only, that may exclude less powerful actors such as community members who are not proactively engaged. If they are to accrue to those with legal rights to forests or trees, there are questions of clarity and security of tenure. If facilitators (including the government or NGOs) should benefit, how will percentages devolved to local actors be determined and by whom? Relevant stakeholders will need to be identified and involved in the process of developing a benefit sharing approach so that various competing interests can be weighed.

The Kulera Landscape REDD+ Programme, the only currently functioning REDD+ initiative in Malawi, provides some lessons with respect to benefit sharing in the Malawian context. The Kulera programme is taking place in Nyika National Park, Vwaza Wildlife Reserve and Nkhotakota Wildlife Reserve. The programme is targeting 65,000 households (350,000 people) living in rural communities within 5 kilometre radius of the three protected areas. The proponents of the programme are the Department of National Parks and Wildlife (DNPW), the Nyika Vwaza Association (NVA), the Nkhotakota Wildlife Reserve Association (NAWIRA), Total Land Care (TLC) and Terra Global. The programme was initially funded by USAID with TLC as the lead implementing partner. The main buyer of carbon is Microsoft through the Carbon Neutral Company.

The main purpose of the Kulera programme is to implement co-management activities in the three protected areas in order to reduce deforestation and improve livelihoods. Deforestation, poaching and limited community benefits related to forest resources have been some of the key concerns around the

¹⁸⁵ This issue was raised in the *Governance Assessment of Participatory Forest Management in Malawi* carried out by the World Resources Institute for PERFORM in 2015.

¹⁸⁶ Lutrell *et al.*, 2013.

three protected areas. By the end of November 2015, Kulera had completed two sales of carbon credits: (1) in January 2015 a total of 34,000 voluntary carbon units (VCUs) were sold at \$7.47¹⁸⁷ per ton, generating \$241,350; and (2) in June 2015 a total of 50,000 VCUs were sold at \$5.65 per ton, generating \$268,584. There is no structured benefit sharing arrangement under the programme and currently the benefits are allocated based on a calculation of need. The first carbon sales were shared as follows:

- DNPW received \$67,000, with some of the funds coming as “in kind” equipment through TLC;
- NVA received \$68,000; and
- Terra Global received 5 percent of the total sales.

The Kulera experience shows that a structured, transparent, thoroughly negotiated and agreed upon benefit sharing arrangement needs to be in place to avoid future misunderstanding. While NVA were open and willing to discuss the financial issues related to the Kulera programme, the NAWIRA executive was very sceptical about transparency in the decision-making about allocation of benefits. As evidence of the need for a more open and accountable process, he highlighted the fact that traditional authorities in the association have no knowledge about the financial benefits that have been accrued.

6.2.7 Corruption, transparency and accountability

Corruption in the forestry sector, as well as in sectors driving deforestation and forest degradation, has the potential to derail even the most well-planned and financed REDD+ initiative. A corruption risk assessment is currently being undertaken as part of the UN-REDD Programme’s technical support to Malawi, and its preliminary findings have been used in this assessment as the basis for identifying the legal issues and options for addressing corruption as these relate to REDD+.

Corruption can impact REDD+ implementation in different ways, including through land grabbing and undermining of legitimate tenure rights; fraud in monitoring, evaluation and reporting; and elite capture of benefits emanating from REDD+. The risks for corruption and elite capture as they relate to tenure are discussed in section 6.2.2. This section focuses on the corruption risks identified under the corruption risk assessment being carried out as part of the UN-REDD Programme’s technical support, and how they relate to the various drivers of deforestation and forest degradation in Malawi. These are the risks that could undermine the overall integrity of REDD+ and that present major governance obstacles to the effective implementation of the programme.

The corruption risk assessment has highlighted some specific and consistent legal and regulatory aspects of corruption that will need to be addressed, including:

- Bribery has been a consistent issue across the different drivers, with reports of DoF officials, the police and traditional authorities taking or soliciting bribes. Whistleblower protections are in place, but they are broadly regarded as not being protective of the people who try to report corruption.
- There is weak enforcement against violators, which is closely tied to low levels of monitoring in forest reserves. While financial gains (bribes) were cited as undermining enforcement efforts, other reasons include low salaries of enforcement officials; lack of technical and monetary enforcement capacity; security issues; lack of cooperation between the police and communities to facilitate effective enforcement; and lack of inspection training. Additionally, prosecutors and judges lack awareness of the requirements of the Forestry Act and other relevant laws and often issue insufficient penalties against violators. The lack of monitoring and enforcement is in turn a major enabler of corruption, as there is no credible threat of being caught or punished.

187 \$=US dollar here and for the remainder of section 6.2.6.

- Land tenure insecurity was cited as an underlying driver of illegal practices by communities. As noted in section 6.2.2, the alienation of communities from areas they perceive to be theirs to create forest reserves acts as an incentive to encroach on forest reserve lands. Co-management practices are beginning to address this issue, but even where they are in place, illegal activities are so entrenched that they continue unabated. Poor boundary demarcation and lack of forest officers' knowledge of boundaries has contributed to this problem, as has the pervasive lack of functioning management plans for forest reserves.

A critical enabling factor for corruption in the forestry sector and beyond is the lack of provisions for promoting and securing transparency in existing legal frameworks. Examples abound within the forestry sector of the lack of public scrutiny and the lack of specific requirements for stakeholder engagement when critical decisions are being made, including decisions on issuing or revoking concession licences, or establishing (or revoking) village forest areas and forest management agreements on customary land. 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, rule making and the 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 that have been established in the legal frameworks.

6.2.8 Compliance and enforcement

As noted earlier, one of the most consistent forest governance issues that will impact REDD+ implementation at all levels is that of inadequate enforcement. A number of reasons were cited for this by the stakeholders consulted during this assessment:

- lack of effective legal provisions for enforcement, including inadequate penalties;
- lack of resources for effective enforcement (personnel, equipment, etc.);
- lack of technical capacity/insufficient training for monitoring, inspections and enforcement;
- overly complex requirements for community-based forest management;
- lack of judicial and prosecutorial awareness of forest issues and legal requirements; and
- corruption.

REDD+ payments will be conditional on the ability to avoid leakage and ensure permanence of emission reductions. This, in turn, will depend on the government's capacity to stem illegal encroachment and harvesting on government lands, monitor and enforce the terms of concession agreements, and ensure compliance with the provisions set up under forest management agreements on customary forest land and in forest reserves.

From a legal perspective, there needs to be better clarity on the mandates and procedural requirements for enforcement, as well as a flexible mechanism for setting penalties that are capable of deterring violations. Under the Forestry Act, forest officers have a broad mandate to inspect vehicles, buildings and property without warrants, and the authority to seize and detain any forest products if the officers reasonably suspect that the products have been obtained or removed illegally.¹⁸⁸ However, there is no procedural guidance on how to conduct inspections, properly file complaints against violators, and 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 forest officials who are trying to

188 GoM. 1997. *Forestry Act*, art. 9.

do their job. Many of the officials consulted for this assessment have said they would welcome clear guidance and a broader set of tools for implementing their enforcement activities. There is thus an urgent need to elaborate on these processes, build the capacity of officials to undertake them effectively, and make information about violations and violators publicly available.

Lack of resources, including both personnel and equipment, were cited as major impediments to effective enforcement. Budgets at the district level were quoted as MK60-80,000 per month, which would barely cover fuel costs. This hinders effective monitoring to detect violations and undermines compliance, as most violators have little fear of being caught.

Lack of transparency in enforcement proceedings is another factor that both facilitates corruption and undermines effective implementation. An example is the lack of required process under the Forestry Act for the issuance of permits or licences, which is currently left to the discretion of the director of forestry. The decision-making process is not subjected to public scrutiny and there are no specific requirements even for interested stakeholders to be consulted. There are thus no legal or regulatory mechanisms for holding the decision-maker accountable or even for identifying the criteria used for making decisions. The situation is the same in the granting of forest concessions. These processes should be specifically elaborated either in legislation or in a regulation, along with any relevant criteria or standards on which officials must base 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 meaningful input. 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.

The governance analysis completed for PERFORM found that another weakness in enforcement stems from the lack of awareness of officials and communities of their precise enforcement duties under forest management agreements.¹⁸⁹ Part of this is attributable to the fact that the documents are not available in local languages, and that community participation in the development of the agreements has varied between locations.¹⁹⁰ It is therefore critical to formalize the process for setting up local forest organizations and concluding forest management agreements (or co-management agreements) so that both communities and forestry staff are able to come to the process on equal footing, and can thus be held accountable.

An additional challenge for enforcement is the perceived lack of incentives by communities to comply with and enforce management agreements in areas under participatory forest management. The actual benefits are not viewed as sufficient, and specific issues have been raised regarding the lack of payment for taking on block management committee responsibilities and the size of the benefits channelled to the government. If communities do not see the benefits and foregone opportunities to use forest resources as worth their investment in forest management, they are much less likely to participate actively and comply with the rules of participatory management and co-management. Identifying real benefits and structuring equitable benefit sharing arrangements will thus be a critical aspect of implementing REDD+ activities at the local level.

6.2.9 Policy coherence and intersectoral coordination

Perhaps the most critical issue raised from a REDD+ governance perspective is the lack of policy and legal coherence across all relevant sectors, and the failure of existing coordination mechanisms to affect real integration and to avoid overlapping and even contradictory efforts. This issue was raised repeatedly in the stakeholder interviews and workshops conducted for this assessment.

189 PERFORM, 2015.

190 PERFORM, 2015.

Several sectoral policies, including the National Forest Policy, highlight the need for effective intersectoral coordination and alignment with policies of other sectors. The policy calls for joint development of natural resource management plans with other agencies in the natural resource sector; collaborative planning for extension services and agroforestry with the Ministry of Agriculture; policy harmonization with continuous review to ensure harmonized approaches among sectoral policies; and legal harmonization between any forest law and other sectoral laws that have a bearing on forests and trees.¹⁹¹ While these policy statements are clear, there are no real mechanisms within the Forestry Act to support and facilitate this intersectoral collaborative approach. The Forest Management Board was created to provide a multi-stakeholder forum for discussion and debate on critical issues that have intersectoral implications, but it has failed to achieve this mission, likely because of the lack of detailed implementation requirements under the act.

In recognition of the need for effective coordination among natural resource and development sectors more broadly, the Environment Management Act established the National Council for the Environment (NCE), which is comprised of all principal secretaries of government institutions, other public agencies and NGOs whose functions are related to the environment and natural resource management.¹⁹² The council is meant to act as an advisory body to the minister on integration of environmental considerations into economic planning and development, as well as harmonization of activities, plans and policies of all lead agencies.¹⁹³ Unfortunately, stakeholders have consistently raised concerns that NCE has not performed as expected. Many state that the main reason has been the lack of consistent participation by senior officials with decision-making authority. Another key issue is that NCE has no independent authority outside of the Ministry of Natural Resources, Energy and Mining, yet it is expected to coordinate other ministries. According to Victoria Kachimera, Principle Legal Officer in EAD, this has hindered NCE's ability to control the allocation of resources to intersectoral coordination activities and to ensure political support from other sectors. Lack of sufficient funding has underlined this legal issue and further hampered the ability of NCE to effectively carry out its mandate.

To address this issue, the Environmental Management Bill is proposing to raise the political level of this coordination mechanism and establish an independent National Environmental Protection Authority (NEPA) that would report directly to the Office of the President. There are specific articles in the draft legislation requiring NEPA 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 the Department of Forestry to bring REDD+ into the discussion and raise the cross-sectoral implications and needs for coordination.

The creation of NEPA would have major implications for the existing institutional structures governing climate change in Malawi. The National Technical Committee on Climate Change, which consists of subject matter specialists from various ministries, departments, donor organizations and civil society, is meant to advise the National Steering Committee on Climate Change and act as a forum for information exchange and knowledge transfer. Thus far, there has been little progress in meeting its mandate of developing strategies to link climate change programmes with national development planning. Any REDD+ initiative to promote intersectoral coordination, such as the establishment of a REDD+ steering committee, must account for this mandate.

With little progress being made by existing forums, a key issue that will need to be addressed as part of REDD+ planning is the existence of parallel planning processes that are currently mandated under various pieces of legislation. Development planning, environmental planning, physical planning, catchment

191 GoM. 1996. *National Forest Policy*, sec. 2.3.4 and 2.8.1.1.

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

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

management planning and forest management planning are currently not coordinated. Both the proposed Environmental Management Bill (EMB) and GoM's Procedural Catchment Management Guidelines present a process that could be used to coordinate among the relevant agencies and stakeholders at various levels. The bill envisions a nested environmental planning process that would line up with existing political jurisdictions and local resource management institutions. The Procedural Catchment Management Guidelines insert an additional level of planning at the level of a catchment, one that would be extremely useful to REDD+ planning and monitoring. Integration, or at the very least, coordination among the natural resource-focused planning processes envisaged under EMB with a process for decentralized and community-based forest planning and management would enable REDD+ to be mainstreamed. It would also enable the realization of the multiple benefits related to watershed health, biodiversity and other ecosystem services that would, in turn, benefit livelihoods. These processes would then need to be effectively taken up in development planning at the local, district and national levels. Discussions have been initiated on integrating forest and catchment management planning, but they appear to have stalled.

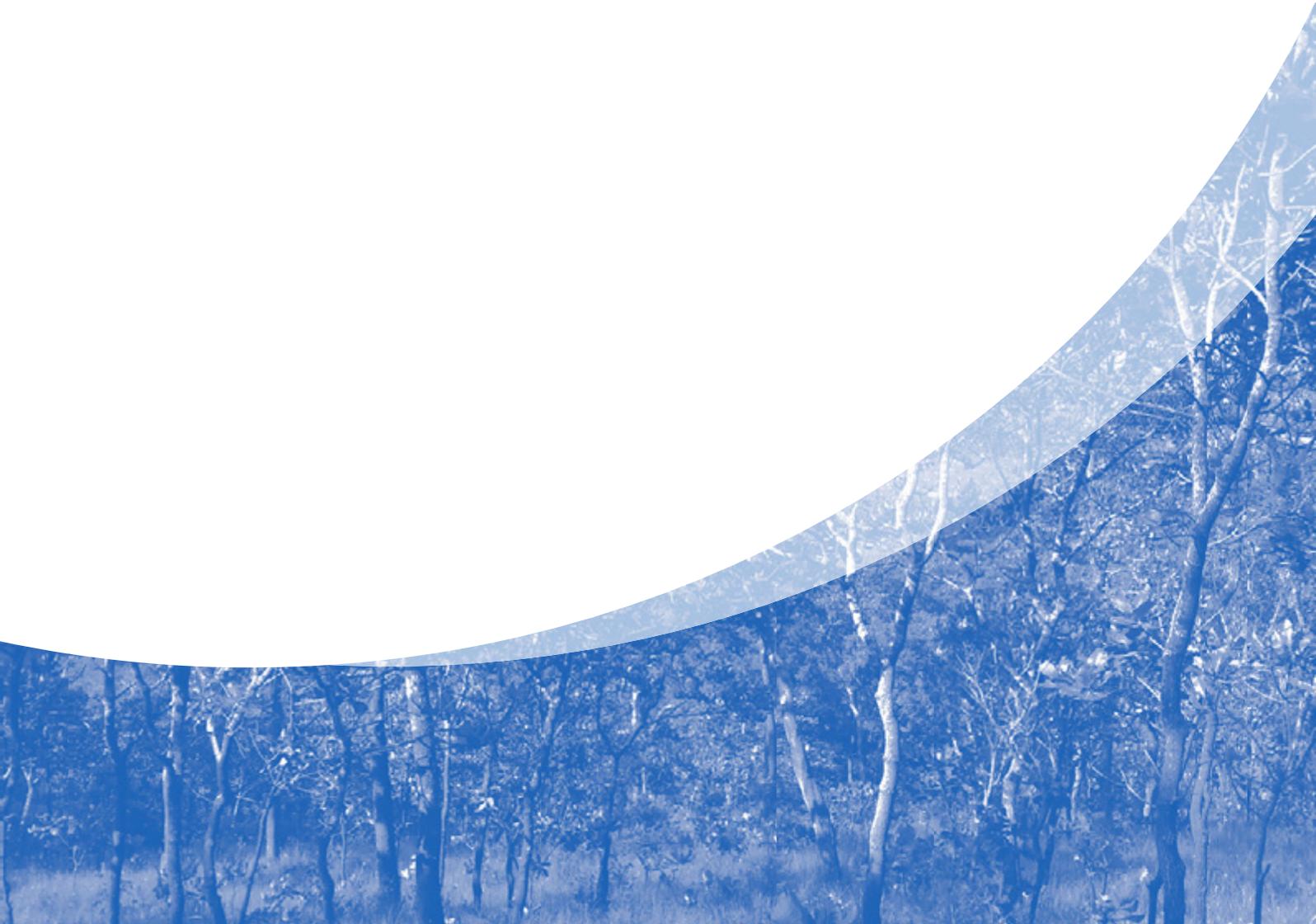
Cross-sectoral integration will require not only legislative mandates and specific cooperative planning mechanisms, but also a rethinking of the existing and proposed institutional structures for regular consultation among relevant agencies to address key areas of policy development, including REDD+, at various levels. Many of the stakeholders interviewed for this assessment felt that the current mechanisms for integrating forest resource considerations into development planning were not functioning as expected. In many cases this was attributed to the lack of resources and political power of the district forest offices (DFOs). The fact that DFOs are still reliant on central DoF policy guidance and budgets was also cited as a key issue preventing the effective integration of forestry into local government decision-making.

In some instances, at the reserve and district levels, multi-stakeholder local forest management boards (LFMBs) have been established as formal bridging organizations for local development institutions. LFMBs have the primary role of scaling up conservation beyond co-management blocks through: (1) monitoring and coordination of forest planning and management, providing strategic planning advice, and resolving conflicts across blocks; (2) integrating village forest areas outside reserves into reserve co-management, thereby also broadening the incentive structures for forest reserve co-management, and exploiting synergies between village and reserve forests; and (3) forging important semiformal links among constituent central/local government, communities and private entities.

Although the local forest management board was conceived as part of local government to help integrate co-management into district decentralization processes and structures, it has functioned more as a bridge between local forest users and organizations under DoF supervision (with occasional input from other agencies), and has lacked the mandate or clout to function as a broader inter-agency bridging organization. Its legal status, including the relative mandates of agency members and how the board is integrated into local government structures, requires clarity. Its coordination role could be strengthened as options are explored for integrating forestry into nested institutional management structures under the proposed Environmental Management Bill and as catchment management processes are explored.

Another key issue relates to the hierarchy or balancing of decision-making authority among the relevant sectors governing land and land-based resources. Currently, there are overlapping mandates among the ministries governing land, forest and water with respect to the ability to make regulations that impact and grant access to or control over forest land. While these are not necessarily in conflict with each other, there is a need to determine how best to coordinate among them and how to balance the policy priorities for the development and protection of forest land.

The proposed integration of resource-related institutions into a nested hierarchy that would ultimately report to the independent National Environmental Protection Authority could go a long way towards addressing some of the fragmentation that is currently hindering effective realization of forest policy goals. It will be critical that this integration process learns from past and ongoing efforts of various sectors to develop capacity and create institutional mechanisms at the local level, and builds on what successes such efforts have generated. The Department of Forestry needs to play a key role in this process and align with it the department's own efforts to achieve the policy goals of more effective community-based management and forest management planning, as these will form the basis for effective REDD+ implementation at the local level. According to Teddie Kamoto, Deputy Director of Forestry for Policy, DoF is committed to passing the Draft National Forestry Policy and to making necessary amendments to the Forestry Act to realize these policy goals. If this is the case, there is a window of opportunity to align new forestry legislation with the aforementioned developing institutional frameworks and planning processes. Alignment also needs to be addressed between the proposed Land Bill and the Customary Land Bill on the one hand, and the Forestry Act on the other, specifically with respect to tenure issues.



Summary of findings and options for action

The underlying question for this assessment is whether Malawi's existing policy, legal and institutional frameworks are sufficient to meet the requirements of REDD+ readiness under the Warsaw Framework of the UNFCCC and whether they will be able to support and promote effective, efficient and equitable REDD+ implementation. As explored in this document, there are a number of critical gaps in the existing frameworks that will need to be addressed at all levels before the required level of preparedness is achieved.

One option for addressing all of these gaps in an integrated manner would be to draft a REDD+ policy and/or law. However, there are serious concerns as to whether there is the political will to devote the time and resources necessary to undertake this process. Even with the Draft National Forestry Policy, the mere recognition of REDD+ as a priority for climate mitigation was contentious. Given current political realities, the Department of Forestry and the existing Malawi REDD+ Programme have expressed scepticism about the potential success of a REDD+ policy or regulation.

Consequently, the recommendations in this assessment focus on the gaps, overlaps and conflicts in existing policies and legislation and the ways in which they can be addressed in concert to support REDD+ readiness and implementation. Some of the recommendations would require amending existing legislation or drafting new regulations, but these changes would all support multiple forest and land management policy objectives, including but not exclusive to REDD+.

The following next steps were endorsed at the two validation workshops held with the Governance and Policy TWG and high-level staff of the Department of Forestry. The next steps entail the creation of a working group or a task force from members of the Governance and Policy TWG and additional appropriate stakeholders to:

- prioritize the various recommended options for action and identify which can be undertaken immediately to lay the groundwork for longer-term reforms/activities;
- work with appropriate staff at the Ministry of Justice and the Environmental Affairs Department to draft the relevant regulations with technical and stakeholder input; and
- convene policy dialogues across relevant sectors to promote the need for harmonization among sectoral laws and the necessary legislative amendments and institutional changes to support REDD+.

Table 3, which begins on the following page, presents an overview of the options for addressing the priority issues raised throughout this assessment. Broadly speaking, the options for action across these issues can be broken into four categories: (1) legal or regulatory reforms; (2) institutional reforms; (3) capacity building; and (4) further assessment to support the proposed reforms.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/requirement	Recommended responses	Specific actions
National REDD+ strategy	<p>Strengthen REDD+ governance structures to support multi-stakeholder engagement.</p> <p>Integrate findings of country needs assessment and technical support into the strategy.</p>	<ul style="list-style-type: none"> • Refine ToRs of REXG, TWGs and the secretariat to clarify roles in development of the strategy. • Identify specific Department of Forestry (DoF) staff to take lead on strategy development. • Create intersectoral REDD+ steering committee to oversee the strategy development process. • Finalize a synthesis report for the country needs assessment and technical support and use this as a basis for developing a roadmap for the national strategy.
<p>Lack of effective cross-sectoral engagement in REDD+ institutional arrangements</p> <p>Lack of political prioritization of REDD+ across sectors</p> <p>Failure of REDD+ governance structures to implement ToRs</p>	Strengthen REDD+ governance structures.	<ul style="list-style-type: none"> • Refine ToRs of TWGs in REXG to ensure cross-sectoral participation and clarify reporting and participation requirements of the National Technical Committee on Climate Change (supported by PERFORM). • Build technical capacity of TWGs to create and implement work plans to support the national REDD+ programme (supported by PERFORM). • Ensure that the broader, multi-stakeholder group that has functioned as REXG is expanded to provide a consistent platform for engagement in REDD+ decision-making. • Establish a cross-sectoral REDD+ steering committee with higher-level participation within DoF (at the level of department heads) to facilitate decision-making and allocation of resources to REDD+, as well as coordination. • Specifically include mandates in ToRs for REXG Policy and Governance TWG (or a steering committee if established) to: <ul style="list-style-type: none"> - develop ongoing consultative mechanism with the Ministry of Lands to address issues related to tenure and land use/forestry management; - coordinate with the Environmental Affairs Department (EAD) on an appropriate management structure for REDD+ in the institutional framework under the proposed National Environmental Protection Authority if/when the Environmental Management Bill passes, taking into consideration the need for political prioritization and cross-sectoral coordination for REDD+.
Lack of capacity and clear mandates for measurement, reporting and verification (MRV)	Implement a roadmap for a national forest monitoring system.	<ul style="list-style-type: none"> • Draft forestry regulation to: <ul style="list-style-type: none"> - clarify data collection mandates for Ministry of Lands departments and DoF and set up a clear mechanism for sharing land monitoring data among departments; - clarify the role of the Forest Research Institute of Malawi (FRIM) as the lead agency for field-based forest inventories and set procedural requirements for gathering, maintaining and sharing data (including planning, quality control and archiving). • Incorporate specific language into the proposed Environmental Management Bill (or a subsequent regulation) to clarify EAD's role as the lead agency for the greenhouse gas (GHG) inventory. This could also be incorporated into the broader MRV regulation outlined above. • Ensure that all relevant legislation is aligned with regulations, including the Forestry Act, the Planning Act, the Physical Planning Bill, the Land Bills and the Environmental Management Bill. • Legalize new definition of "forest" (either in an amendment to the Forestry Act or via a regulation) developed as part of the land use/land cover standards to provide a secure basis for MRV.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/ requirement	Recommended responses	Specific actions
<p>Lack of understanding of specific social and environmental risks from REDD+ activities and identified/ harmonized policies and measures for ensuring implementation of safeguards</p> <p>Lack of an integrated safeguards policy</p>	<p>Identify risks and develop a national safeguards policy.</p> <p>Strengthen existing policies and measures.</p> <p>Harmonize policies and measures for safeguards across sectors.</p>	<ul style="list-style-type: none"> • Department of Forestry should spearhead a national process for identifying environmental and social risks of proposed REDD+ activities (potential to apply the Benefits and Risks Tool). • Identify existing safeguards (environmental impact assessment and strategic environmental assessment [SEA]) and specific mechanisms for strengthening the safeguards (i.e. incorporating social risks into SEA). • Harmonize across sectors and include mechanisms for biodiversity protection under the National Biodiversity Strategy and Action Plan II (NBSAP II). • Develop a national policy for the implementation of safeguards for REDD+. • Improve enforcement capacity and strengthen provisions for enforcement in forestry and related legislation to avoid reversals and leakage (see details in enforcement recommendations). • Department of Forestry should consult with communities engaged in participatory forest management (PFM) to identify effective benefit-sharing mechanisms to increase equity of REDD+ implementation and likelihood for compliance. • Amend forestry legislation to incorporate specific measures for strengthening procedural safeguards, including: <ul style="list-style-type: none"> - requirements for access to information; - specific consultation requirements with stakeholders and the public; - access to dispute resolution/justice. (See details in recommendations for strengthening stakeholder engagement.) • Once safeguards measures are in place, develop a safeguards information system.
<p>No clear legal basis for forest tenure rights</p>	<p>Amend the Forestry Act and the Land Bills under consideration to clarify forest tenure and its relationship with proposed land tenure reforms.</p>	<ul style="list-style-type: none"> • Clarify forest and tree tenure under both existing and proposed land tenure and forestry legislation through amendments or regulations to specify: <ul style="list-style-type: none"> - 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); - who will have access, use and management rights to community forest areas once customary estates are established; - what tenure rights accrue under various types of co-management and participatory management arrangements; - how these rights can be verified and what specific measures can be taken (and by whom) to enforce the rights and exclude others from infringing on the rights; - what evidence is necessary to support tenure rights; - which dispute resolution mechanism(s) can be used to uphold forest tenure rights; - what is the role of traditional authorities with respect to allocation and oversight of forest tenure on customary estates; - what is the role of traditional authorities with respect to the formation and oversight of VNRMCs/LFOs and BMCs; - the legal definition of carbon rights and whether these are severable from land and forest tenure, and the implications for benefit sharing under REDD+.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/ requirement	Recommended responses	Specific actions
Legal definition of “forest” does not support effective REDD+ MRV	Adopt proposed definitions for forests and forest sub-categories developed as part of the land use/land cover study.	<ul style="list-style-type: none"> • Provide legal basis for new definitions to ensure that they facilitate MRV. Options include revision of the Forestry Act or creation of a new regulation that revises the existing definition.
Lack of legal basis for implementing participatory forest management (PFM)	Develop specific regulation to guide PFM planning, implementation and oversight.	<ul style="list-style-type: none"> • Review existing regulatory requirements and guidance on PFM, co-management and the relevant institutional arrangements, and draft a streamlined process with specific criteria that emphasize clear lines of accountability between relevant stakeholders and institutions and align roles to the power and capacity of actors who will implement them (including traditional authorities). • Draft a regulation to the Forestry Act that incorporates the procedural requirements and clarifies the institutional and stakeholder roles described above. • Incorporate specific guidance within the regulation on what tenure rights are associated with co-management and community management. • Review existing management plans and develop a template that can be tailored to various types of co-management arrangements. • Develop and deliver training modules to build the capacity of forest officers, community forest institutions, traditional authorities and other relevant stakeholders to implement and enforce PFM.
Risk of elite capture of land and forest tenure rights under REDD+	<p>Put safeguards into the tenure reform process to ensure that the rights of vulnerable individuals and groups are protected.</p> <p>Incorporate proactive measures and policies into the Land Bills that have been proposed to ensure equitable access to land and resources for traditionally marginalized populations.</p>	<ul style="list-style-type: none"> • Clarify the legal definition of customary law in the Customary Land Bill to ensure that its application is equitable, transparent and accountable in relation to customary land administration. • Department of Forestry should consult with communities, traditional authorities and vulnerable stakeholder groups to create a participatory process for clarifying the content of customary tenure laws and practices, one that considers the need for safeguarding the rights of women and other vulnerable groups. • Clarify the legal relationship between traditional authorities, the customary land committees proposed under the Land Bills, and the local forest institutions existing under the Forestry Act, to ensure transparency and accountability of land allocation and management decisions and alignment of forest and land policy implementation. • Clarify the status of customary forest tenure rights pursuant to the Land Bills under consideration, as well as who has regulatory and enforcement oversight of those lands. • Incorporate principles of non-discrimination and equality in the Land Bills and in a Forestry Act amendment. • Legislate guaranteed procedural rights of access to information, participation in decision-making and access to justice in the Land Bills and a Forestry Act amendment (or regulation) (see details in recommendations on procedural rights below). • Develop capacity building and training materials on land/forest rights and the reform process tailored to women and other vulnerable groups.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/ requirement	Recommended responses	Specific actions
No legal definition of carbon or carbon rights	Regulate carbon rights so they are not severable from rights to forests.	<ul style="list-style-type: none"> Clearly define carbon and carbon rights under a Forestry Act regulation or amendment and in the proposed Land Bills.
<p>Lack of legal basis for effective enforcement</p> <p>Lack of enforcement capacity</p> <p>Corruption</p>	<p>Strengthen forestry legal/regulatory provisions to enable more effective enforcement.</p> <p>Build technical capacity across all enforcement stakeholders to implement the new requirements.</p>	<ul style="list-style-type: none"> Amend the Forestry Act or create regulations that stipulate procedural requirements for all aspects of inspection, monitoring and enforcement, in order to create a transparent and uniform process that can be tracked and where officials can be held accountable for enforcement failure. Create guidance on forest inspections and train officers and their counterparts in the police. Develop joint monitoring and enforcement requirements between the Department of Forestry and the Department of Mines for mining licenses on forest land. Train forest officers, judges, prosecutors and community forest institutions on how to apply requirements under the Forestry Act and relevant regulations. Create specific access to information and accountability requirements within the Forestry Act or through regulations to ensure that all enforcement-related information is made public, and define the limited circumstances under which exceptions can be made (e.g. national security, proprietary information). Revise the penalties section of the Forestry Act through a regulation that can be updated as necessary to raise fines and sentences, so they act as effective deterrents. Develop administrative procedures within DoF for initial enforcement activities and create an enforcement department to implement them. This should include processes for issuing warnings, for administrative reviews and penalties for initial offenses, and for coordinating with the court system when the administrative process is unsuccessful in achieving compliance. 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 and permits (e.g. lack of previous violations). This information should be publicly available to enable transparency and accountability in decision-making and enforcement. Formalize the process for setting up local forest organizations and concluding forest management agreements (or co-management agreements) so that both communities and forest staff are able to come to the process on equal footing and be accountable to the process (see recommended actions for participatory forest management). In line with the recommendations of the corruption risk assessment, revise the Forestry Act (or include a regulation) 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.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/ requirement	Recommended responses	Specific actions
Lack of legal basis for requiring effective stakeholder engagement for REDD+	Regulate requirements for improved stakeholder engagement and transparency/accountability.	<ul style="list-style-type: none"> • At a minimum, new legislation (or regulations) should incorporate specific requirements for participation in REDD+ policy and decision-making processes: which government agencies must be consulted, when and how; how the broader range of stakeholders and the public will be engaged; and what opportunities will be made available to inform decision-making in a meaningful way. This should include: <ul style="list-style-type: none"> - creation of ongoing institutional platforms for multi-stakeholder and intersectoral coordination (see recommended actions regarding RExG); - clear set of procedural requirements for when and how to consult with communities and other stakeholders on rule making (setting regulations); permitting/licensing; granting (and revoking) of concessions; creation of any form of management agreement; and during other administrative decision-making processes; - clear set of procedural requirements for community consultation in the establishment of LFOs/VNRMCs and on any decisions taken on forest or tree tenure, including defining the “community” that is being represented and specifying the measures to be taken to consult marginalized members of the community and to ensure their meaningful representation by local institutions/decision-makers; - specific requirements for making information about matters relating to forests and REDD+ publicly accessible in a timely manner with limited and well-defined exceptions for withholding information; - 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 draft Environmental Management Bill is not in line with international best practice and should be reviewed and amended for these purposes).
Lack of effective intersectoral coordination mechanisms	<p>Create a specific coordination mechanism for REDD+.</p> <p>Improve involvement of DoF and RExG TWGs in other sectoral coordination mechanisms.</p>	<ul style="list-style-type: none"> • Create an intersectoral REDD+ steering committee to oversee the development of the national REDD+ strategy. • Refine ToRs of RExG TWGs to ensure cross-sectoral participation, and clarify reporting and participation requirements of the National Technical Committee on Climate Change (supported by PERFORM). • Build technical capacity of TWGs to create and implement work plans to support the national REDD+ programme (supported by PERFORM). • Ensure that the broader, multi-stakeholder group that has functioned as RExG is expanded to provide a consistent platform for engagement in REDD+ decision-making. • Ensure that RExG TWGs and/or the REDD+ focal point participate actively in the Ministry of Lands Governance TWG (to address tenure issues and land use planning coordination) and NTCCC (to ensure that REDD+ is mainstreamed into national climate change planning). • Develop a consultative mechanism with EAD to ensure that DoF input into institutional reforms reflects the needs of the Malawi REDD+ Programme and supports the national REDD+ strategy.

Table 3: Options for addressing the priority issues raised in the assessment

Issue/ requirement	Recommended responses	Specific actions
<p>Policy/legal incoherence across sectors relevant to REDD+</p>	<p>Address overlapping mandates among the land, forest and environment ministries.</p> <p>Address specific inconsistencies in sectoral laws that will impact REDD+ implementation.</p>	<ul style="list-style-type: none"> • Through regulations define the role of traditional authorities in community-based and co-management institutions (VNRMCs and BMCs) in order to clarify participatory forest management (PFM) more broadly (see details in recommendations on PFM). • Clarify the relationship and mandates for regulatory oversight of village forest areas between the land administration proposed in the Customary Land Bill and MNREM, and clearly set forth requirements in amendments/regulations. • Amend section 34 of the Forestry Act to reflect requirements for obtaining tenure rights under PFM arrangements. • Stipulate consultation requirements for land use planning processes under the proposed Land Bills and the Physical Planning Bill in order to ensure that the Department of Forestry can provide input and align land use planning with forestry policy. • Department of Forestry should assess whether the catchment management process under the National Water Resources Act provides an effective umbrella for integrating natural resource planning and management at the district and local levels. This process should include consultations with EAD on the implications of the institutional reforms proposed under the Environmental Management Bill. • Incorporate REDD+ activities as triggers for SEA/EIA under the Environmental Management Bill as a tool for preventing intersectoral conflicts. • Develop a consultative process between EAD and DoF to ensure that the biodiversity aspects of REDD+ safeguards are integrated into NBSAP II implementation. • Develop coordination mechanism between the Ministry of Lands and the Department of Forestry to address current conflicts in land and forest tenure provisions. Specific mechanisms for coordination include: <ul style="list-style-type: none"> - engaging RExG Policy and Governance TWG members in the Land Governance TWG at the Ministry of Lands; and - addressing coordination issues as part of broader intersectoral coordination (i.e. establishment of a multisectoral REDD+ steering committee). • Create procedural requirements to ensure consultation with the Department of Forestry and with community-based forest management institutions before mining licenses on forest land are granted. • Develop joint monitoring requirements for mining licenses in forest reserves.

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Annex B: 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
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
Moses Zuze	Economist	Ministry of Local Government and Rural Development

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 C: 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	Makhambere	Department of Forestry	Deputy Director	Lilongwe
Troell	Jessica	Environmental Law	Senior Attorney	Lilongwe
Yakuwawa	Msiska	Malawi Law Commission		Lilongwe

Annex D: Validation workshop A

Legal and policy frameworks assessment for REDD+ in Malawi for the RExG Governance and Policy Technical Working Group

17 December 2015
Sunbird Capital Hotel, Lilongwe, Malawi

This one-day workshop brought together members of the RExG Technical Working Group on Governance and Policy and selected other individuals to review and provide feedback on the draft REDD+ legal and policy frameworks assessment. The list of participants is provided at the end of this report. Consultants Jessica Troell and Gracian Banda presented the work and then facilitated two hours of discussion.

The presentation covered the research and fieldwork undertaken by the consultants and then a detailed overview of the findings and options for addressing the issues raised. This workshop was convened in advance of a larger stakeholder validation workshop to enable discussion of some of the more policy-oriented issues. The Director of Forestry, Dr Clement Chilima, was in attendance and participated for the majority of the discussions. The Chairman of the Governance and Policy Technical Working Group, Mr William Chadza, chaired the workshop sessions.

Opening session: Welcome remarks and opening statement

In the absence of Ms Stella Gama, REDD+ Focal Point (who joined later in the workshop), Deputy Director of Forestry Nyuma Mghogho provided opening remarks, followed by a welcome and introduction by Director Chilima. Dr Chilima stressed the critical importance of the legal frameworks in facilitating REDD+, but also in supporting Malawi's broader goals for sustainable and equitable forest management. The director placed the legal and policy frameworks assessment (LPFA) in the context of the broader support being received by the Government of Malawi from the UN-REDD Programme and thanked the FAO, UNDP and other agencies providing support. Dr Chilima noted that the assessment was critical to all other aspects of forest and REDD+ reforms and asked participants to actively support and lend their expertise to ensure the recommendations are tailored appropriately and are able to be implemented.

Overview of the assignment and presentation of the report by Ms Jessica Troell

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

larger integrated package of support to facilitate the creation of a national REDD+ strategy for Malawi. The assessment builds on other components of the total package of support provided by the UN-REDD Programme.

Ms Troell then went on to present the assessment itself, giving an overview of the relevant international legal frameworks governing REDD+, as well as the domestic legal requirements for REDD+ implementation. Ms Troell then provided an overview of key areas of legal preparedness in Malawi and highlighted where there are gaps and/or issues that need to be addressed, including:

- need for clarity on specific responsibilities under a REDD+ regime;
- need for improved cross-sectoral coordination and decision-making mechanisms;
- options for REDD+ institutional arrangements;
- Malawi's preparedness for meeting the Cancun Safeguards;
- legal implications of the findings of the NFMS roadmap;
- options for managing REDD+ funding under existing and proposed legislation;
- need and options for clarity on legal definitions of forests and other REDD+ terminology;
- need and options for improved stakeholder and public participation in decision-making and REDD+ implementation;
- options for addressing issues related to the existing legal and institutional frameworks for participatory forest management in Malawi;
- options for addressing issues related to tenure security and clarity (land and forest);
- options for benefit sharing arrangements;
- issues and options for improving compliance and enforcement;
- critical legal developments in Malawi (Land Bills, proposed Environmental Management Act, etc.) and gaps with respect to REDD+; and
- cross-cutting governance issues related to corruption, transparency and accountability.

Discussion and prioritization of issues, facilitated by Mr Gracian Banda

The consultants proposed a series of discussion questions, which were accepted by the participants, and the following points were raised in the context of those questions.

Dr Chilima asked whether the consultants had provided concrete recommendations for definitions of forests and REDD+ incorporation in law. The consultants responded that many of these recommendations were made in the report and built directly on the work undertaken by DoF and the U.S. Forest Service to create land use and land cover standards for Malawi.

Dr Chilima then asked about the concept of benefit sharing, and noted that there are conflicts of interest with relation to tenure of forested lands. He stressed that there needs to be a decision of how much cutting can be allowed under community-based forest management schemes. The consultants noted that while it was an important finding that many communities did not feel the benefits they were receiving were adequate, future benefits did not necessarily need to be in the form of timber. There is a need to identify the range of benefits acceptable to communities in order to engage in sustainable forest management and REDD+, including those related to watershed services. A consultative process is required for this.

Dr Chilima also raised the issue of creating a new fund specifically for REDD+. He commented that there is a plethora of existing and proposed funds and we need to be careful not to create administrative burdens.

Alinafe Chibwana, REDD+ Secretariat and PERFORM Project, noted that the definition of a forest has been contentious and ultimately was defined as a technical issue and not a policy one. He agreed it was time again to raise the issue of its legal implications. He also noted that the boundaries of forest reserves are implicated in this definition and the definition of other protected areas and that the assessment should

consider this as well.

Mr Chibwana also noted that the question of an “institutional home” for REDD+ was raised by an earlier study undertaken by PERFORM, but it had not addressed the full scope of the issue. He believed it was a good time to ask these questions in light of the Paris agreements.

Mr Blessings Mwale, DCOP of the PERFORM Project, wanted to know how consultative the process was for the drafting of the Land Bills. His concern was that chiefs seem against the bills and that if they pass there will be a power imbalance and more land degradation. The consultants agreed that this is a key area related to tenure of land and forests, as the role of traditional authorities is still unclear under the Land Bills, and if the bills are passed, there is the potential for the creation of a vacuum of authority in the implementation phase. More clarity is needed on the role of traditional authorities on the proposed land administration committees under the Customary Land Bill.

Mr Mwale also noted that there is a need to define more clearly what information is given to stakeholders when they are consulted, to ensure they are able to participate effectively. He provided an example of conflicts in some forest reserves between mining revenues and the potential related to conservation of resources.

Henry Utila of FRIM raised the issue of defining what constitutes a “forest-dependent community” and how far from the forest they can be located. The consultants agreed that this has created tensions, especially where people have been relocated and are now not eligible for the benefits of community-based forest management or REDD+ on reserves.

Mr Utila also commented on the institutional arrangements in terms of implementing REDD+, and stressed that he thought there needed to be more review of legislation and clear guidelines on when and how to do this.

Deputy Director Nyuma Mghogho commented that REDD+ should remain within the Department of Forestry, as removing it would threaten the existing momentum. However, she stated that to build on the momentum, there needs to be more work done to increase REDD+ visibility and to improve ownership. She agreed with the proposal in the assessment to have a REDD+ steering committee with DoF as the coordinator, but tied to other initiatives under climate change, and maintaining the links to the National Steering Committee on Climate Change and the National Technical Committee on Climate Change.

Ms Troell asked the participants whether they could be specific about the challenges presented by the current institutional arrangements with respect to intersectoral coordination. Mr Chibwana responded that there is not enough staff to work on REDD+. There are plans to expand staffing, but existing staff cannot take on further responsibilities. He noted that there was a past proposal for a national programme for REDD+, which would be supervised by DoF as head of the REDD+ steering committee, and would have the ability to hire staff to undertake activities and responsibilities related to REDD+.

Dr Chilima noted that the institutional issues depend on which phase of REDD+ we are talking about. Currently, the institutional “home” is already decided, but once we have a national REDD+ strategy, we will need to consider the more complex issues raised in the assessment. He suggested following the recommendation made in the assessment to continue strengthening existing structures and propose necessary changes pursuant to the national strategy.

Another participant suggested that this could include designating a person within DoF to act as the intersectoral coordination point person.

Mr Chibwana noted that the proposal within the assessment to consider aligning REDD+ with catchment

management has been made at local and district levels.

A discussion then ensued related to the need for legislative or regulatory reforms and the feasibility of achieving REDD+ goals with smaller regulatory amendments versus the need for a new forestry law. Ms Stella Gama remarked that we need a two-pronged approach that addresses both. The revision of the Forestry Act needs to be more comprehensive, and we also need to include new regulations under the act.

Ms Troell raised the possibility of developing a legal drafting technical committee or task force to ensure that issues would be prioritized effectively, and also to ensure cross-sectoral integration/coordination. Ms Gama agreed with this approach. Ms Troell asked whether participants had any specific priorities that they felt should be addressed as a pressing matter. Mr Chibwana noted that we could use the roadmap to provide sequencing of events, and that we need to first focus on adopting the new National Forestry Policy to guide the legal drafting task force.

Mr Chadza noted that the task force should build on the existing Technical Working Group on Governance and Policy and co-opt members with legal and policy expertise, and he agreed that technical people need to drive the legislative process.

The consultants then explained the next steps, including a further review session as part of a larger series of events coordinated by the UN-REDD Programme in January or February, and asked for comments on the assessment by 8 January 2016. Ms Mghogho thanked the consultants for a thorough and compelling presentation and discussion and closed the meeting.

Participant list

Name of institution	Participant
Department of Forestry	Patricia Masupayi
Department of Forestry	Nyuma Mghogho
Department of Forestry	Henry Kadzuwa
Department of Forestry	Stella Gama
Department of Forestry / PERFORM	Alinafe Chibwana
PERFORM	Jennifer Graham
PERFORM	Blessings Mwale
Director of Forestry	Dr Clement Chilima
Department of Environmental Affairs	Walunsi Wisiska
Forest Research Institute of Malawi	Henry Utila
Centre for Environmental Policy and Advocacy	William Chadza
Centre for Environmental Policy and Advocacy	Gracian Banda
SRGDI	Aques Mangoche
ELI	Jessica Troell

Annex E: Validation workshop B

Policy, legal and institutional frameworks assessment for REDD+ in Malawi

23 March 2016
Crossroads Hotel, Lilongwe, Malawi

Background and introduction

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 (LPFA);
- tenure frameworks assessment;
- institutional and context analysis;
- corruption risk assessment;
- roadmap for a national forest monitoring system; and
- knowledge management support.

This validation workshop was called to validate the report on the legal and policy frameworks assessment (LPFA). The report provides a thorough analysis of Malawi's existing and developing policies, laws and regulations, as well as the institutional frameworks and procedures that are in place for implementing and enforcing them. The broad objective of the assessment is to identify existing capabilities and inventory the gaps and needs of Malawi's policy and legal frameworks for implementing REDD+, in order to support the Government of Malawi and other stakeholders in filling the prioritized needs based on input from a wide range of stakeholders. Preliminary consultative meetings have taken place with the RExG Governance and Policy Technical Working Group and with senior staff of the Department of Forestry. The current version of the LPFA report has incorporated the feedback received at these previous events as well as comments received from other government, NGO, community, donor and UN-REDD stakeholders.

Presentation of the legal and policy frameworks assessment

The report on the assessment was delivered by Mr Gracian Banda, one of the two consultants on the assignment. In his presentation, Mr Banda informed the participants that the process commenced with an inception meeting in April 2015, which was attended by a number of stakeholders from the public, private and civil society sectors who have an interest in REDD+ readiness and implementation. In addition, the consultants met with a number of stakeholders in individual interviews and focus group meetings. The consultants have also shared preliminary findings and a draft report with members of the RExG Technical Working Group on Governance and Policy, as well as at a consultative workshop held in December 2015 with government officials. The comments and recommendations from these various consultative meetings and workshops have been incorporated in the LPFA report, which is being presented today.

The objectives of the LPFA were to:

- Determine how Malawi's domestic policy and legal frameworks can support REDD+ readiness and implementation.
- Identify any gaps or overlaps across relevant sectors.
- Provide options and recommendations for how the Government of Malawi can tailor or amend

its policy and legal frameworks and build the necessary capacity to effectively implement and enforce its laws to support REDD+.

Mr Banda highlighted a number of key issues that arose from the assessment. Some of the key findings are as follows:

- Strong sectoral policies are in place but there are failures in implementation, including gaps in legislation.
- There is a lack of policy and legal coherence across sectors.
- Effective cross-sectoral and intergovernmental coordination mechanisms are lacking.
- There is a need to align/harmonize institutional and planning frameworks for decision-making on land and natural resources.
- There are key substantive and procedural gaps in existing and proposed legislation.
- Capacity for implementation and enforcement is lacking.
- Developing policy and legislation is promising.
- The Malawi REDD+ Programme (MRP) lacks legal status. There is no official mechanism for integrating it into policy- and decision-making in the Department of Forestry (DoF) and beyond.
- REDD+ lacks sufficient cross-sectoral decision-making and support. Establishing a REDD+ steering committee could complement existing structures, drawing on expertise and raising the prominence of REDD+ in DoF, and facilitating integrated planning and better coordination across sectors.
- Looking forward, capacity is needed to expand or manage various aspects of REDD+ implementation, for example the coordination of monitoring activities and oversight of adherence to safeguards.

The presentation then focused on the recommendations and proposals that need to be addressed in order to make Malawi ready for REDD+. Participants were organised into two groups to review the proposals and recommendations and to point out any gaps or weaknesses that needed to be dealt with before finalising the LPFA report.

Group deliberations

Group 1

Group 1 adopted the proposals and recommendations and made additional suggestions as outlined below:

Policy and legal issues for the national REDD + strategy

- Pursuant to the roadmap for a national REDD+ strategy, define specifically the roles of DoF, REXG and its TWGs, and the need for engaging other government departments (e.g. EAD, Ministry of Lands), as well as consultation requirements for the broader multi-stakeholder group to ensure effective technical input and stakeholder engagement in the development of the national REDD+ strategy.
- Continue to build the capacity of DoF, TWGs, the REXG Secretariat and other implementing government agencies to effectively develop and implement the national REDD+ strategy.
- Provide a legal basis for the REDD+ institutional architecture within DoF. This could be done through a new regulation under the Forestry Act or amendments to the Forestry Act.
- Establish a REDD+ steering committee, either within DoF or chaired by DoF and with participation of other relevant sectors, to facilitate closer collaboration and integrated, cross-sectoral planning.

Additionally, Group 1 emphasized that DoF and MRP should:

- Work with communities and provide capacity support for community contribution to the REDD+ strategy, because communities are the ones who will implement the strategy.
- Provide a framework for communities to participate effectively in the strategy development and implementation process.
- Clearly delineate the roles of communities and emphasize the recommendations (below) on stakeholder engagement.

Policy and legal issues related to the institutional architecture for REDD+ implementation

- Continue to strengthen the capacity for REDD+ implementation within the Department of Forestry, including building the capacity of the REDD+ Experts Group and the TWGs and hiring new staff as necessary.
- Work closely with the Environmental Affairs Department (EAD) to determine how best to integrate REDD+ into the new institutional frameworks proposed under the Environmental Management Bill.
- Provide a legal basis for the REDD+ institutional architecture within DoF. This could be done through a new regulation or an amendment to the Forestry Act.
- Establish a REDD+ steering committee, either within DoF or chaired by DoF and with participation of other relevant sectors, to facilitate closer collaboration and integrated, cross-sectoral planning.

Additionally, Group 1 emphasized that:

- The institutional architecture for REDD+ should include local communities and other stakeholders (private sector, academia, CSOs, FBOs etc).

Policy and legal issues for the national forest monitoring system

- Conclude a Memorandum of Understanding among the various entities responsible for data gathering and management to guide effective coordination in relation to land monitoring.
- Specify the institutional mandate for forest inventories and procedural requirements for gathering, maintaining and sharing such data in a regulation to the existing Forestry Act and/or as an amendment as the Forestry Act is revised. This should include planning, quality control, archiving and other functions that the current legal framework does not address.
- Specify the institutional mandate for undertaking a greenhouse gas inventory and related planning, quality control, data collection and dissemination requirements in the appropriate legal instrument. With the development of a new institutional framework under the draft Environmental Management Act, it may be most effective to designate specific responsibilities under the envisioned Climate Change Committee, which will sit under the proposed National Environmental Protection Authority that will replace the EAD. As with many other components of REDD+, there will need to be an official institutional coordination mechanism between the Climate Change Committee, the new authority and the REDD+ management institutions under DoF.
- Specify the institutional mandate for forest reference level setting and any requirements for interagency consultation and technical assistance, either as part of amended forest legislation or a subsidiary regulation.

Policy and legal issues related to safeguards

- Create a participatory, national process for identifying social and environmental safeguards and a safeguards information system.
- Strengthen stakeholder/public participation in forest and climate sectors through regulatory or legislative procedural requirements for engagement in decision-making and redress mechanisms.
- Introduce specific accountability measures into key decision-making processes (e.g. licensing, concessions, management planning).

- Clarify and streamline the process and requirements for establishing PFM institutions and management plans.
- Define in legislation or a regulation the mechanisms for equitable benefit sharing.
- Define REDD+ terms, including “forest” and “natural forest”, in line with recommendations of the land use/land cover proposal by the U. S. Forest Service.
- Define “forest-dependent community” and requirements for where FPIC may be applicable to ensure active and equitable participation of all relevant stakeholders, including marginalized stakeholders, in REDD+ decision-making.
- Align NBSAP II and the REDD+ strategy and create a formal consultative mechanism for addressing forest biological diversity on an ongoing basis.
- Strengthen enforcement provisions and capacity.
- Align strategic environmental assessment requirements with safeguard needs, including more elaborate protections against social risks.
- Establish accountability and fiscal responsibility requirements as part of the UN-REDD Programme’s finance mechanism(s).
- Strengthen the regulatory basis for ensuring marginalized stakeholders (including women) are engaged effectively in REDD+ planning and decision-making.
- DoF should engage more actively with the Ministry of Lands (and the Land Governance Task Force) to ensure that forest protection and equitable allocation of resources are considered integrally in the implementation of legislative reforms.
- Continue to strengthen (and provide legal basis for) REDD+ management structures that are capable of fostering more effective intersectoral coordination for REDD+ planning and implementation (including consideration of the establishment of a REDD+ steering committee).

Additionally, Group 1 emphasized that DoF and MRP should:

- Include an aspect of environmental education.

Participatory forest management and stakeholder engagement

- Review existing guidance on PFM and co-management to distil essential procedural requirements and address identified challenges in implementation.
- Review existing management plans to create a template that will be tailored to various types of co-management arrangements.
- Revise existing management plans as appropriate.
- Clarify the legal basis for VNRMCS versus other local institutions with a mandate for forestry management (LFOs), and how they should coordinate with other community-based resource institutions.
- Draft regulations to formalize certain basic requirements for establishing VNRMCS/LFOs and creating and implementing management agreements.
- Work with traditional authorities to ensure their roles are clear and embedded in new regulations/requirements.

Additionally, Group 1 emphasized that:

- DoF and MRP should provide environmental education for local communities.
- Free, prior and informed consent is necessary but it will require time to be implemented.
- DoF and MRP should work with key stakeholders to build their capacity to implement the requirements and tools (cuts across all participation/engagement recommendations).

Group 2

Group 2 adopted all of the proposals and recommendation with minor amendments as follows:

- Provide a framework for working with or empowering local communities.
- Provide a framework for local communities to actually do the work in REDD+ planning and implementation.
- Ensure that the role (and required capacities) of local communities are clearly outlined in the national REDD+ strategy, as communities will be the implementers of the programme.

Policy and legal issues for institutional architecture for REDD+ implementation

- The institutional architecture for REDD+ should include local communities and other stakeholders (private sector, academia, CSOs, FBOs, etc.).

Policy and legal issues for safeguards

- The proposed options are the necessary requirements for Malawi's safeguards/safeguards information system, and they are in the right order and priority.
- Include an aspect of environmental education.

Policy and legal issues for the national forest monitoring system

- The group agreed with all options for action and highlighted that an MoU is already underway to coordinate data gathering and management in relation to land monitoring. The MoU awaits signature of relevant GoM partners/agencies.

Stakeholder engagement and free, prior and informed consent

- Agreement with all options for action.

Participatory forest management

- Include environmental education for local communities.

Participant list

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Department of Forestry	Mr Teddie Kamoto, Assistant Director
Department of Forestry	Mrs Nyuma Mughogho, Deputy Director
Department of Forestry	Ms Patricia Masupayi
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Department of National Parks and Wildlife	Mr Davis Kalima
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Name of institution	Participant
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