

The PNG forest industry, incorporated entities and environmental protection

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At face value, the forest industry in Papua New Guinea appears to be governed by an elaborate Act requiring forest development plans and layers of official approval before one tree can be cut. If you relied on this document as your sole source of information you would come away with the idea that forestry is a closely regulated and monitored industry. The reality is and has been somewhat different.

Despite the new Act coming into force in the early 1990s, the logging industry has been largely unchanged although suffering decreasing productivity (Curtin 2004). The major players have been, and remain, the landowner companies and the foreign logging companies. So-called 'landowner' companies are characterised by shareholders and management who tend mostly to be part of a group supporting a particular leader, such as a provincial politician or a national member of parliament, who has made contact with, or has been contacted by, an overseas logging company (Holzknecht 1996:4). The landowner company agitates in the highest circles to be granted a logging permit, and, when this is successful, the overseas company is contracted to log and

market the timber. Very few of the landowner companies present financial reports of income to the resource owners or send annual returns to the Registrar of Companies. Their management officers usually live extravagantly in the provincial or national capital. At the same time, local politicians are trapped into patron–client relationships with the foreign logging company, a situation that is antithetical to the best interests of the landowners and the industry (Holzknecht 1996:3).

The logging companies ensure that their clients—local leaders and groups of supporters—are kept happy, using these 'representatives' as a comfortable buffer between themselves and the resource owners (Holzknecht 1996:5). Not only does this deprive the resource owners of a participatory role in the project it also diverts profits through the landowner company to a small minority of individuals. In conflicts between landowners and logging companies, it is common to find the landowner company executives taking the side of the logging company. They are often even able to enlist the provincial police to arrest or harass the protesting resource owners.

Incorporated Land Groups and landowner companies

In order to remedy the social and environmental effects engendered by these conditions, highlighted by the Barnett Inquiry of the late 1980s (Barnett 1989), the Forestry Act gazetted in 1992 and implemented from 1993 repealed the previous Forestry Act and Forestry (Private Dealings) Act. One of the keys to reform was to form resource owner groups under the Land Groups Incorporation Act (Holzknecht 1996:8). These are customary groups (sometimes clans) who, as empowered by the Act, can make fundamental decisions about their land without reference to any other group or approval from any other group (Holzknecht 1996:9). They are distinct from landowner companies (formed under the PNG Companies Act), which do not have to exhibit a customary relationship between shareholders (Holzknecht 1996:9). According to the new Act, when landowners wish to develop a logging project, they are required to incorporate under the Land Groups Incorporation Act 1974 (Section 57). In most cases, however, it seems that, when landowners proceed to associate with the logging company, they persist in setting up so-called landowner companies in particular to receive financial benefits which accrue to the landowners under the terms and conditions of the Timber Permit (2003/2004 Review Team 2004:29). This is generally promoted by the PNG Forest Authority and the logging companies because it is easier to deal with a single entity than a large number of individual incorporated land groups (ILGs). The 2003/2004 Review Team (2004:28–29) summarised five generally perceived shortcomings of landowner companies. The team recommended that there be ‘... some form of direction (perhaps regulation) regarding a logging project wide

body which properly represents the Incorporated Land Groups’ (2003/2004 Review Team 2004:30). At the same time they recommend that the state provide administrative assistance and guidance to representative bodies until they prove they can manage their own affairs. All this is somewhat puzzling in that the same Review Team reports that landowners commonly feel that the PNG Forest Authority has not properly monitored and supervised logging operations (2003/2004 Review Team 2004:36).

Generally, the commentators (Holzknecht 1996; The 2003/2004 Review Team 2004; Power 1995) seem to approve of the formation of ILGs to organise landowner interests while reserving their criticisms for the landowner companies. The question one asks is why, if the ILG is deemed a singular positive development, is it so singularly ineffective in protecting and promoting landowner interests? Moreover why do landowners still tend to push for the formation of landowner companies, even though they are already supposedly organised along customary lines as ILGs? One might take a closer look at the facts, which establish that ILGs have been less than successful in resolving problems besetting the forestry industry.

The PNG Forestry Review Team’s reports (2001) consist of audits of forestry projects for compliance with the requirements of policy, the Forestry Act and other regulations and guidelines (Lea 2002). Twenty reports drawn from areas in 11 provinces—Western, Madang, West Sepik, East Sepik, Oro, West New Britain, Southern Highlands, Milne Bay, Gulf, East New Britain, and Central provinces—were filed between 5 February and 5 March 2001 and submitted to government through the Interagency Forestry Review Committee and the Chief Secretary. These reports document the general failure of custom, operating

through the legal mechanism of the incorporated land groups and landowner companies, to secure an unambiguous, just, equitable and transparent distribution of benefits.

Only one of the 20 case studies argues that landowner involvement is at an acceptable level—the auditors found both sufficient landowner awareness and ‘adequately documented’ ILGs only in Cloudy Bay, Central Province. Let us now turn to the issue of environmental protection under the new Act.

PNG Forest Authority and the Department of Environment and Conservation

With respect to environmental issues, the new Act was intended to ensure that harvesting occurred at sustainable rates in accordance with environmental standards and with adequate consideration for forest and biodiversity conservation. All forest resources are supposed to be developed according to a National Forest Plan (produced in 1996). Forest Management Agreements are to be drawn up to regulate dealings between the resource owners and the Forest Authority. Environmental plans are to be scrutinised and approved prior to issuing of timber permits. The Act also required National Forestry Development Guidelines (produced in 1993). The two key government institutions are the PNG Forest Authority and the Department of Environment and Conservation. They have put in place more detailed standards and procedures to give operational effect to the policy. These include specific Guidelines for (Environmental Plans for) Forest Harvesting Operations, produced by the Department of Environment and Conservation; and the Planning, Monitoring and Control Procedures for Natural Forest Logging Operations Under Timber Permit, produced by the PNG Forest

Authority; Guidelines for Environmental Monitoring and Management Programmes, Guidelines for Waste Management Plans and so forth (2003/2004 Review Team 2004:1). None of this has worked to improve matters but seems simply to have added new layers of bureaucracy.

Tim Curtin (2004) reports that, as of 2002, few Forest Management Agreements had been granted other than conversions from the former Timber Rights Permits under the old Act, so that for the most part ongoing logging projects were those in operation before 1992. The 2003/2004 Review Team’s reports also clearly indicate that the institutions empowered by the 1991 Act have been ineffectual and the new legislation has essentially been insignificant. The Department of Environment and Conservation is responsible for monitoring and controlling logging companies’ compliance with the terms and conditions of the Environmental Plan and the Waste Management Plan (2003/2004 Review Team 2004:52). The Department of Environment and Conservation also shares a responsibility with the Papua New Guinea Forest Authority for controlling and monitoring compliance with 24 key standards imposed on logging companies by the PNG Forest Authority’s Planning, Monitoring and Control Procedures, which contain an environmental protection basis (2003/2004 Review Team 2004:32). The reports state succinctly that the Department of Environment and Conservation is currently not functioning—there is no evidence that it is achieving anything in its core task of environmental protection and conservation (2003/2004 Review Team 2004:33). The reason for inactivity and lack of monitoring is obvious when you consider that the department’s budget is nearly all soaked up by wages and the costs of running the head office, leaving a very small and declining amount for operational activities. In 2004, the total allocation to the

Department's Environmental Protection and Pollution Control Program, responsible for the fieldwork for the monitoring and control purposes, was K10, 000 (2003/2004 Review Team 2004:52).

The Forest Authority was set up in 1993 and intended to act independently of the logging companies, thus allowing it to ensure loggers' compliance with the 24 key standards. The reports also indicate that overexpenditure in areas other than monitoring and support is drawing resources away from these core functions (2003/2004 Review Team 2004:47). Accordingly, there was found to be insufficient staff at the large project sites to provide proper monitoring. Field-based staff lack the equipment necessary to carry out their tasks and depend on the logging companies to provide office space and communications services (2003/2004 Review Team 2004:50)—so much for independence. Dereliction of other non-environmental responsibilities is also evident. For example, the Forest Authority does not check the Investment Promotion Authority registration of intended recipients of logging companies, thus allowing unregistered landowner companies to receive payments (2003/2004 Review Team 2004:36).

Wealth-creating economic organisations and wealth-redistributing interest groups

To this point, we have seen that the new Forestry Act has sought to remedy the ills of the industry by requiring the involvement of Incorporated Land Groups and by giving greater responsibility to the government and its institutions, even though this has failed in the past. Moreover, all the new Forestry Act and the recently introduced tax system have achieved is the decline of the industry—an industry that earned K233 million in

export revenues in first-half 1997 could only raise 80 million in first-half 1998 (Curtin 2004:9; 2003/2004 Review Team 2004:11). This, Curtin (2004) suggests, may reflect the World Bank and other organisations' desire to stop the logging altogether. It may also reflect the New Zealand government's indirect efforts to persuade South Pacific communities to reject logging operations in favour of other forms of income-generating activities, such as ecotourism (Nizar and Clark 1996).

But a better strategy would see Western governments and financial institutions endeavouring to improve rather than destroy the industry. After all, Western countries tolerate greater levels of logging in their own countries, generating valuable income for their own citizens, while denying the right of other developing economies to gain income from the same activities. If we are really interested in improving the industry, we must step back and consider the dynamics of wealth-creating organisations in order to develop effective remedies.

Francis Fukuyama (1995), in trying to explain the mysteries of successful capitalism, has seized on the element of trust as being the principal trait of the peoples who populate successful capitalist countries like the United States, Japan and the nations of Western Europe. In exploring this insight he allows that the element of trust is essential in the creation of those voluntary organisations, such as the private universities, church groups, news groups, sporting clubs and firms, that make up civil society, the intermediate realm between the family and the state. Economic success, he argues, is dependent on the capacity of individuals to become motivated by trust and move beyond familial interaction and mere reaction to the authority of the state. In doing so, they form relationships based on voluntary association rather than mere social interaction required by family association or political imposition.

These voluntary associations then give civil society its dynamism and resilience. Countries whose civil societies exhibit these features have also succeeded in creating vibrant and wealth-generating economies.

One may become convinced that societies that are capable of creating these voluntary associations, which are dependent on a high degree of trust between people not related by consanguinity, will enjoy greater economic prosperity. However, is the mere presence of voluntary association sufficient to ensure wealth creation? Fukuyama's thesis is, of course, that successful economic activity is produced ultimately not through the coercive authority of the state but rather by business organisation based on voluntary association. At the same time, societies in which individuals are dominated by family ties to the exclusion of other forms of social commitment exhibit 'amoral familism', to use Banfield's (1958) term, which is equally antithetical to successful economic activity. But he points out that not every voluntary association with economic designs is wealth-creating. Fukuyama distinguishes between wealth-creating economic organisations and wealth-redistributing interest groups. His examples of the latter are the mafia, the United Jewish Appeal and the Catholic Church. He states that 'there are societies that are good at producing only interest groups without being able to create effective businesses, in which case sociability will be considered to be an overall liability' (1995:158). He argues that many developing countries only appear to be capable of an excess of this type of organisation. He lists an overabundance of 'parasitic employers' groups, labor unions, and community organisers and a dearth of productive corporations' (Fukuyama 1995:158).

Now let us return to our subject—the forest industry—and apply Fukuyama's distinctions. Fukuyama's analysis will help to explain why forestry in Papua New

Guinea has been a dismal failure in terms of performance and high levels of corruption. We have seen that two of the principal players in the industry are the incorporated land groups and the landowner companies. We need first to ask ourselves whether these organisations represent voluntary associations. In the case of the landowner companies this appears to be so but less so with the ILGs. Clearly the ILG is restricted in terms of its membership—only certain people are eligible to join. Individuals must be related by custom in terms of kinship ties, consanguinity, and so forth. Although the customary relation is never clearly defined it certainly presupposes clan or tribal relationships. As such, it represents an extended familial relationship and therefore is not the sort of voluntary association that Fukuyama has in mind. Leaving all this aside, however, it is also clear, following Fukuyama's characterisation, that both incorporated land groups and the landowner companies are wealth-redistributing rather than the wealth-creating organisations. Neither of these types of organisations has been engaged in the productive activity of logging itself. To put the case bluntly, wealth is created in the logging industry by cutting down trees and transporting them to their markets—neither group has sullied its hands with this type of activity. In an almost pure sense of the term, both represent rent-seeking interest groups seeking to capture a portion of the wealth that has been produced by the activities of the logging companies and redistribute it to their membership. In most cases, it seems these organisations' leaders have been most successful at redistributing most of the captured wealth to the leadership itself.

In effect, however, this means we have at least three wealth-redistributing interest groups—the ILGs, the landowner companies and the government—engaged in a tussle to grab a percentage of the wealth derived from the activities of the wealth-producing

economic organisation. Certainly the government, steadily scaling down its services and increasingly abdicating its responsibility for providing the usual public goods, including the monitoring of logging sites, has come to resemble a mere wealth-redistributing interest group narrowly focused on redistributing wealth to its membership, the politicians and well-placed government officials. It is not surprising, therefore, that we find landowner companies colluding with logging companies to reduce the share paid to others, or government politicians colluding with logging companies to suppress the voice of the landowners in order to secure greater wealth for themselves.

A possible solution

A solution is to eliminate ILGs and landowner companies and then replace foreign logging companies with domestic logging companies. The latter would be companies created on a voluntary basis as public companies according to the Companies Act. Moreover, by requiring that all logging companies be PNG companies, that is, owned and managed by PNG citizens, we could avoid many of the messy problems that the PNG Forestry Amendment Act was designed to overcome. It has failed. One of the obvious problems highlighted by the Barnett Report (1989) that precipitated the legislative reform was irresponsible logging and environmental damage of certain areas. Additionally, the Inquiry highlighted the practice of transfer pricing as a means to avoid fair payment to landowner companies, taxes and royalties. It is out of concern for these issues that the World Bank overreacted and encouraged the government to apply a graduated or progressive excise tax that has severely cut into profits and brought about a decline in forestry. The cut-back in logging activity has clearly delivered a reduction in

abuses, but this is rather like curing a rash by amputating the limb.

But if the government just did away with the Act altogether, including the necessity for ILGs, by requiring that logging companies be owned by PNG citizens, the same results could be achieved with much greater benefit. There would be a similar significant decrease in logging, perhaps even greater, because it would take time to develop these companies. Critics might object, however, arguing that this would destroy the industry altogether because Papua New Guineans have not yet exhibited an inclination or capacity for managing significant logging operations. The obvious counterargument is that at present there is no incentive to get involved because individuals can simply form landowner companies to seize the wealth derived from logging without actually running a logging operation. Once we require logging to be done by PNG companies, this incentive to ride on the activities of foreign firms will be undercut. To gain income from logging, Papua New Guineans would have to get involved themselves. An example of the success of indigenous management of logging activities is in the case of Fiji, where Fijians have formed their own companies to harvest pine and mahogany plantations. These companies are not supervised or government controlled but created by Fijian entrepreneurs. The Director of Fiji Pine describes these Fijian-run companies as one of the success stories of the industry (Duncan 2004:6).

These changes would limit the incentives to engage in transfer pricing, especially if the progressive excise tax were abolished. But what would be the relationship between the 'owners' of the resource and the PNG logging companies? The rules that apply to logging on freehold land should apply to logging on other forms of land—logging should simply occur with the consent of the owner(s) as it currently does on freehold land under the

Act. Thus, all that would be needed is an agreement between two parties which could be in terms of payments calculated on the basis of the value of the logs harvested. Alternatively, if there is a view to creating forest plantations there could be a long-term lease, which unfortunately according to the current state of land tenure transactions in Papua New Guinea would require the usual lease-lease back arrangement through the government. But these moves would avoid the various bureaucratic layers and could thereby avoid the need for bureaucratic supervision through a Forest Management Agreement between customary owners and the Authority to accord with a National Forest plan, which also necessitates the ILG. It would also avoid the other inefficiencies associated with the tussles and collusion between the various current rent-seeking groups.

What about environmental damage? How will it be controlled if the Act is swept away *tout court*? The Barnett Inquiry heavily criticised the government's failure to supervise the industry adequately, a failure which allowed and contributed to the abuses. As Curtin (2004) points out, the new Forestry Act ironically tries to address these problems by expanding the supervisory role of the government, whose institutions have already been judged inadequate. This all brings to mind the US libertarian Tibor Machan (1991) and his attack on the view that environmental protection can be achieved by greater government regulation. Machan excoriated those who hold this opinion, arguing that governments have always been closely aligned with powerful economic interests. The idea that government will champion environmental protection over economic interest, he argues, is woefully misplaced. Certainly Machan's words seem to ring true if we consider the philosophy and actions of the Bush administration in Washington or, as observed by Holzknecht

(1996), the government officials, who align themselves with foreign logging companies against the interests of their own citizens. Machan's preferred solution is development of the common law in which the judiciary rather than the government takes a principled stand against industrial activities that cause damage to persons or the environment through pollution or destructive practices. Whether this is a reliable solution is questionable, given that it rests on the view that the legal and the political are clearly distinguishable. What is clear, however, is that more government monitoring will be ineffective at best if the government is incompetent. More seriously, expanding government agencies' roles in these circumstances may simply create opportunities for more rent seeking and political corruption. On the other hand, the government could easily enact legislation setting environmental standards and then leave it to the courts and judicial system to develop the law and enforce sanctions through the usual litigation processes. Alternatively, the common law could be developed, as Machan suggests, to include tortious liability for actions that pollute or degrade the environment.

By scrapping the Act altogether, abolishing the punitive excise tax, and insisting that logging companies be PNG-owned, we will achieve all that the current Act and excise tax have accomplished as well as certain added benefits. It is clear that all that these measures have tangibly done is secure a reduction in logging because, as the 2003/2004 Review Team states, logging is simply no longer profitable (2003/2004 Review Team 2004:11). By insisting that the logging companies be PNG-owned and managed we will initially achieve the same thing, a similar reduction in logging, but hopefully we will also be creating organisations that are actually wealth-creating rather than wealth-redistributing. Certainly this is an improvement over the

Policy dialogue

current situation in which landowners and landowner companies wait opportunistically for foreign-owned logging companies to express an interest in logging their area. Moreover, insisting that logging companies be domestically based will give rise to a multiplier effect as profits generated will be spent within the country rather than repatriated, thus stimulating other wealth-producing activities within the country (see Lea 2000).

Additionally, by insisting on domestically-based logging companies, we will replace idle landowner companies whose observed interests often apparently appear to conflict with those of the landowners (2003/2004 Review Team 2004:29) with indigenously owned logging companies. There would be no need for landowner companies because the logging company would simply deal directly with the landowners. This may well be the optimal outcome given the 2003/2004 Review Team reports fully document a litany of abuses that have been committed by landowner companies, which clearly militate against the interests of the actual landowners (2003/2004 Review Team 2004:29). Ultimately the rules of the Act that apply to freehold should apply to customary landowners—logging proceeds with the consent of the owners. On a fairly simplistic level, this should not be a problem. The logging company operates at a profit, earns cash and therefore some of the money will go to the landowners as rent and payments for the resource. These monies can then be divided between the landowners. But here we run into the very problems that have in part led to the incorporated land group legislation. Most PNG nationals living in rural areas do not have bank accounts and have only a very fleeting acquaintance with handling significant amounts of cash. However, the use of landowner companies and ILGs in handling monies has not really been successful and neither has the creation

of trustees and trust accounts as in the Bougainville case. The solution may be to create accounts for the head of each household and pay the monies directly into these accounts. Under this scenario each household unit would be registered instead of the ILGs. Despite the despair about the splitting of ILGs in the Southern Highlands among the Foe tribal groups (see Power, *The National*, 19 March 2001; 20 March 2001) and their reconfiguration into what appear to be family groupings, this may well be the natural way to proceed. This solution would avoid the ILG altogether and simply recognise family units, setting up accounts for these units and paying money into those accounts.

Of course, this problem would not be so difficult if so-called landowners really did actually possess identifiable property rights. Unfortunately despite the rhetoric, which freely uses the term 'landowners', effective property rights are virtually nonexistent. So-called customary landowners, as individuals, lack the capacity to exclude others, lack the possibility of exclusive use, and lack the right to alienate. Although they may exercise the first two rights on family garden sites and family domiciles, insofar as the areas subject to logging are not found in either of these areas, the usual rights of individual exclusion and exclusive use do not apply (see Ward 1997). Furthermore, it is impossible to assign a value to an individual interest in a collectively owned piece of land according to customary land tenure in these circumstances. There are, in effect, no individual landowners, although we do speak of a form of collective ownership. But, while the collective may claim these rights—the right to exclusive use for the group and the right to exclude people from outside the group—the claims made by the collective resemble the claims that governments make over areas not subject to freehold, or a municipality's claim to park land. To regard

individual clan members as owners of these areas is almost silly because ownership in the accepted sense of the term cannot be applied to the individual in such cases. It is as if a native New Yorker boasted that he was one of the landowners of Central Park or a Londoner claiming to be an owner of Kensington Gardens.

Moreover, creating corporate bodies such as the ILGs to deal with collectively held land virtually abnegates the application of the term 'ownership' altogether, in favour of something that more closely resembles the holdings of the municipality or the state. In these situations, the idea of individual entitlements does not figure as responsibility is given to the corporate body, the municipality, or the state to work out an agreement that supposedly takes into consideration the best interests of the constituency as whole. One needs to remember that, at law, the agents of an incorporated body owe ultimate responsibility not to individuals or even the individual shareholders but to the corporation as a whole. This is the model Papua New Guinea actually adopted when it decided to tackle customary land-tenure issues by introducing corporate bodies such as the ILGs and landowner groups. It should be obvious now that the current situation does little for individuals involved in a collective with a recognised territorial claim. Of course, what this means is that we are also running into the usual problems of agency as the interests of the agent may conflict with those of the principal—as in the case of the landowner company and the ILG or the conflict between the leadership and membership.

Moreover, the conditions for successful collective action will not come about if there is a lack of understanding and agreement. The 2003/2004 Review Team reported that landowners are not a homogeneous stakeholder, although they are treated as

such. Typically, there is a great deal of internal division and factionalism. This actually highlights the importance of voluntary association because the very fact of voluntary association presupposes that there is consensus on a certain fundamental set of principles. In contrast, an ILG based solely on customary relations does not presume voluntary consent or agreement on principles or methods. It is far better simply to resolve all this by paying money directly to family units leaving subsequent distribution and conflict to the dynamics of family interaction. The 2003/2004 Review Team reports that

[g]enerally landowners would prefer direct access to cash rather than seeing funds managed towards community facilities or invested on the community's behalf (2004:206).

It might be worthwhile to consider what people actually want rather than to prescribe elaborate corporate entities whose mechanisms are only grasped by the few.

This means ridding the landscape of ILGs and landowner companies. By scrapping the ILGs and paying money directly to the family unit through the family head we may actually be reinstating the term 'ownership'. By instituting these changes, we can begin to put a value on individual, or at least family interests in land, and thus give meaning to the term individual landowner.

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Policy dialogue

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