

**THE ROLE OF LAW IN SUPPORTING AND STRENGTHENING
OTHER EFFECTIVE AREA-BASED CONSERVATION
MEASURES TO IMPROVE IN-SITU CONSERVATION IN
PAPUA NEW GUINEA**

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SUBMITTED TO THE UNIVERSITY OF CAPE TOWN

in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law

UNIVERSITY OF CAPE TOWN

Date of submission: 13 February 2025

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Date

Acknowledgements

To Stan, thank you for your patience, encouragement, and confidence that this would all come together. To Fleur and Wilder, thank you for making life more fun. Your love and laughter are a constant reminder of what truly matters. I hope that our make-believe adventures will someday inspire your reality. To Sandy, thank you for your guidance and expertise. Your support and thoughtful feedback were exceedingly appreciated in shaping this thesis.

Abstract

This thesis explores how the law can support and strengthen Other Effective Conservation Measures (OECMs) as a tool to improve *in-situ* biodiversity conservation in Papua New Guinea. The research is undertaken through two methodological components. Part I reflects on what is the role of law in supporting and strengthening OECMs. This examines the evolution of conservation thinking that has led to the inclusion of OECMs within the modern international conservation discourse. Having outlined the broad context, the thesis proposes a theoretical legal framework for recognising OECMs, structured on the IUCN guidance for recognising and reporting OECMs. Part II narrows to examine the application of the theoretical context to a domestic model. The dominance of customary land tenure and legal pluralism in Papua New Guinea provides an interesting study to develop a deeper understanding of the role of law in supporting and strengthening OECMs for improved area-based conservation. To establish the legal foundation, the thesis provides a broad overview of Papua New Guinea's policies and laws with potential relevance to OECMs. This then underpins a critical review of the policy and laws against the theoretical legal framework developed for OECMs in Part I. Finally, the thesis reflects upon the domestic opportunities and reforms required to strengthen and support the recognition, regulation, and reporting of OECMs within Papua New Guinea. OECMs could afford a mechanism to expand the discourse of what is desirable and acceptable as defined by national protected area legislation without necessitating the adoption of new provisions through the inclusive recognition of laws that may exist within the multiple legal systems of a state. Within the context of Papua New Guinea, it is argued not to present OECMs as a new mechanism but rather to afford recognition to existing area-based conservation measures found within sub-national legislation and customary laws as given effect by the Constitution and Organic Law on Provincial Governments and Local-level Governments. A new Protected Areas Act has enacted changes that could risk overstating the protected area coverage as not all recognised areas will meet the IUCN definition of a protected area. To promote clarity and consistency, it will be critical for the law to explicitly identify the context and parameters that will differentiate OECMs from protected areas within the domestic context. Although the central message of the Kunming-Montreal Global Biodiversity Framework has been to conserve at least 30% of terrestrial, inland water, coastal, and marine areas by 2030, coverage alone does not translate into effective biodiversity conservation. States will need to address the target's qualitative elements, such as being effectively managed, ecologically representative, well-connected, and equitably governed. While most states globally have established laws for protected areas, and perhaps OECMs, many are laced with weaknesses and gaps that hinder the realisation of equitable and effective governance and management regimes. The IUCN's recent guidance on OECM encourages the review of existing policies, laws, and regulations with potential relevance to OECMs, yet explicit considerations of the role of law are under-explored. Despite a growing body of literature and research relevant to OECMs, few studies directly engage with the Papua New Guinea and broader Pacific context. This thesis seeks to advance the legal recognition, regulation, and reporting of OECMs to more equitably acknowledge conservation efforts by a range of actors and stakeholders.

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Acronyms and Abbreviations

CCDA	Climate Change and Development Authority
CBD	Convention on Biological Diversity
CCAMLR	Convention for the Conservation of Antarctic Marine Living Resources
CEPA	Conservation and Environment Protection Authority
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CMS	Convention on the Conservation of Migratory Species of Wild Animals
Constitution	Constitution of the Independent State of Papua New Guinea (1975)
COP	Conference of the Parties
CTI	Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security
EEZ	Exclusive Economic Zone
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
FPIC	Free, Prior, and Informed Consent
GAPA	Governance Assessment for Protected and Conserved Areas
ICCA	Territories and Areas Conserved by Indigenous Peoples and Local Communities
ILO Convention 169	ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries
IPLC	Indigenous Peoples and Local Communities
IUCN	International Union for Conservation of Nature
JPPBPC	Joint Provincial Planning and Budget Priorities Committee
JDPBPC	Joint District Planning and Budget Priorities Committee
KBA	Key Biodiversity Areas
KMGBF	Kunming-Montreal Global Biodiversity Framework
LLG	Local Level Government
LMMA	Locally Managed Marine Area
LMCA	Locally Managed Conservation Area
MEPCA	Management Effectiveness of Protected and Conserved Areas
MoU	Memorandum of Understanding
NbS	Nature-based Solutions
NBSAP	National Biodiversity Strategy and Action Plan
NCC	National Conservation Council
NEMS	National Environment Management Strategy
NGDP	National Goal and Directive Principle

Noumea	Convention for the Protection of the Natural Resources and Environment of the South Pacific
OECD	Other Effective Area-Based Conservation Measures
OLPGLLG	Organic Law on Provincial Governments and Local-Level Governments
PAME	Protected Area Management Effectiveness
PNG	The Independent State of Papua New Guinea
PNGFA	PNG Forest Authority
PoWPA	Programme of Work on Protected Areas
PPA	Privately Protected Area
REDD+	Reduce Emissions from Deforestation and Forest Degradation plus conservation, the sustainable management of forests, and enhancement of forest carbon stocks
Ramsar	Convention on Wetlands of International Importance especially as Waterfowl Habitat
SAGE	Site-level Assessment of Governance and Equity
SAPA	Social Assessment for Protected and Conserved Areas
SBSTTA	Subsidiary Body on Scientific, Technical and Technological Advice
SMA	Special Management Area
SPA	Strategic Priority Area
SPREP	Secretariat of the Pacific Regional Environment Programme
SPREP Treaty	Agreement Establishing the South Pacific Regional Environment Program
Stockholm Conference	United Nations Conference on the Human Environment
UNCCD	United Nations Convention to Combat Desertification
UNCED	United Nations Conference on the Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNDHR	United Nations Declaration of Human Rights
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNHRC	United Nations Human Rights Council
WDPA	World Database on Protected Areas
WD-OECD	World Database on Other Effective Area-Based Conservation Measures
WHC	World Heritage Convention
WMA	Wildlife Management Area

Chapter 1 Introduction to the Research

Global biodiversity may be approaching a critical tipping point as scientific evidence suggests an accelerated decline of biodiversity.¹ In response, the international community has united under the Convention for Biological Diversity² (CBD) to take collective action against the escalating threats to biodiversity. The CBD's Kunming-Montreal Global Biodiversity Framework (KMGBF) emphasises this commitment through Target 3 that aims to conserve at least 30% of terrestrial, inland water, coastal, and marine areas by 2030 through a system of protected areas and other effective area-based conservation measures (OECMs).³ Notably, coverage alone is not sufficient to ensure meaningful biodiversity conservation.⁴ Target 3 qualifies that protected areas and OECMs should strive to be effectively managed, ecologically representative, well-connected, and equitably governed.

Despite calls for the expansion of the global network of protected areas and OECMs, the planet's finite space could hinder the realisation of targets. An escalating global population⁵ could exacerbate challenges as evidenced by a mounting body of research that highlights a strong correlation between biodiversity decline and anthropogenic drivers such as habitat loss and fragmentation due to over-exploitation and intensifying changes in land and sea use.⁶ Given the shared planetary boundaries of humans and nature, achieving a balance between environmental and socio-economic needs becomes crucial to ensuring the equitable use of space.

Protected areas alone are inadequate to meet the mounting ambition of the international community. The recognition of OECMs afford a mechanism to address key challenges facing area-based conservation through inclusive and equitable approaches that accommodate an array of worldviews and create space for broader participation.⁷ Although the

¹ IPBES *Summary for policymakers of the global assessment report on biodiversity and ecosystem services of the Intergovernmental Science Policy Platform on Biodiversity and Ecosystem Services* (2019) 24; Ceballos, et al. "Accelerated modern human-induced species losses: Entering the sixth mass extinction" (2015) *Science advances*; CBD COP 16 *Decision 16/22: Biodiversity and climate change* (2024) 2.

² *Convention on Biological Diversity* (1992) 31 ILM 818.

³ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) 9.

⁴ Geldmann, et al. "A global-level assessment of the effectiveness of protected areas at resisting anthropogenic pressures" (2019) *Proceedings of the National Academy of Sciences*; Montesino Pouzols, et al. "Global Protected Area Expansion is Compromised by Projected Land-use and Parochialism" (2014) *Nature*.

⁵ Predictions submit that by 2050, 9.7 billion people could inhabit the Earth *UN DESA World Population Prospects 2022: Summary of Results* (2022) 3.

⁶ IPBES *Summary for policymakers of the global assessment report* (2019) 33; Montesino Pouzols, et al. "Global Protected Area Expansion is Compromised" (2014) *Nature*.

⁷ Dudley, et al. "The Essential Role of Other Effective Area-Based Conservation Measures in Achieving Big Bold Conservation Targets" (2018) *Global Ecology and Conservation* 5.

international community has been slow to explore the role of OECMs,⁸ a growing body of guidance and research is encouraging states to recognise, regulate, and report on a diversity of tools to achieve international commitments.

The historical implementation of the protected area regime in Papua New Guinea (PNG) has demonstrated limitations in achieving effective area-based conservation outcomes.⁹ OECMs could provide an opportunity to think beyond the colonial legacy embedded in existing protected area legislation to embrace locally appropriate conservation measures and afford equitable recognition to traditional systems. The recognition of both protected areas and OECMs would align with the KMGBF Target 3. In the context of PNG, there may be opportunities to recognise existing measures, other than protected areas, that have demonstrated effectiveness within the domestic context. The primary objective of this thesis is to explore the opportunities to support and strengthen the legal recognition of OECMs to improve *in-situ* area-based conservation in PNG.

This chapter will outline the purpose, methodology, scope, and structure of the thesis. It will first briefly introduce the international context that has led to the current guidance for recognising, regulating, and reporting OECMs. This is further explored in Chapter 2 through the evolving discourse that has fostered the inclusion of OECMs into international environmental law. It will then broadly frame area-based conservation in PNG, including the key cross-cutting challenges, that will influence the recognition, regulation, and reporting of OECMs within PNG's policy and legal frameworks.

1.1 THE INTERNATIONAL CONTEXT

The CBD provides the overarching international legal framework for biodiversity conservation. It seeks to foster conservation and sustainable use of biological resources to conserve biological diversity for present and future generations.¹⁰ Achieving the CBD's objective of advancing in-situ conservation¹¹ requires transcending questions of a purely scientific nature as biodiversity loss has consequences for human well-being and sustained social and economic development. The people and communities directly dependent on the local environment for food, clean water, livelihood, health, and well-being are often disproportionately more negatively affected by ecological modifications and associated social and economic repercussions.¹² The recognition of OECMs creates an opportunity to consider more equitable and just approaches¹³ to balance human and ecological needs. As the global community strives to meet the collective goals

⁸ Cook "Progress developing the concept of other effective area-based conservation measures" (2024) *Conservation biology* 3; Laffoley, et al. "An Introduction to 'Other Effective Area-Based Conservation Measures' Under Aichi Target 11 of the Convention on Biological Diversity: Origin, Interpretation and Emerging Ocean Issues" (2017) *Aquat Conserv* 131-132.

⁹ Leverington, et al. *Assessment of Management Effectiveness fo Papua New Guinea's Protected Areas 2017*.

¹⁰ CBD Preamble.

¹¹ CBD Article 8.

¹² IPBES *Summary for policymakers of the global assessment report* (2019) 14.

¹³ Jonas, et al. "Will 'other effective area-based conservation measures' increase recognition and support for ICCAs?" (2017) *PARKS* 67.

and targets of the CBD's KMGBF by 2030, there is a compelling case for OECMs to engage a range of actors and stakeholders to acknowledge their diverse contributions across a spectrum of area-based conservation measures.¹⁴

1.1.1 Area-based measures under the CBD and the IUCN

The CBD and the International Union for Conservation of Nature (IUCN) have a mutually beneficial relationship for advancing global goals and objectives for area-based conservation. Founded in 1948, the IUCN¹⁵ actively facilitates knowledge sharing, international cooperation, and global policy to advance nature conservation.¹⁶ The establishment of the IUCN as a hybrid intergovernmental organisation comprising both governmental and non-governmental organisations was considered an innovative approach, fostering credibility and advancing scientific research.¹⁷ Committed to collaborating with the CBD, the IUCN has assisted in implementing the Programme of Work on Protected Areas (PoWPA), the Strategic Plan for Biodiversity 2011-2020, and most recently the KMGBF. This alignment of objectives has resulted in the publication of several guidance documents by the IUCN¹⁸ and support to parties to develop National Biodiversity Strategies and Action Plans (NBSAP) under the CBD.¹⁹ Although non-binding, IUCN's decisions, resolutions, recommendations and guidance serve an important function that exposes the evolution of conservation thinking. The information and documents produced by the IUCN assist states and non-governmental partners to develop and refine practices, policies, and legal frameworks. Such collaboration will likely prove advantageous for expanding global targets to support biodiversity conservation.

During the IUCN's 3rd World Parks Congress in 1982, members introduced a target to safeguard 10% of the global land area under protected areas.²⁰ While, for some, this may have been considered unachievable at the time, over the decades to follow the collective targets have undergone a progressive “upscaling of ambition”.²¹ The 2011-2020 CBD Strategic Plan for Biodiversity enhanced the aim by including Aichi Target 11, which sought to protect 17% of terrestrial and inland water areas and 10% of marine and coastal areas.²² However, conservation scientists advanced that the associated quantitative targets were inadequate to conserve biodiversity.²³ The KMGBF seeks to foster biodiversity conservation by

¹⁴ Jonas, et al. “Editorial Essay: Other Effective Area-based Conservation Measures: From Aichi Target 11 to the Post-2020 Biodiversity Framework” (2018) *PARKS* 14-15; Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 5.

¹⁵ Originally called the International Union for the Protection of Nature (IUPN).

¹⁶ IUCN *Nature 2030: One nature, one future* (2021); Holdgate *The green web: a union for world conservation* (2014).

¹⁷ Holdgate *The green web* (2014).

¹⁸ Including the IUCN-WCPA Task Force on OECMs *Recognising and Reporting Other Effective Area-Based Conservation Measures* (2019); Jonas, et al. *Site-level tool for identifying other effective area-based conservation measures (OECMs) (First edition)* (2023); Jonas, et al. *Guidance on other effective area-based conservation measures* (2024).

¹⁹ Resolution 7.043 Enhancing implementation of the Convention on Biological Diversity through National Biodiversity Strategies and Action Plans (NBSAPs).

²⁰ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 2.

²¹ Laffoley, et al. “OECMs under Aichi Target 11 ” (2017) *Aquat Conserv* 132.

²² CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010) Annex, para 13, Target 11.

²³ Woodley, et al. “A Review of Evidence for Area-Based Conservation Targets for the Post-2020 Global Biodiversity Framework” (Nov 2019) *PARKS*; Woodley, et al. “Area-Based Conservation Beyond 2020: A Global Survey of Conservation Scientists” (Nov 2019) *PARKS*.

enhancing the target to at least 30% of terrestrial and inland waters, and coastal and marine areas by 2030 through a system of protected areas and OECMs. The target further qualifies that area-based conservation should be effective, ecologically representative, well-connected, and equitable.²⁴ These qualitative measures may prove vital to manage the threat of sacrificing quality over quantity,²⁵ as area coverage alone is inadequate for mitigating biodiversity declines.²⁶

Historically, the key tool for realising area-based conservation has been legally recognised protected areas.²⁷ Article 8 of the CBD obliges all parties to establish, manage and promote a system of protected areas to conserve biological diversity.²⁸ The CBD and IUCN advance definitions of a protected area that are slightly varied but recognised as comparable. The IUCN defines a protected area²⁹ as:

A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.³⁰

Over the decades, the concept of a protected area has become more complex, recognising a spectrum of management and governance models that emphasise the benefits they provide to both people and biodiversity conservation.³¹ Initial protected area models focused heavily on management aims and objectives. More contemporary approaches consider the influence and role of the type of governance as it signifies who holds the power and decision-making authority.³² The IUCN Protected Area Management Categories range from Category 1A: Strict Nature Reserve to Category VI: Protected Area with Sustainable Use of Natural Resources. Other categories along the spectrum include Category 1B: Wilderness Area, Category II: National Park, Category III: Natural Monument, Category IV: Habitat/Species Management, and Category V: Protected Landscape/Seascape.³³ Importantly, these categories do not represent a hierarchy of quality, importance or naturalness; rather, they reflect the objectives, needs, and situation of the individual protected area.³⁴ In

²⁴ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section H, Target 3.

²⁵ Claudet, et al. "Avoiding the misuse of other effective area-based conservation measures in the wake of the blue economy" (2022) *One Earth* 970; Lemieux, et al. "Running to stand still: The application of substandard OECMs in national and provincial policy in Canada" (2022) *Biol Conserv* 2-3; Lemieux, et al. "How the Race to Achieve Aichi Target 11 Could Jeopardize the Effective Conservation of Biodiversity in Canada and Beyond" (2019) *Mar Policy*.

²⁶ MacKinnon, et al. "Editorial Essay: Protected and conserved areas: Contributing to more ambitious conservation outcomes post-2020" (May 2021) *PARKS* 8; Visconti, et al. "Protected area targets post-2020" (2019) *Science* 239; Geldmann, et al. "Effectiveness of protected areas at resisting anthropogenic pressures" (2019) *Proceedings of the National Academy of Sciences*; Hausner, et al. "Policy Indicators for Use in Impact Evaluations of Protected Area Networks" (2017) *Ecol Indic* 1; Montesino Pouzols, et al. "Global Protected Area Expansion is Compromised" (2014) *Nature* 385.

²⁷ Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation* 1-2; Lopoukhine & de Souza Dias "What does Target 11 really mean" (2012) *PARKS* 5; Gurney, et al. "Area-based conservation: Taking stock and looking ahead" (2023) *One Earth* 98.

²⁸ CBD Article 8.

²⁹ As the criteria of an OECM explicitly excludes areas that meet the IUCN definition of a protected area, this definition is applied throughout this research.

³⁰ Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 8.

³¹ Dudley, et al. "Where now for protected areas? Setting the stage for the 2014 World Parks Congress" (2014) *Oryx*; Shafer "Arguments for and against IUCN protected area management category VI with a review of state versus community governance" (2020) *J Nat Conserv*.

³² Borri-Feyerabend & Hill "Governance for the Conservation of Nature" in Worboys, et al. (eds) *Protected Area Governance and Management* (2015) 4-12.

³³ Dudley *Guidelines for Applying Protected Area Management Categories* (2013) 13-22.

³⁴ *Ibid.* 24.

recent years, the IUCN's Management Category VI has become the leading category globally, both in number and land area, attributed to its less restrictive provisions that provide for an element of sustainable use.³⁵ While the literature provides evidence of the benefits and constraints of multi-use protected areas,³⁶ the IUCN definition distinctly draws attention to the need for conservation to be the principal objective of a protected area.³⁷ Although states are not required to use these management categories in their domestic policies and legal frameworks, the CBD formally recognises the use of the IUCN management categories as a reporting tool for protected areas to encourage consistency³⁸ and provide a common language for describing similar experiences and objectives within the global community.³⁹

The principles outlined in the Guidelines for Applying Protected Area Management Categories⁴⁰ state that any management category may be coupled with any type of governance. The IUCN recognises four broad governance types: governance by government (Type A), shared governance (Type B), private governance (Type C), and governance by Indigenous peoples and local communities (IPLCs) (Type D).⁴¹ In the case of an expansive area, multiple governance types may co-exist within its boundaries.⁴²

Notably, a strong focus remains on the use of protected areas as the primary tool for area-based conservation. However, the advent of Aichi Target 11 established an opportunity to acknowledge a diversity of contributions and just approaches to conservation by officially recognising the role of OECMs in international environmental law.⁴³ Further inclusion within the KMGBF cemented OECMs as a complementary tool to protected areas.⁴⁴ OECMs may reflect the same management categories and governance types as protected areas.⁴⁵ The key distinguishing factor lies within the management objective. Unlike protected areas, an OECM may have conservation as the primary, secondary, or ancillary objective.⁴⁶ This has fostered a shift in thinking from the traditional protected area paradigm as one of primary intention to one of result-based outcomes.⁴⁷

³⁵ Shafer "Arguments for and against IUCN category VI" (2020) *J Nat Conserv* 2-3.

³⁶ Ibid. 3-6.

³⁷ Jonas, et al. "New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-Based Conservation Measures" (2014) *PARKS* 115; Dudley, et al. "Where now for protected areas?" (2014) *Oryx* 2; Dudley *Guidelines for Protected Area Management Categories* (2013) 34-35.

³⁸ CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004) para 31.

³⁹ Worboys "Concept, Purpose and Challenges" in Worboys, et al. (eds) *Protected Area Governance and Management* (2015) 16.

⁴⁰ Dudley *Guidelines for Protected Area Management Categories* (2013) 10.

⁴¹ Borrini-Feyerabend, et al. *Governance of Protected Areas: From Understanding to Action* (2013) 44.

⁴² Ibid. 30.

⁴³ CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010) Annex, para 13, Target 11; Jonas, et al. "OECMs: Aichi Target 11 to Post-2020 Framework" (2018) *PARKS*; Jonas, et al. "Equitable and effective area-based conservation: Towards the conserved areas paradigm" (2021) *PARKS*.

⁴⁴ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 3.

⁴⁵ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

⁴⁶ Ibid. 10-11.

⁴⁷ Eghenter "Indigenous Effective Area-Based Conservation Measures: Conservation Practices Among the Dayak Kenyah of North Kalimantan" (2018) *PARKS* 70.

Globally, there is a growing appreciation of the benefits afforded to areas managed and governed by IPLCs, which may exist with or without formal state recognition.⁴⁸ In 2004, the IUCN defined and adopted the first policy for territories and areas conserved by Indigenous peoples and local communities (ICCA), with their contributions accredited a new protected area governance type (Type D).⁴⁹ This is notable to the advancement of OECMs for a couple of reasons. First, the extent of customary community-based tenure systems is not insignificant, with estimates suggesting IPLCs govern as much as 65% of the world's land area.⁵⁰ Second, many ICCAs may not have conservation as the primary objective. One study showed that approximately 20% of ICCAs within its research purview collectively recognised ecological, socio-economic, and cultural intentions for establishment.⁵¹ During the negotiations for the KMGBF some argued that protected areas were embedded with colonial ideologies that did not align with the worldview of many IPLCs.⁵² The resulting Target 3 affords explicit recognition of the rights and territories of IPLCs and offers OECMs as an alternative mechanism for recognising and reporting progress towards the goals of area-based conservation.⁵³

1.1.2 Growing guidance on OECMs

Until recently, the term "other effective area-based conservation measures" had emerged from international negotiations as an undefined concept, thus hindering significant implementation and reporting by CBD parties.⁵⁴ During the 2018 Conference of the Parties (COP), the parties sought to fill this void by adopting a definition⁵⁵ and inviting technical assistance for recognising and reporting on OECMs.⁵⁶ The CBD defines an OECM as:

A geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.⁵⁷

⁴⁸ Jonas & Lucas *Working Paper on Legal Aspects of Aichi Biodiversity Target 11: A Scoping Study (version 1.0)* (2011) 5-6; Tran, et al. "A Review of Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) *Biol Conserv*.

⁴⁹ Resolution 3.049 *Community Conserved Areas*.

⁵⁰ This does not imply that these are afforded legally recognised land rights. Eghenter "Indigenous OECMs in North Kalimantan" (2018) *PARKS* 70; Rights and Resources Initiative "Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights" (2015) 1.

⁵¹ Tran, et al. "Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) *Biol Conserv* 5.

⁵² Gurney, et al. "Area-based conservation" (2023) *One Earth* 99.

⁵³ The full text of Target 3 states that the GBF encourages actions to "[e]nsure and enable that by 2030 at least 30 per cent of terrestrial and inland water, and of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem functions and services, are effectively conserved and managed through ecologically representative, well-connected and equitably governed systems of protected areas and other effective area-based conservation measures, recognizing indigenous and traditional territories, where applicable, and integrated into wider landscapes, seascapes and the ocean, while ensuring that any sustainable use, where appropriate in such areas, is fully consistent with conservation outcomes, recognizing and respecting the rights of indigenous peoples and local communities, including over their traditional territories." CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section H, Target 3.

⁵⁴ Donald, et al. "The prevalence, characteristics and effectiveness of Aichi Target 11's "other effective area-based conservation measures" (OECMs) in Key Biodiversity Areas" (2019) *Conserv Lett* 2; Jonas, et al. "New steps of change: Beyond protected areas to consider OECMs" (2014) *PARKS* 117-124.

⁵⁵ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) para 2.

⁵⁶ *Ibid.* para 9.

⁵⁷ *Ibid.* para 2.

The IUCN published a technical report and screening tool in late 2019 to aid states in recognising and reporting potential OECMs.⁵⁸ This was later refined into a site-level assessment tool for recognising OECMs.⁵⁹ In 2024, the IUCN published the updated guidance on OECMs.⁶⁰ The guidance draws strong parallels with protected areas as an OECM should be a geographically defined area, support important biodiversity values, be governed and actively managed for effective *in-situ* and long-term conservation, apply the principle of free, prior and informed consent (FPIC), and reflect the norms of human rights.⁶¹ A distinct difference between protected areas and OECMs is that the latter are not required to have conservation as their primary objective.⁶² This broadens the scope to include areas with conservation as a primary, secondary, or ancillary objective, yet importantly, it still delivers long-term conservation outcomes.⁶³ This extends recognition to a spectrum of measures, including conservation efforts by IPLCs whose worldviews may differ from the Western paradigm of conservation.⁶⁴ For the IPLCs, the intent of conservation may be the sustainability of the local environment and natural resources for the security of traditional values and practices.⁶⁵

Protected areas and OECMs must be mutually exclusive.⁶⁶ However, they may be collectively used to support greater connectivity and ecological representation for strengthening coordinated networks.⁶⁷ This complementary approach could generally strengthen area-based conservation by addressing the threat of protected areas becoming “isolated ecological islands” due to habitat fragmentation.⁶⁸

Critically, the quality of conservation efforts must not be compromised for the opportunity to increase the coverage of protected areas and OECMs.⁶⁹ Unlike protected areas which are monitored and measured against the stated management objectives, OECMs explicitly reference effectiveness.⁷⁰ However, there is no clear measure of effectiveness for OECMs, especially where conservation may not be the primary objective.⁷¹ Various metrics and indicators are suggested in the

⁵⁸ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019).

⁵⁹ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

⁶⁰ Jonas, et al. *Guidance on OECMs* (2024).

⁶¹ Jonas, et al. “Equitable and effective conservation” (2021) *PARKS*.

⁶² IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 3; CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (C)(1)(c-d).

⁶³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 3-4; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 11.

⁶⁴ Jonas, et al. “Will OECMs increase recognition and support for ICCAs?” (2017) *PARKS* 66-68.

⁶⁵ Eghenter “Indigenous OECMs in North Kalimantan” (2018) *PARKS* 70; Govan & Jupiter “Can the IUCN 2008 Protected Areas Management Categories support Pacific island approaches to conservation?” (2013) *PARKS* 140.

⁶⁶ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4; CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B).

⁶⁷ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III(A)(b); Laffoley, et al. “OECMs under Aichi Target 11” (2017) *Aquat Conserv* 133.

⁶⁸ Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011) 7.

⁶⁹ Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation” (2019) *Mar Policy*; Laffoley, et al. “OECMs under Aichi Target 11” (2017) *Aquat Conserv*.

⁷⁰ Jonas & Mckinnon *Framing the Issues: Discussion Paper 1 of the Task Force on Other Effective Area-Based Conservation Measures* (2015) 11-12.

⁷¹ Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970; Mwamidi, et al. “Contemporary Pastoral Commons in East Africa as OECMs: A Case Study from the Daasanach Community” (2018) *PARKS* 86; Jonas & Mckinnon *Framing the Issues* (2015) 11-12.

literature, including protected area management effectiveness (PAME) tools,⁷² the IUCN Green List of Protected and Conserved Areas Global Standard,⁷³ the ability to implement management plans,⁷⁴ changes in important ecological values,⁷⁵ presence or absence of key species,⁷⁶ coverage of Key Biodiversity Areas (KBAs),⁷⁷ and monitoring of forest loss or land-use changes.⁷⁸ Most recently, the KMGBF Monitoring Framework adopted the management effectiveness of protected and conserved areas (MEPCA)⁷⁹ as a complementary indicator.⁸⁰ This new metric utilises a weighted system to foster improved monitoring of conservation outcomes.⁸¹ Despite this array of potential tools, challenges persist in accounting for what constitutes effectiveness from a diversity of worldviews.⁸²

Despite the growing guidance on OECMs, explicit considerations of the role of law are under-explored. The IUCN's recent guidance on OECM encourages the review of existing policies, laws, and regulations with potential relevance to OECMs. This may then inform an appropriate course of action to support and strengthen the legal frameworks for recognising, regulating, and reporting OECMs.⁸³ This thesis seeks to deepen the understanding of the role of law as aligned with the criteria of an OECM.

1.1.3 OECMs and the law

The law may provide for both the enabling and regulatory environment in which to recognise and implement area-based conservation measures within a domestic context.⁸⁴ The law may implement the enabling role by establishing clear definitions and objectives, promoting good governance and effective management, and providing legitimacy, long-term security, and formal acknowledgement of OECMs.⁸⁵ The regulation of OECMs may be through rules that prescribe activities for management, access and use, monitoring, reporting, and mechanisms for compliance.⁸⁶ Importantly, given the nature of OECMs to provide recognition to a broad scope of area-based conservation measures, the legal mechanisms

⁷² IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 13.

⁷³ IUCN & WCPA *IUCN Green List of Protected and Conserved Areas: Standard, Version 1.0* (2016).

⁷⁴ *Ibid.*

⁷⁵ Watson, et al. "Bolder Science Needed Now for Protected Areas" (2016) *Conservation Biology*; Gray, et al. "Comparing Screening Tools for Assessment of Potential 'Other Effective Area-Based Conservation Measures' in Ontario, Canada" (2018) *PARKS*.

⁷⁶ Eghenter "Indigenous OECMs in North Kalimantan" (2018) *PARKS*.

⁷⁷ Donald, et al. "Prevalence, characteristics and effectiveness OECMs in KBAs" (2019) *Conserv Lett*.

⁷⁸ Matallana-Tobón, et al. "Rethinking Nature Conservation in Colombia: A Case Study of Other Effective Area-Based Conservation Measures" (2018) *PARKS*.

⁷⁹ Given the recent development and introduction of MEPCA, there is a lack of literature regarding its application, however, it may present a future opportunity for monitoring OECMs. Further information regarding MEPCA is available *Department for Environment Food & Rural Affairs Submission from the United Kingdom of Great Britain and Northern Ireland (UK) on progress made in the development of a new globally applicable indicator on Management Effectiveness of Protected and Conserved Areas (MEPCA)* (2022).

⁸⁰ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) Annex I, Table 2.

⁸¹ Gurney, et al. "Area-based conservation" (2023) *One Earth* 103.

⁸² *Ibid.*

⁸³ Jonas, et al. *Guidance on OECMs* (2024) 25-26 and 74-75.

⁸⁴ Robinson "Biodiversity in International Environmental Law Through the UN Sustainable Development Goals" in McManis&Ong (eds) *Routledge Handbook of Biodiversity and the Law* (2017) 43; Lausche *Guidelines for Protected Area Legislation* (2011). Paterson *Other Effective Area-Based Conservation Measures Legal Review - South Africa* (2024) 7-8.

⁸⁵ Paterson *OECM Legal Review - South Africa* (2024) 7-8.

⁸⁶ *Ibid.*

may balance flexibility with sufficient rigour to assess and monitor a commitment to long-term effective conservation. This may require policy and legislation to establish institutions and procedures to both recognise and regulate OECMs.⁸⁷ While most states globally have established laws for protected areas, and perhaps other area-based conservation, many are laced with weaknesses and gaps that hinder the realisation of equitable and effective governance and management regimes.⁸⁸ The recognition, regulation, and reporting of OECMs may be strengthened through legal reforms and harmonisation.⁸⁹

OECMs could enrich the legal environment through “just approaches to conservation”⁹⁰ that extend to recognise customary laws. The inclusion of customary laws acknowledge the norms, rules, authority, and consequences enforced by IPLCs. OECMs could afford a mechanism to expand the discourse of what is desirable and acceptable as defined by national protected area legislation without necessitating the adoption of new provisions through the inclusive recognition of laws that may exist within the multiple legal systems of a state.⁹¹ The legal frameworks could equitably support and strengthen systems of legal pluralism to give recognition to OECMs.

Over the past few decades, the international community has succeeded in achieving consistent growth in the number of protected areas gazetted globally.⁹² This may be a positive outcome of the escalating ambition to conserve biodiversity. As Article 6 obliges contracting states to develop national strategies and plans for implementing the commitments under the CBD,⁹³ states may be expected to pursue ways to enhance their protected area estates. However, it is suggested within the literature that these obligations retain a soft nature as a significant amount of national discretion is permitted for the incorporation into legal instruments.⁹⁴ The international guidelines for protected areas legislation may provide direction for developing specific legal guidance for OECMs as a complementary area-based measure.

Acknowledging OECMs within international law recognises the contribution of effective area-based conservation outside of legally gazetted protected areas.⁹⁵ As protected areas and OECMs are associated with the same KMGBF target for advancing area-based conservation, the alignment within domestic legal frameworks may be appropriate to encourage

⁸⁷ Lausche *Guidelines for Protected Area Legislation* (2011) 124-125.

⁸⁸ Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011) 14.

⁸⁹ Jonas, et al. *Guidance on OECMs* (2024) 75.

⁹⁰ Jonas, et al. “Will OECMs increase recognition and support for ICCAs?” (2017) *PARKS* 67.

⁹¹ Ibid. 71-72; Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4; Rodríguez-Rodríguez, et al. “Potential contribution of OECMs to international area-based conservation targets in a biodiversity rich country, Spain” (2021) *J Nat Conserv* 6; Eghenter “Indigenous OECMs in North Kalimantan” (2018) *PARKS*.

⁹² UNEP-WCMC & IUCN *Protected Planet: WDPA* (accessed January 2025); Lausche *Guidelines for Protected Area Legislation* (2011) 1.

⁹³ CBD Article 6(a).

⁹⁴ Sands, et al. “Biological Diversity” in Sands, et al. (eds) *Principles of International Environmental Law* (2018).

⁹⁵ Estradivari, et al. “Marine conservation beyond MPAs: Towards the recognition of other effective area-based conservation measures (OECMs) in Indonesia” (2022) *Mar Policy*.

credibility.⁹⁶ However, explicit “pathways” may be necessary to foster clarity in their differentiated functions.⁹⁷ The criteria of an OECM provide the implicit recognition of the role of law that will inform this thesis.

1.1.3.1 Consent

Importantly, FPIC has emerged as an accepted international legal principle⁹⁸ essential for recognising OECMs.⁹⁹ Although an area may be currently available to meet conservation targets and objectives, it is inappropriate and idealistic to assume that the local people or community will commit to long-term conservation when pressed with alternatives.¹⁰⁰ The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP)¹⁰¹ supports the right to consultation and consent for undertakings that may affect the lands, territories, or resources of IPLCs.¹⁰² The state is given the duty to obtain FPIC before instituting legislation and administrative measures in recognition of an OECM, as it may diverge from local values or affect the sovereignties of IPLCs.

1.1.3.2 Demarcation of boundaries

The essence of an OECM as a spatially defined area suggests the need for the legal demarcation of boundaries. As existing ownership and tenure status can influence boundaries, the legal frameworks may be required to adequately address tenure and resource rights as a precondition to recognition.¹⁰³ It may be imperative to observe that geographical space is composed of three dimensions, which can carry distinct ownership rights.¹⁰⁴ It is suggested within the literature that the legal frameworks associated with OECMs may need to regulate both height and depth dimensions to ensure adequate protection.¹⁰⁵ Notably, however, affording legal recognition to all three dimensions, especially the vertical dimensions, may pose legal complexity and enforcement challenges.¹⁰⁶ The OECM guidance highlights that legal demarcation should capture elements of consent and agreement.¹⁰⁷ The nature, form, and content of this consent and any agreement would need to be detailed in the law, including details of whom the relevant parties would be and the processes to be followed.

⁹⁶ Robinson “Biodiversity Through the UN SDGs” in *Biodiversity and Law* (2017).

⁹⁷ Fitzsimons, et al. “Other Effective Area-Based Conservation Measures (OECMs) in Australia: Key Considerations for Assessment and Implementation” (2024) *Conservation* 193-194.

⁹⁸ Filer, et al. “The FPIC Principle Meets Land Struggles in Cambodia, Indonesia and Papua New Guinea” (2020) *Land* 1-4.

⁹⁹ Eghenter “Indigenous OECMs in North Kalimantan” (2018) *PARKS* 70; Jonas, et al. “Equitable and effective conservation” (2021) *PARKS* 76.

¹⁰⁰ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4-5; Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS* 77.

¹⁰¹ *United Nations Declaration on the Rights of Indigenous Peoples* (2007) 46 ILM 1013.

¹⁰² *Ibid.* Articles 10 and 32(12); Jonas, et al. *An Analysis of International Law, National Legislation, Judgements, and Institutions as They Interrelate with Territories and Areas Conserved by Indigenous Peoples and Local Communities: Report No. 1 International Law and Jurisprudence* (2012) 7-8.

¹⁰³ Lausche *Guidelines for Protected Area Legislation* (2011) 154-155.

¹⁰⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

¹⁰⁵ *Ibid.*

¹⁰⁶ Laffoley, et al. “OECMs under Aichi Target 11 ” (2017) *Aquat Conserv* 137.

¹⁰⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4-5; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 8-9.

1.1.3.3 Governance

The law may explicitly or implicitly reference governance types. This could include a direct mention of the IUCN governance types or may imply governance through a description of who has the authority to make decisions, how those are taken, and who is accountable.¹⁰⁸ The literature emphasises not to disregard unusual governance arrangements but rather to secure these through legal recognition.¹⁰⁹ The quality of governance is of equal importance to the type of governance. The principles of good governance are related to those of human rights¹¹⁰ and may encompass concepts such as accountability, transparency, equity, justice, and participation.¹¹¹ Legal frameworks can support the expression of good governance by including relevant provisions.

1.1.3.4 Management

The management of OECMs under the law may encompass a number of tools, such as the establishment of recognition of a management authority, identification of key objectives, development of a management regime, and the regulation of activities.¹¹² While management may include intentional decisions to leave the area in a natural state, the absence of a management regime does not meet the OECM criteria.¹¹³ The law can support proper management planning through the inclusion of guidelines that may identify a description of the area, the authority in charge, governance arrangements, conservation values and objectives, threats, zoning plans, monitoring and measures of effectiveness.¹¹⁴ The OECM guidance encourages the employment of the ecosystem approach as an integrated management strategy.¹¹⁵ This may necessitate coordination with a broad array of policies and legislation associated with land-use planning, development control and natural resource management.¹¹⁶ Coordination may also extend to elements found within customary law or agreements made directly with local landowners.¹¹⁷

1.1.3.5 Positive and sustained outcomes

The pursuit of sustained long-term conservation outcomes under OECMs may mirror the protected area definition of being managed in perpetuity.¹¹⁸ The protected area guidelines note the concept of perpetuity may be interpreted as having a multi-generational timeframe given the impossibility of predicting all future activities that may threaten legal status.¹¹⁹ While

¹⁰⁸ Borrini-Feyerabend & Hill "Governance for conservation" in *Protected Area Governance and Management* (2015) 171.

¹⁰⁹ Ibid.

¹¹⁰ Lausche *Guidelines for Protected Area Legislation* (2011) 41-43.

¹¹¹ Franks, et al. *Understanding and assessing equity in protected area conservation: a matter of governance, rights, social impacts and human wellbeing* (2018) 16; Benidickson & Paterson "Biodiversity, Protected Areas and the Law" in McManis&Ong (eds) *Routledge Handbook of Biodiversity and the Law* (2017) 52; Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 57-60; Lausche *Guidelines for Protected Area Legislation* (2011) 40-43.

¹¹² Paterson "Scoping the Potential Influence of Law on Terrestrially Located Other Effective Area-Based Conservation Measures" (2023) *Law, Environment and Development Journal*.

¹¹³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

¹¹⁴ Lausche *Guidelines for Protected Area Legislation* (2011) 163-166.

¹¹⁵ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

¹¹⁶ Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011) 14.

¹¹⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

¹¹⁸ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 181; Lausche *Guidelines for Protected Area Legislation* (2011) 17-19.

¹¹⁹ Lausche *Guidelines for Protected Area Legislation* (2011) 17.

formally protected areas can utilise the weight of the law through high-level government commitment to foster long-term protection,¹²⁰ these mechanisms may not be available to OECMs. Therefore, OECMs could seek to rely on the principles of good governance, public participation, access to information, and equity in decision-making processes to secure sustained support from stakeholders.¹²¹

Although the laws regarding OECMs may be derived from the frameworks associated with protected areas, land use, planning, and natural resources, the clear reference to the role of law explicitly for OECMs may enhance recognition and reporting. The law may seek to answer questions such as how recognition should be accorded and who has the authority to do so, how to address management and governance, what constitutes effectiveness, and how OECMs legally relate to protected areas.¹²² Exploring these questions through both statutory and customary law provides an opening to account for OECM holistically and potentially enrich area-based conservation.

1.2 AREA-BASED CONSERVATION IN PAPUA NEW GUINEA AND THE LEGAL FRAMEWORKS

PNG is a party to a number of international conventions that compel the development and implementation of conservation and environmental legislation. This includes the CBD, as well as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),¹²³ Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar),¹²⁴ World Heritage Convention (WHC),¹²⁵ United Nations Convention to Combat Desertification (UNCCD),¹²⁶ United Nations Convention on the Law of the Sea (UNCLOS),¹²⁷ and the United Nations Framework Convention on Climate Change (UNFCCC)¹²⁸ including the Paris Agreement.¹²⁹ Recognising the importance of regional cooperation, PNG is also a party to the Convention for the Protection of the Natural Resources and Environment of the South Pacific (Noumea Convention),¹³⁰ the Agreement Establishing the South Pacific Regional Environment Program (SPREP Treaty),¹³¹ the Torres Strait Treaty,¹³² and a member of the Coral Triangle Initiative on Coral Reefs, Fisheries and Food Security (CTI). Collectively, the provisions and obligations of these international conventions have shaped the

¹²⁰ Ibid. 17-18.

¹²¹ Ibid. 18.

¹²² Robinson "Biodiversity Through the UN SDGs" in *Biodiversity and Law* (2017).

¹²³ *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) 993 UNTS 243.

¹²⁴ *Convention on the Protection of Wetlands of International Importance Especially as Waterfowl Habitats* (1972) 11 ILM 963.

¹²⁵ *Convention for the Protection of the World Cultural and Natural Heritage* (1972) 11 ILM 1358.

¹²⁶ *United Nations Convention to Combat Desertification* (1994) 33 ILM 1328.

¹²⁷ *United Nations Convention on the Law of the Sea* (1982) 21 ILM 1261.

¹²⁸ *United Nations Framework Convention on Climate Change* (1992) 31 ILM 849.

¹²⁹ *Paris Agreement* (2015) C.N.92.2016.TREATIES-XXVII.7.d

¹³⁰ *Convention for the Protection of the Natural Resources and Environment of the South Pacific Region* (1987) 26 ILM 38.

¹³¹ *Agreement Establishing the South Pacific Regional Environment Program* (1995) ATS 24.

¹³² *Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the area between the two Countries, including the area known as Torres Strait, and Related Matters* (1985) ATS 4.

PNG's domestic legal frameworks relevant to OECMs. The recognition, regulation, and reporting of OECMs within the domestic context, may similarly align with the international guidance.

1.2.1 State of biodiversity and coverage of area-based biodiversity conservation

The island of New Guinea provides space for an estimated 5% to 9% of the world's terrestrial biodiversity on less than 1% of the total land area.¹³³ In addition to a scattering of smaller islands, the eastern half of the island is governed under the jurisdiction of PNG and collectively encompasses 461,690 km² of land area.¹³⁴ Spatial imaging reveals forests cover over 70% of PNG's terrestrial area.¹³⁵ The rugged geographic composition of the country promotes high levels of endemism.¹³⁶ With approximately a third of terrestrial species being endemic, this signifies an essential consideration for environmental policies and programs as species face a greater likelihood of extinction.¹³⁷ The biological diversity extends beyond terrestrial areas to also embrace the marine environment held within an Exclusive Economic Zone (EEZ) of 2,396,575 km².¹³⁸ PNG lies within the Coral Triangle, a region celebrated for hosting the world's highest concentration of marine biological diversity.¹³⁹ Given the rich biodiversity, PNG has been identified as one of the world's megadiverse countries.¹⁴⁰

Despite this ecological richness, the existing protected area network poorly covers both terrestrial and marine habitats. According to the World Database on Protected Areas (WDPA), protected area coverage extends to only 3.67% of land and 0.14% of marine areas.¹⁴¹ Notably, this falls significantly short of the collective targets of the CBD's KMGBF.¹⁴² A 2017 national assessment estimated that approximately 20% of PNG's land and sea area must be protected to meet current government objectives and international obligations.¹⁴³ The disparity between the actual and target coverage may signal the existence of a gap hindering the advancement of the protected area estate.

In PNG, the influence of worldviews coupled with a high dependency on locally available natural resources fosters an intrinsic link between conservation and sustainable use. Estimates suggest 75% to 80% of PNG's population continues to rely on local resources for their primary livelihood.¹⁴⁴ Although the notion of set-aside protected areas may not align with local worldviews, nor address socio-economic and nutritional needs, linking conservation with sustainable use and

¹³³ Adams, et al. *Land-Sea Conservation Assessment for Papua New Guinea* (2017) 7.

¹³⁴ Ibid.

¹³⁵ IPBES *The IPBES regional assessment report on biodiversity and ecosystem services for Asia and the Pacific* (2018) 181.

¹³⁶ Ibid. 3.

¹³⁷ Adams, et al. *Land-Sea Conservation Assessment* (2017) 7.

¹³⁸ Notably, the literature is inconsistent in reporting the size of PNG's EEZ. vanNimwegen, et al. *Conserving our sea of islands: State of protected and conserved areas in Oceania* (2022) 4.

¹³⁹ Adams, et al. *Land-Sea Conservation Assessment* (2017) 7.

¹⁴⁰ IPBES *IPBES assessment report for Asia and the Pacific* (2018) 9.

¹⁴¹ In their 6th Report to the CBD, the figures for protected area coverage sourced from the national government database differ slightly. UNEP-WCMC *WDPA Profile for PNG* (accessed October 2024). These statistics do not recognise all areas protected under custom, conservation deeds, nor the powers granted by the OLPGLLG.

¹⁴² It is suggested within the literature that many Melanesian countries align domestic targets with international obligations, such as those under the CBD, despite the disconnect in worldviews thus driving the failure to achieve goals. Melick, et al. "How Global Biodiversity Targets Risk Becoming Counterproductive: The Case of Papua New Guinea" (2012) *Conserv Soc* 344.

¹⁴³ Adams, et al. *Land-Sea Conservation Assessment* (2017).

¹⁴⁴ vanNimwegen, et al. *Conserving our sea of islands* (2022) 167.

livelihoods may be a locally appropriate driver to foster area-based conservation.¹⁴⁵ Noting the unique connection with the environment, recognition of culture and traditional knowledge may also enrich conservation objectives.¹⁴⁶

1.2.2 Domestic legal framework governing area-based approaches to biodiversity conservation

Upon gaining independence in 1975, PNG's Constitution¹⁴⁷ enshrined a commitment to conserve, replenish, and protect the land, sea, air, and all that lives there for the “collective benefit of us all, and be replenished for the benefit of future generations”.¹⁴⁸ The Constitution's Fourth National Goal and Directive Principle (NGDP) embraces this environmental commitment with a call for “all necessary steps to be taken to give adequate protection to our valued birds, animals, fish, insects, plants and trees”.¹⁴⁹ Despite a Constitutional commitment to protect and conserve biodiversity, PNG's protected areas system remains one of the weakest in the world.¹⁵⁰

A legacy of colonial influence and conflicting ideas of land use rights has constrained the expansion and effectiveness of PNG's protected area development. After independence, a top-down approach of establishing government-controlled national parks quickly proved ineffective given its incompatibility with the system of customary land tenure and the influence of customary law.¹⁵¹ The National Parks Act¹⁵² (repealed) required land to be alienated from the customary landowners who were unfamiliar with the concept of the permanent transfer of ownership.¹⁵³ Yet, the system of communal land ownership created challenges for the state to manoeuvre through the intricacies to identify the legitimate landowners and rightsholders.¹⁵⁴ With only a total of 3% of land nationally available outside of the control of community-clan systems,¹⁵⁵ there is a perceived justification for the inadequate advancement of international obligation given the state's limited influence over the expansion of the protected area network.¹⁵⁶ The dominance of customary land has encouraged an implicit recognition that the coordination of state and non-state actors may be critical to advance effective governance and management functions.¹⁵⁷

¹⁴⁵ Ibid.

¹⁴⁶ IPBES *IPBES assessment report for Asia and the Pacific* (2018) 213-214.

¹⁴⁷ *Constitution of the Independent State of Papua New Guinea* (1975)

¹⁴⁸ Ibid. Preamble.

¹⁴⁹ Ibid.

¹⁵⁰ Laurance, et al. “Defeating the ‘resource curse’: Key priorities for conserving Papua New Guinea's native forests” (2012) *Biol Conserv* 38.

¹⁵¹ Melick, et al. “Biodiversity Targets Risk Becoming Counterproductive” (2012) *Conserv Soc* 346.

¹⁵² *National Parks Act 1982 (Chapter 157)*. This replaced the earlier National Parks Act 1966.

¹⁵³ Leverington, et al. *Assessment of Management Effectiveness for Papua New Guinea's Protected Areas 2017* (2017) 23.

¹⁵⁴ Ibid.

¹⁵⁵ Keppel, et al. “Conservation in tropical Pacific Island countries: why most current approaches are failing” (2012) *Conserv Lett* 257. CEPA & SPREP *Papua New Guinea National Environment Management Strategy 2021-2025* (2021) 3.

¹⁵⁶ Keppel, et al. “Conservation in tropical Pacific countries” (2012) *Conserv Lett*; Melick, et al. “Biodiversity Targets Risk Becoming Counterproductive” (2012) *Conserv Soc* 347; Beehler & Kirkman *Lessons Learned from the Field: Achieving Conservation Success in Papua New Guinea* (2013) 14.

¹⁵⁷ Filer “Why Green Grabs Don't Work in Papua New Guinea” (2012) *J Peasant Stud*.

The current protected area network is primarily the result of three pieces of legislation: the National Parks Act, Conservation Areas Act,¹⁵⁸ and Fauna (Protection and Control) Act.¹⁵⁹ Although all of these initial pieces of legislation have been repealed by the Protected Areas Act,¹⁶⁰ the transition to align with the new legislation is ongoing. The vast majority of current protected areas in PNG were gazetted under the Fauna Act (repealed).¹⁶¹ This Act provided for the creation of wildlife management areas (WMA), the most widely used protected area type,¹⁶² which afforded protection to specific species yet neglected to recognise the importance of protecting habitat.¹⁶³ Unfortunately, the Fauna Act did little to explicitly prohibit mining, forestry or other environmentally destructive economic activities within the protected area. The Conservation Areas Act (repealed) provided a broader scope of area-based protection encompassing “particular biological, topographical, geological, historical, scientific or social significance or other special value for the present community or future generations”.¹⁶⁴ However, this latter Act was successfully employed only twice during its 46 years of existence,¹⁶⁵ thus perhaps suggesting challenges in its implementation. The designation of conservation areas under this Act has been described as “resource-intensive”¹⁶⁶ and long, taking over a decade to realise formal gazettal.¹⁶⁷ Notably, questions have been raised within the literature about the capacity of landowners to undertake such a rigorous process without long-term financial assistance and support from external partners.¹⁶⁸

In 2014, PNG introduced the Policy on Protected Areas which sought to learn from past experiences in implementing the protected area legislation and advocate more contemporary thinking for area-based conservation. Nevertheless, enacting legislation that reflected this new direction took ten years. At the time of writing this thesis, the new protected area legislation had yet to be tested.¹⁶⁹ Importantly, OECMs are not explicitly recognised within the policy and new legislation. However, several of the systems and institutions the Protected Areas Act endeavours to establish could reasonably be extended to encompass OECMs to encourage clarity and consistency across a network of area-based conservation measures.

In addition to the frameworks primarily intended to recognise and regulate protected areas and potential OECMs, the OLPGLLG gives powers to the local and provincial governments to make laws regarding a number of sectors, including

¹⁵⁸ *Conservation Areas Act 1978 (Chapter 362)*.

¹⁵⁹ *Fauna (Protection and Control) Act 1966 (Chapter 154)*.

¹⁶⁰ *Protected Areas Act (No. 9 of 2024)*. Section 80.

¹⁶¹ The exact numbers differ across the resources, with representations ranging from approximately 65-90%. The descriptive terminology is also inconsistent and in some cases the legislation used to gazette the protected area cannot be confirmed.

¹⁶² *Protected Areas Act (No. 9 of 2024)*. Schedule 2; Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 29; *GoPNG Papua New Guinea Policy on Protected Areas* (2014) 74.

¹⁶³ Melick, et al. “Biodiversity Targets Risk Becoming Counterproductive” (2012) *Conserv Soc* 346.

¹⁶⁴ *Conservation Areas Act 1978* Section 12(1).

¹⁶⁵ The first Conservation Area was gazette in 2009 and the second in 2017. *GoPNG Papua New Guinea 6th National Report to the Convention on Biological Diversity* (2019) 98; Dabek & Wells “Creating the first conservation area in Papua New Guinea to protect tree kangaroos” in Lisa Dabek, et al. (eds) *Tree kangaroos: science and conservation* (2021).

¹⁶⁶ Dabek & Wells “Creating the first conservation area in PNG” in *Tree kangaroos* (2021) 143; Filer “Why Green Grabs Don't Work in PNG” (2012) *J Peasant Stud* 610.

¹⁶⁷ Dabek & Wells “Creating the first conservation area in PNG” in *Tree kangaroos* (2021) 150.

¹⁶⁸ *Ibid.* 140.

¹⁶⁹ The Protected Areas Act was passed by Parliament on 20 February 2024 but was not certified for circulation until November 2024.

parks, reserves,¹⁷⁰ the local environment, and the protection of traditional and sacred sites, amongst others.¹⁷¹ There are several examples across the country of the OLPGLLG being used to address gaps in the national frameworks and give legal recognition to locally protected areas governed by custom.¹⁷² Such areas typically have not been included within PNG's formal protected areas network nor reported to the WDPA.

1.2.3 Key challenges for implementing area-based biodiversity conservation measures

In recent years, PNG has seen very little expansion of its formal protected area estate. The number of new gazetted protected areas peaked during the decade following independence and has slowly declined. In the past decade, just one new protected area was nationally gazetted.¹⁷³ Although the decline has not been explicitly canvassed in the literature, future provisions and legal frameworks relevant to OECMs could facilitate improved outcomes by adequately accounting for challenges generally found in PNG, such as an inadequate management regime, fragmented and weak governance, capacity and resource issues, neglect to address issues of customary land tenure and property rights, and the failure to account for legal pluralism. These challenges influence the enabling environment to recognise and report OECMs.

1.2.3.1 Inadequate management regime

Across Melanesia, conservation is rarely the primary objective of a protected area.¹⁷⁴ Establishing protected areas is often driven by the need for sustainable livelihoods and economic well-being;¹⁷⁵ access to aid, political power, or group status;¹⁷⁶ and for cultural or spiritual reasons.¹⁷⁷ Landowners also have expressed an intent to maintain land and resources for future generations.¹⁷⁸ These drivers, while locally relevant, may not align with Western scientific thinking which may prioritise conservation efforts simply for aesthetic value.¹⁷⁹ Nor do they lend to the IUCN definition of a protected area where conservation must be the primary objective.¹⁸⁰ Given that 75% to 80% of the population of PNG is based in rural

¹⁷⁰ Section 42(1).

¹⁷¹ Section 44(1).

¹⁷² Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific: meeting nature conservation and sustainable livelihood targets through wide-spread implementation of LMMAs: Study Report" (2009) 3-7; Kwa *Biodiversity Law and Policy in Papua New Guinea* (2004) 86.

¹⁷³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 165-166.

¹⁷⁴ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc*; Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS*; Jupiter "Culture, Kastom and Conservation in Melanesia: What Happens When Worldviews Collide?" (2017) *Pacific Conservation Biology*.

¹⁷⁵ Beehler & Kirkman *Lessons Learned from the Field* (2013) 12; West *Conservation is Our Government Now: The Politics of Ecology in Papua New Guinea* (2006); West & Kale "The Fate of Crater Mountain: Forest Conservation in the Eastern Highlands of Papua New Guinea" in Bell, et al. (eds) *Tropical Forests of Oceania* (2015); Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS*; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*.

¹⁷⁶ Bartlett, et al. "Policy Implications of Protected Area Discourse in the Pacific islands" (2010) *Mar Policy*; Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

¹⁷⁷ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 260; Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017); Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

¹⁷⁸ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 48-50.

¹⁷⁹ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*.

¹⁸⁰ Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS*; Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy*.

areas and engages in the subsistence sector,¹⁸¹ the lack of a meaningful distinction between conservation and sustainable use¹⁸² may not be surprising. It is the responsibility of the protected area management regime to effectively balance values through a management regime that supports these dual objectives. A 2017 assessment of management effectiveness found that nearly 90% of PNG's gazetted protected areas had major management concerns, quite inadequate management, or management systems had not been established.¹⁸³ Potential OECMs may observe these lessons to develop management regimes that balance potentially competing objectives and foster local relevance.

1.2.3.2 Fragmented and weak governance

Customary law and community-led systems of governance have regulated the use and management of natural resources in PNG for centuries, although admittedly with variable effectiveness.¹⁸⁴ Of PNG's 57 protected areas listed on the World Database of Protected Areas,¹⁸⁵ 47 identify community governance structures and six are governed by Indigenous people.¹⁸⁶ As customary land rights are legally recognised, local people remain the *de facto* decision-makers regarding land use and area-based conservation. However, the law provides little guidance as to who is legally compelled to make decisions, how they are taken, and who is accountable. This uncertainty may be exacerbated by domestic legal frameworks that often fail to explicitly recognise the principles of good governance.¹⁸⁷

Good governance of protected areas and potential OECMs may be strengthened through decision-making institutions with the capacity to exercise authority.¹⁸⁸ Local decision-making requires acknowledgement of clan leadership and the traditional processes of gaining consensus, although a lengthy process, is essential to foster local ownership and mitigate threats of dissent or sabotage.¹⁸⁹ In PNG, local allegiances and a failure of cooperation and trust beyond a community-clan level can result in fragmented and weak governance.¹⁹⁰ A protected area or potential OECM may span thousands of hectares and include many different clans with various worldviews, resulting in social and political fragmentation.¹⁹¹ This division may lead to a lack of consensus within governance structures.¹⁹² Fragmentation may be more profound where

¹⁸¹ vanNimwegen, et al. *Conserving our sea of islands* (2022) 167; GoPNG PNG's 6th National Report to the CBD (2019); IPBES *IPBES assessment report for Asia and the Pacific* (2018) 192.

¹⁸² Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

¹⁸³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017).

¹⁸⁴ Clarke & Jupiter "Law, Custom and Community-Based Natural Resource Management in Kubulau District (Fiji)" (2010) *Environ Conserv.*

¹⁸⁵ Other sources identify 61 nationally recognized protected areas. *UNDP Environment-Climate Analysis for United Nations Common Country Assessment, Papua New Guinea* (2022) 55-56.

¹⁸⁶ UNEP-WCMC *WDPA Profile for PNG* (accessed October 2024). Two protected areas are listed as having unreported governance types.

¹⁸⁷ For the purpose of this research the concepts of good governance will be explored through a focus on equity, public participation, clear and transparent decision-making, and accountability and justice. Also see: Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013).

¹⁸⁸ Eghenter "Indigenous OECMs in North Kalimantan" (2018) *PARKS*.

¹⁸⁹ GoPNG PNG's 6th National Report to the CBD (2019) 146; Beehler & Kirkman *Lessons Learned from the Field* (2013) 12-13.

¹⁹⁰ Beehler & Kirkman *Lessons Learned from the Field* (2013) 13.

¹⁹¹ Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud* 613-615.

¹⁹² *Ibid.*

governance is legally mandated to a central government body. Geographic distance, limited capacity, and the marginal ability of the central government to influence everyday decisions can further weaken governance.¹⁹³

1.2.3.3 Capacity and resource issues

PNG, like other countries in the global south, faces significant resource and capacity constraints to meet international obligations.¹⁹⁴ This may be characterised by constraints associated with finances, technology, human resources, professional development opportunities, and a general deficiency in the public's awareness of environmental laws.¹⁹⁵ The government's limited capacity has resulted in the *de facto* responsibility for conservation ultimately resting with the customary landowners.¹⁹⁶ The 2017 METT Assessment identified the limited capacity of customary landowners as a risk to many protected areas across the country, as local communities may not have the resources or knowledge to address potential threats effectively.¹⁹⁷ Capacity and resource constraints may hinder the successful implementation, monitoring, and enforcement of PNG's legal frameworks for protected areas and potential OECMs.¹⁹⁸

It is suggested within the literature that limitations may be further exacerbated as international agreements, NGOs, and other external funders direct resources away from promising conservation approaches outside their specific priorities or philosophy.¹⁹⁹ Historically, external environmental NGOs have been PNG's strongest promoters of protected areas.²⁰⁰ However, the NGO sector's inclination towards a traditional protected area model may be driven by the desire to access donor funding rather than encourage conservation approaches that are more relevant to local worldviews.²⁰¹ Although the literature cautions that external interests dominating decision-making may hinder conservation goals,²⁰² a low capacity to implement the legal frameworks associated with protected areas and potential OECMs, coupled with a high financial dependence, may perpetuate reliance on external partners.

¹⁹³ Ibid. 610.

¹⁹⁴ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 344; *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022).

¹⁹⁵ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 98.

¹⁹⁶ Jupiter, et al. 2014 *Pacific Conservation Biology* 206-220; Leverington, et al. *Assessment of Management Effectiveness for Papua New Guinea's Protected Areas 2017*.

¹⁹⁷ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 124.

¹⁹⁸ Techera "Legal approaches to MPA governance in Indo-Pacific small island states: A focus on public participation" (2019) *Ocean & coastal management* 88.

¹⁹⁹ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 344-345.

²⁰⁰ Ibid. 347; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 256-259.

²⁰¹ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 347; Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud* 610.

²⁰² Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud*; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*; Beehler & Kirkman *Lessons Learned from the Field* (2013); Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017).

1.2.3.4 Neglect to address issues of customary land tenure and property rights

Land is commonly viewed as "the central value" for Melanesians.²⁰³ Landownership represents one's membership in a clan or other customary kinship-based group and establishes the basis for citizenship and nationality.²⁰⁴ This membership allows for sharing in the clan's land entitlements and may bestow the ability to participate in decision-making processes for regulating access and use of resources.²⁰⁵ However, it does not allocate permissions to autonomously alienate or transfer rights.²⁰⁶ The connection fosters an integral link between land and a community's social and political structures.²⁰⁷ Neglecting to recognise resource tenure, inheritance systems, and customary decision-making processes in the management and governance structures will likely result in conflict and eventual failure of protected areas and potential OECMs.²⁰⁸ Not uncommon in Melanesia, the concepts of conservation and protected areas may be associated with land alienation.²⁰⁹ Local communities and landowners may be cautious to "codify or gazette" their lands as protected areas because of the perception of constraints placed upon their ability to adapt conservation strategies to address changes in the local context.²¹⁰

Customs associated with land and sea tenure share similarities across Melanesia.²¹¹ However, the legal frameworks vary in the degree to which these customary laws and traditions are recognised within the respective Constitutions and national legislation.²¹² A considerable amount of land in the region is held under customary communal title.²¹³ It is commonly cited that in PNG 97% of land is customary, 2.5% public lands, and 0.5% freehold.²¹⁴ Notably, customary land cannot be legally sold except to other customary groups or the state²¹⁵ and the ability to acquire freehold land is also deemed a special right of citizens by the Constitution.²¹⁶ Therefore, given the composition of land tenure, a considerable amount of PNG's domestic territory may be subject to local management and decision-making. There is speculation within the literature that this could be a contributing factor for hindering the expansion of the protected area estate as the government is void of the power to gazette new protected areas and has little input as to where protected areas may be established.²¹⁷

²⁰³ Lea "Are there advantages to maintaining customary land tenure in Papua New Guinea?" (2002) *Pac Econ Bull* 44.

²⁰⁴ Ballard "It's the Land, Stupid! The Moral Economy of Resource Ownership in Papua New Guinea" in Larmour (ed) *The Governance of Common Property in the Pacific Region* (1997); Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull* 49.

²⁰⁵ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 140-141.

²⁰⁶ Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull* 46-47.

²⁰⁷ Ballard "It's Land, Stupid!" in *Governance of Common Property* (1997) 52.

²⁰⁸ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv*; Beehler & Kirkman *Lessons Learned from the Field* (2013).

²⁰⁹ Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy* 101.

²¹⁰ Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS* 77.

²¹¹ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 139-140.

²¹² Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 98.

²¹³ Ibid.

²¹⁴ However, some suggest that this may not accurately depict current ownership and rights. See Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 257. CEPA & SPREP PNG's *National Environment Management Strategy* (2021) 3.

²¹⁵ *Land Act* (No. 45 of 1996). Section 132; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 258.

²¹⁶ *Constitution of the Independent State of Papua New Guinea* (1975) Section 56(51)(b).

²¹⁷ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 347; Beehler & Kirkman *Lessons Learned from the Field* (2013) 14.

Largely, customary land tenure boundaries are not legally demarcated.²¹⁸ Lessons have shown that this results in contentious ownership claims and conflict during the process to clarify, especially when economic incentives are present.²¹⁹ Over the years, the government has implanted various strategies to facilitate conflict resolution, ownership rights, and mobilisation of customary land for development; all have been plagued with adverse outcomes primarily attributed to an inability to identify the rightful owners and the state's recognition of communal land rights.²²⁰ The careful and proactive consideration of these challenges could lead to improved outcomes for potential OECMs.

1.2.3.5 Failure to account for legal pluralism

In PNG, as well as across Melanesia, formal government institutions often co-exist with community customs and traditional laws,²²¹ resulting in a system of legal pluralism.²²² In remote areas, the regard for *de jure* regulation and control may be non-existent given the degree of separation.²²³ PNG's system of legal pluralism is given effect by the Underlying Law Act²²⁴ that identifies the order of law as written law, underlying law,²²⁵ customary law, and common law.²²⁶ The written law may ascribe ownership rights to a group or clan, but often leaves individual rights to be established by custom.²²⁷ As customary law varies significantly across the country, it may lead to a broad application of the law and possible confusion.²²⁸

Although local customary laws may be viewed with apprehension at the national level as being weak against external threats,²²⁹ local institutions remain influential over decisions associated with resource use, development, and regulation given the connection to community-clan systems of tenure and property.²³⁰ The influence of legal pluralism is evident as numerous potential OECMs are not formally recognised under national legislation but rather recognised through a system of customary laws.²³¹ The definition of an OECM offers the possibility of including a more comprehensive range of worldviews than the traditional protected area model.

²¹⁸ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 140.

²¹⁹ Ibid. ; Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull* 49-52; West & Kale "The Fate of Crater Mountain" in *Tropical Forests of Oceania* (2015) 168.

²²⁰ Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull* 42-54.

²²¹ Rose "Community-Based Biodiversity Conservation in the Pacific: Cautionary Lessons in "Regionalising" Environmental Governance" in Jeffery, et al. (eds) *Biodiversity Conservation, Law and Livelihoods: Bridging the North-South Divide* (2008).

²²² Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv*; Rose "Conservation in the Pacific" in *Biodiversity Conservation, Law and Livelihoods* (2008).

²²³ Rose "Conservation in the Pacific" in *Biodiversity Conservation, Law and Livelihoods* (2008); Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv*.

²²⁴ *Underlying Law Act* (No. 13 of 2000).

²²⁵ The underlying law is comprised of customary law and common law. For further discussion see 4.1.3. *Constitution of the Independent State of Papua New Guinea* (1975) Schedule 2; Care & Zorn "Legislating pluralism: Statutory 'developments' in Melanesian customary law" (2001) *The Journal of Legal Pluralism and Unofficial Law* 60.

²²⁶ Corrin "Getting Down to Business: Developing the Underlying Law in Papua New Guinea" (2014) *The Journal of Legal Pluralism and Unofficial Law*.

²²⁷ Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull*.

²²⁸ Ibid.

²²⁹ GoPNG PNG's 6th National Report to the CBD (2019).

²³⁰ Rose "Conservation in the Pacific" in *Biodiversity Conservation, Law and Livelihoods* (2008) 202.

²³¹ CBD Report of the Capacity-Building Workshop for the Pacific Region on Achieving Aichi Biodiversity Targets 11 and 12 (2017); GoPNG PNG's 6th National Report to the CBD (2019).

1.3 PURPOSE

The primary purpose of this thesis is to explore how the law can support and strengthen OECMs as a tool to improve *in-situ* conservation in PNG. This question will be considered through three subsidiary questions. First, what is the role of law in supporting and strengthening OECMs? Second, what is the policy and legal framework relevant to OECMs in PNG? Third, what opportunities and reforms to the domestic policy and legal frameworks could facilitate the recognition, regulation, and reporting of OECMs in PNG?

With the inclusion into the CBD's Aichi Targets and current KMGBF, OECMs have secured a place as a complementary mechanism to protected areas for fostering equitable and effective area-based conservation. Over recent years, the IUCN and academic scholars have developed a definition, criteria, screening tools and guidance for recognising and reporting OECMs.²³² As the role and influence of law may enable or hinder the recognition, regulation, and reporting of OECMs,²³³ the review of domestic legal frameworks will facilitate the identification of certain provisions that are underdeveloped or could create potential barriers.²³⁴ This thesis seeks to address a deficit in legal guidance by developing a theoretical legal framework founded on the OECM criteria²³⁵ and informed by the good practices established within the OECM guidance.²³⁶

Despite a growing body of literature and research relevant to OECMs, few studies directly engage with the PNG and broader Pacific context.²³⁷ The application of the theoretical framework to the PNG context will hopefully provide insights into how the law can support and strengthen OECMs under a system dominated by customary land tenure and legal pluralism that couples Western-influenced statutory laws with Constitutionally recognised customary law. This thesis seeks to advance the legal recognition, regulation, and reporting of OECMs to more equitably acknowledge conservation efforts by a range of actors and stakeholders in PNG, the Pacific region, and globally.

1.4 SCOPE, METHODOLOGY, AND STRUCTURE

To adequately explore the primary research question of how the law can support and strengthen OECMs as a tool to improve *in-situ* biodiversity conservation in PNG, the thesis will be divided into two main methodological components. Part I will canvas the theory that envelopes OECMs (Chapters 2 and 3), while Part II shall apply to the practice of

²³² Jonas & Mckinnon *Framing the Issues* (2015); Laffoley, et al. "OECMs under Aichi Target 11 " (2017) *Aquat Conserv*; Gray, et al. "Comparing Screening Tools for OECMs" (2018) *PARKS*; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019); Marnewick, et al. "Assessing the extent and contribution of OECMs in South Africa" (2021) *PARKS*; Garcia, et al. *OECMs in Marine Capture Fisheries: Systematic approach to identification, use and performance assessment in marine capture fisheries (Version 2)*. (2021); FAO *A handbook for identifying, evaluating and reporting other effective area-based conservation measures in marine fisheries* (2022); Jonas, et al. *Site-level tool for identifying OECMs* (2023); Fitzsimons, et al. " OECMs in Australia: Key Considerations " (2024) *Conservation*; Cook "Progress developing the concept of OECMs" (2024) *Conservation biology*; Jonas, et al. *Guidance on OECMs* (2024).

²³³ See 3.1 of this text. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 25-26.

²³⁴ vanNimwegen, et al. *Conserving our sea of islands* (2022) 72; Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011).

²³⁵ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

²³⁶ Jonas, et al. *Guidance on OECMs* (2024).

²³⁷ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 6-7.

recognising OECMs within a domestic context (Chapters 4, 5, and 6). The thesis is based on legal doctrinal research.²³⁸ The research methods employed will be undertaken by way of a desk-top review of relevant legal resources and academic literature. This will include international and regional conventions, instruments, guidelines, and reports, as well as PNG's domestic policies and laws. It is hoped that this methodology and structure provide a clear and nuanced approach to consider the potential role of law aligning with the international guidance for scoping OECMs.

The geographic and legal scope of this analysis will primarily be delimited to terrestrial areas in PNG. Despite the opportunities for OECMs in the marine context, the legal frameworks for these areas are underdeveloped or absent, and may face legal, capacity, and financial constraints that impede effective management.²³⁹ Thus, it will be excluded from this thesis. However, as 90% of near-shore coastal areas are customarily owned,²⁴⁰ these may share similar management and governance considerations to terrestrial areas²⁴¹ and will be explored under the umbrella of customary law. Acknowledging that a wide degree of variance exists throughout the country regarding customary law and practices, this thesis does not have the capacity to provide a case-by-case analysis. It shall, however, draw on the theoretical foundations provided in the academic literature to discuss the necessary conditions, implications, and opportunities for OECMs created under the system of legal pluralism. The cross-cutting themes identified above will be woven throughout the thesis as they create the enabling environment for OECMs.

1.4.1 Part I: The Theory

The first methodological component seeks to consider, from a theoretical perspective, the role of law in supporting and strengthening the recognition, regulation, and reporting of OECMs. This will begin by outlining key shifts in the evolution of conservation thinking that have led to the emergence of OECMs within the modern international conservation discourse (Chapter 2). It will broadly survey the global shifts relevant to in-situ conservation, such as the recognition of sustainable use, the ecosystem-based approach, and the landscape approach. It will then narrow the inquiry to the discourse for protected areas as this has led to the recognition of OECMs as a complementary mechanism to meet international targets. As the inclusion of OECMs is not strictly a product of environmental persuasion, the research will consider the influences stemming from sustainable development, human rights, and climate change. This will establish the global context for recognising and reporting OECMs.

²³⁸ For a detailed explanation see: Hutchinson & Duncan "Defining and describing what we do: doctrinal legal research" (2012) *Deakin Law Review*; MD "Legal research-descriptive analysis on doctrinal methodology" (2019) *International Journal of Management, Technology and Social Sciences (IJMTS)*; Taekema "Theoretical and normative frameworks for legal research: Putting theory into practice" (2018) *Law and Method*.

²³⁹ GoPNG *State of the Coral Reefs of Papua New Guinea* (2012) 58-63.

²⁴⁰ vanNimwegen, et al. *Conserving our sea of islands* (2022) 240.

²⁴¹ The literature generally sites customary tenure as accounting for approximately 90% of near-shore marine areas and 97% for terrestrial areas. Notably, these may not accurately recognise more contemporary forms of partial alienation and overlapping tenure. Nevertheless, customary land remains significant as it likely still comprises more than 80% of land tenure. CEPA & SPREP PNG's *National Environment Management Strategy* (2021) 3. GoPNG *PNG Protected Areas Policy* (2014); Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*. Filer "Papua New Guinea's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 6.

Having outlined the broad context, the thesis aims to create a theoretical legal framework²⁴² structured to reflect the IUCN's guidance for recognising OECMs (Chapter 3). The IUCN site-level tool has been selected as the basis for the theoretical framework for this thesis as it reflects the current guidance for recognising OECMs that builds upon the overarching criteria and definitional elements established by the CBD.²⁴³ This tool applies eight criteria by which to assess the qualification of potential OECMs.²⁴⁴ Drawing from the guidance, the theoretical legal framework will canvas the role of law relevant to securing consent, distinguishing an OECM from a protected area, supporting important biodiversity values, demarcating the area, assessing the institutions and mechanisms to govern and manage, and monitoring and reporting to foster positive and sustained long-term outcomes for biodiversity. The thesis will consult and integrate best practices drawn from experiences in the development of protected area legislation,²⁴⁵ governance,²⁴⁶ management systems;²⁴⁷ recognising the contributions of IPLCs,²⁴⁸ privately protected areas to area-based conservation,²⁴⁹ fostering the sustainable use of biodiversity,²⁵⁰ the ecosystem approach,²⁵¹ connectivity conservation,²⁵² and OECM guidance.²⁵³ Although the practice of conservation may be deeply rooted in the histories of numerous cultures, the legal basis for this thesis will be limited to the modern conservation movement.

1.4.2 Part II: The Practice

Once the theoretical questions are applied, the research will investigate how the historical evolution of environmental and conservation priorities, policies, legislation, and practice has shaped protected areas and potential OECMs at a domestic level. This thesis will first provide a broad overview of the PNG's policy and laws with potential relevance to OECMs (Chapter 4). This legal foundation will underpin the critical review against the theoretical legal framework developed for OECMs (Chapter 5). Finally, it will reflect on the domestic opportunities and reforms to strengthen the recognition, regulation, and reporting of OECMs (Chapter 6).

The broad overview of PNG's policy and laws (Chapter 4) will first examine the legal architecture established by the Constitution for governing PNG. Given the explicit acknowledgement of legal pluralism afforded by the Constitution and

²⁴² The purpose of a theoretical legal framework is explored in Taekema "Frameworks for legal research" (2018) *Law and Method* 3-5.

²⁴³ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019).

²⁴⁴ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

²⁴⁵ Lausche *Guidelines for Protected Area Legislation* (2011); Lausche *Guidelines for Protected Areas Legislation* (1980).

²⁴⁶ Borri-Feyerabend, et al. *Governance of Protected Areas* (2013); Worboys, et al. *Protected Area Governance and Management* (2015).

²⁴⁷ Dudley *Guidelines for Protected Area Management Categories* (2013); Worboys, et al. *Protected Area Governance and Management* (2015); Thomas & Middleton *Guidelines for management planning of protected areas* (2003).

²⁴⁸ CBD COP 14 *Decision 14/16: Methodological guidance concerning the contributions of indigenous peoples and local communities* (2018); Beltrán *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000).

²⁴⁹ Mitchell, et al. *Guidelines for privately protected areas* (2018).

²⁵⁰ Secretariat of the CBD *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (CBD Guidelines)* (2004).

²⁵¹ Secretariat of the CBD *The Ecosystem Approach (CBD Guidelines)* (2004).

²⁵² Hilty, et al. *Guidelines for conserving connectivity through ecological networks and corridors* (2020); Lausche, et al. *The Legal Aspects of Connectivity Conservation, A Concept Paper* (2013).

²⁵³ Jonas, et al. *Guidance on OECMs* (2024).

Underlying Law, this thesis will also explore the legal frameworks that give effect to customary law. Once these legal foundations are established, the research then considers the policies and laws specifically related to environmental conservation, as well as the legal regimes associated with land tenure, land use, and planning mechanisms as these policies and laws provide the enabling conditions for all area-based conservation. Other natural resource and climate change policies and laws will also be canvassed for opportunities to recognise OECMs across a range of management objectives.

The thesis will then turn to interrogate PNG's current policy and laws against each of the criteria of an OECM as defined within the theoretical legal framework (Chapter 5). This seeks to identify the key challenges and limitations that may impact the various roles, responsibilities, and mandates for recognising, regulating, and reporting OECMs. As FPIC, public participation, and equity represent important principles within environmental law, the legal frameworks will be scanned specifically for their inclusion. In the absence of adequate provisions, the thesis will suggest opportunities for potential reforms that may strengthen the recognition and reporting of OECMs in PNG (Chapter 6).

Chapter 2 The Evolving Discourse Relevant to the Inclusion of OECMs into Contemporary International Instruments

The modern conservation movement was born in North America¹ through two pieces of legislation: the Yosemite Grant Act of 1864,² which created the first formal protected area,³ and an act in 1872 establishing Yellowstone⁴ as the first national park.⁵ By the early 20th century, modern protected areas had been created around the globe.⁶ Today, the legal landscape of area-based biodiversity conservation is a kaleidoscope of laws across the local, national, regional, and international levels that aim to afford varying degrees of protection to a diverse array of challenges and threats.⁷ Since the beginning, the modern conservation movement has sought to develop shared norms and establish systems of best practice for the natural commons. This has not been a stagnant process but rather one that has evolved to reflect advancements in science, socio-economic development strategies, and the recognition of the rights of IPLC.⁸

The shifting discourse of area-based conservation is given standing through several established international and regional instruments. Although the modern conservation movement had existed for nearly a century, it gained momentum during the 1960s and 1970s as the global community advanced the need to foster cooperation to address growing environmental concerns through a number of proposals and resolutions.⁹ The Ramsar Convention was notably the first modern global environmental agreement. However, the 1972 United Nations Conference on the Human Environment (Stockholm Conference)¹⁰ served as the key moment for advancing environmental issues and triggering a surge in international¹¹ and

¹ While the first recorded conservation law dates to 252 BC by the Indian Emperor Asoka, the remit of this thesis encompasses the modern conservation movement. Holdgate *The green web* (2014) 2, 6-7; Phillips "The history of the international system of protected area management categories" (2004) *PARKS* 4.

² U.S. Statutes at Large, Vol. 13, Chap. 184, p. 325. 'An Act authorizing a Grant to the State of California of the Yo-Semite Valley,' and of the Land embracing the Mariposa Big Tree Grove." [S. 203; Public Act No. 159]

³ The Yosemite Grant Act gave the State of California for the expressed purposes of public use, resort, and recreation. Yosemite did not become a National Park until 1890. However, this early designation provided the foundations on which the national protected area system was established.

⁴ U.S. Statutes at Large, Vol. 17, Chap. 24, pp. 32-33. "An Act to set apart a certain Tract of Land lying near the Head-waters of the Yellowstone River as a public Park." [S. 392].

⁵ Holdgate *The green web* (2014) 6; Phillips "History of protected area management categories" (2004) *PARKS* 4.

⁶ Holdgate *The green web* (2014) 6-7; Watson, et al. "The performance and potential of protected areas" (2014) *Nature* 67; Phillips "History of protected area management categories" (2004) *PARKS* 4-5.

⁷ Robinson "Biodiversity Through the UN SDGs" in *Biodiversity and Law* (2017) 28.

⁸ Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67-68.

⁹ Those recognised under the umbrella of the United Nations are detailed in the United Nations *Procedural History for the Declaration of the United Nations Conference on the Human Environment* (accessed June 2024).

¹⁰ The major output of this conference was the *Stockholm Declaration on the Human Environment* (1972) 11 ILM 1461.

¹¹ This includes the *Convention on the Protection of Wetlands of International Importance Especially as Waterfowl Habitats* (1972) 11 ILM 963; *Convention for the Protection of the World Cultural and Natural Heritage* (1972) 11 ILM 1358; *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1973) 993 UNTS 243; *Convention on the Conservation of Migratory Species of Wild Animals* (1980) 19 ILM 15.

regional¹² environmental agreements.¹³ The subsequent inclusion of several other global initiatives, such as the 1980 IUCN World Conservation Strategy¹⁴ and the 1982 World Charter for Nature,¹⁵ have also been central to the development of international environmental law.¹⁶

Early environmental agreements concentrated efforts on safeguarding species and habitats by countering direct drivers such as unsustainable exploitation, habitat loss and degradation.¹⁷ The CBD was adopted during the 1992 United Nations Conference on the Environment and Development (UNCED), emerging from a narrative dominated by sustainable development. The CBD expanded the remit to address both direct and indirect causes of biodiversity loss¹⁸ through a process of integration¹⁹ and cooperation.²⁰ Embracing the holistic nature of conservation thinking, the CBD recognises the need to find balance in the intrinsic, social, economic, and cultural values of the natural world, the conservation of and the sustainable use of biodiversity by both present and future generations, and the common concern for humankind and the state's sovereign rights over their biological resources.²¹

Some commentators saw the adoption of the CBD as an opportunity to amalgamate older specialised agreements²² as its origins stemmed from a decision by the United Nations Environment Programme (UNEP) requesting an inquiry into the desirability of an “umbrella convention”²³ to rationalise activities and harmonise the existing conventions related to biological diversity.²⁴ However, these international legal frameworks continue to co-exist while encouraging coordination, avoiding duplication, and promoting the exchange of information.²⁵ Upholding the principle of cooperation, the conventions discussed within this chapter seek to foster synergies as affirmed in numerous resolutions and decisions.²⁶ Owing to the

¹² Several examples include the *Convention on Conservation of Nature in the South Pacific* (Apia Convention) (1976) IELMT 976:45; Treaty for Amazonian Cooperation (1978) 17 ILM 1045; Convention on the Conservation of European Wildlife and Natural Habitats (Berne Convention) UKTS 56 (1982); Benelux Convention on Nature Conservation and Landscape Protection and Nature Resources (1982) 2 SMTE 163.

¹³ Handl “Declaration of the United Nations conference on the human environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992” (2012) *United Nations Audiovisual Library of International Law* 1; Sands, et al. “Principles of International Environmental Law” in *Principles of IEL* (2018).

¹⁴ IUCN *World Conservation Strategy* (1980).

¹⁵ *World Charter for Nature* (1982) 22 ILM 455.

¹⁶ Sands, et al. “Principles of International Environmental Law” in *Principles of IEL* (2018) 386.

¹⁷ *Ibid.* 386-387.

¹⁸ *Ibid.*

¹⁹ CBD. Article 6(b).

²⁰ CBD. Article 5, Article 17, and Article 18. Sands, et al. “Principles of International Environmental Law” in *Principles of IEL* (2018) 386-387.

²¹ CBD. Preamble.

²² Sands, et al. “Principles of International Environmental Law” in *Principles of IEL* (2018) 389.

²³ Decision 14/26 Rationalization of international conventions on biological diversity *UN General Assembly Report of the Governing Council on the work of its fourteenth session* (1987) 78-79.

²⁴ Secretariat of the Convention on Biological Diversity *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety* (2005) xxiii.

²⁵ The Liaison Group of Biodiversity-related Conventions seeks to facilitate this cooperation. Several examples of the commitment to cooperation can be found in: CBD COP 7 *Decision VII/26: Cooperation with other conventions and international organizations and initiatives* (2004); CBD COP 9 *Decision IX/27: Cooperation among multilateral environmental agreements and other organizations* (2008); CBD COP 14 *Decision 14/30: Cooperation with other conventions, international organizations and initiatives* (2018); CBD COP 15 *Decision 15/13: Cooperation with other conventions and international organizations* (2022).

²⁶ CBD COP Decisions II/3, III/21, V/21, VI/20, VII/26, IX/27, X/20, XII/6, XIII/24, 14/30, and 15/13; Ramsar Convention Resolutions XI.6, XIII.7, XIII.24 and XIV.6; CMS Resolutions 11.10, 13.1, and 14.3; CITES Resolutions 10.4, 13.3, 16.4, and 18.5.

scope of this thesis,²⁷ this chapter shall be limited to those instruments that relate specifically to terrestrial protected areas and potential OECMs.

Importantly, concepts of area-based conservation have been deeply embedded in the histories of cultures across the world throughout the span of time.²⁸ These ideas have manifested in a vast array of customary and traditional practices, some of which persist today.²⁹ As this chapter focuses on the evolution of contemporary theories, it is important to acknowledge that the application of Western concepts of conservation may be laced with conflicting values and worldviews.³⁰ This thesis does not intend to afford greater attention to Western discourse. However, sufficiently capturing the more nuanced and localised customary and traditional contributions to area-based conservation remains challenging due to the scope and biases that exist within the current literature. It is hoped that the examination of theoretical shifts provides evidence for the move to think more holistically and inclusively about area-based conservation.

To adequately address the prevailing conservation ideologies of today, it is important to reflect upon the historical evolution of area-based biodiversity conservation as the past continues to permeate the present. This chapter identifies the key shifts relevant for recognising, regulating, and reporting OECMs. It reflects upon how these theories drawn from various discourses have been given standing through the inclusion in international instruments.³¹ The chapter will specifically highlight the adaption of guidance, recommendations, resolutions, and decisions to reflect the changing discourse. It begins by broadly surveying the global shifts generally relevant to in-situ area-based conservation, such as the recognition of sustainable use, the ecosystem-based approach and the landscape approach. It will then narrow the inquiry to protected areas as this has given space for the recognition of OECMs by refocusing on human-centred approaches, management categories and effectiveness, and governance diversity and quality. Noting that the inclusion of OECMs is not strictly a product of environmental persuasion, this chapter finally considers the influences stemming from the discourse for sustainable development, human rights, and climate change.

²⁷ See section 1.4 of this text.

²⁸ Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67; Holdgate & Phillips "Protected areas in context" in Swingland, et al. (eds) *Integrated protected area management* (1999); Holdgate *The green web* (2014) 1-6.

²⁹ Barrow & Pathak "Conserving "unprotected" protected areas - communities can and do conserve landscapes of all sorts" in Brown, et al. (eds) *The Protected Landscape Approach: Linking Nature, Culture and Community* (2004) 65; Gurney, et al. "Area-based conservation" (2023) *One Earth* 98.

³⁰ West *Conservation is Our Government* (2006); Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

³¹ The 2003 IUCN World Parks Congress was the advent of the contemporary paradigm shift. Key recommendations contributing to this shift include: V.13 *Cultural and Spiritual Values of Protected Areas*, V.16 *Good Governance of Protected Areas*, V.17 *Recognising and Supporting a Diversity of Governance Types for Protected Areas*, V.18 *Management Effectiveness to Support Protected Area Management*, V.19 *IUCN Protected Area Management Categories*, V.24 *Indigenous Peoples and Protected Areas*, V.25 *Co-management of Protected Areas*, V.26 *Community Conserved Areas*, and V.27 *Mobile Indigenous Peoples and Conservation*. This vision for more equitable representation was reaffirmed in the CBD's Programme of Work on Protected Areas (2004), CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004).

2.1 GLOBAL SHIFTS IN THE DISCOURSE RELEVANT TO IN-SITU AREA-BASED CONSERVATION

The 1967 Technical Conference on the Exploration, Utilization and Conservation of Plant Genetic Resources may have had the earliest reference to the term *in-situ* conservation.³² While conservation has been embedded in cultural practices for millennia,³³ it was not until the 1970s that Western models of conservation recognised the importance of *in-situ* conservation, thus driving the expansion of terrestrial protected areas across the global community.³⁴ In 1990, an Ad Hoc Working Group of Experts on Biological Diversity discussed the need to find a collective understanding and meaning for the conservation of biodiversity.³⁵ The resulting text of the CBD does not explicitly define conservation; however, it does offer a definition for *in-situ* conservation.³⁶

The conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties.³⁷

The CBD implores parties to complement *in-situ* conservation with *ex-situ* conservation measures,³⁸ thus asserting a hierarchical relationship that prioritises *in-situ* conservation. Although protected areas remain a key tool for *in-situ* conservation, the CBD also encourages parties to broadly regulate and manage biodiversity.³⁹ As climate change alters habitats and ecosystems in ways that do not foster adaption or push species into new surroundings,⁴⁰ policies and laws may need to remain flexible yet robust to meet evolving challenges. The explicit inclusion of OECMs within the CBD's KMGBF signifies their acceptance and role in promoting *in-situ* conservation.

2.1.1 The conservation versus sustainable use debate

Over the years, debates about the compatibility of biodiversity conservation and sustainable use have challenged the international community with positions tending to run a divide between developed and developing countries.⁴¹ Early area-

³² Braverman "Conservation without nature: the trouble with in situ versus ex situ conservation" (2014) *Geoforum* 49.

³³ Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67; Holdgate *The green web* (2014) 1.

³⁴ Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67-68.

³⁵ UNEP Ad Hoc Working Group of Experts on Biological Diversity Report of the ad hoc working group on the work of its first session (1989) para 12.

³⁶ For comparison *ex-situ* conservation is defined as conservation outside of natural habitats. CBD. Article 2.

³⁷ Ibid. Article 2.

³⁸ Ibid. Article 9.

³⁹ Ibid. Article 8(c).

⁴⁰ Braverman "Conservation without nature: in situ versus ex situ " (2014) *Geoforum* 50; CBD COP 16 Decision 16/22: *Biodiversity and climate change* (2024).

⁴¹ This may be evident in regional instruments such as the *Convention on Conservation of Nature in the South Pacific* (Apia Convention) and the *African Convention on the Conservation of Nature and Natural Resources* both provide for elements of sustainable use. While the *Benelux Convention on Nature Conservation and Landscape Protection and Natural Resources* and the *Convention on the Conservation of European Wildlife and Natural Habitats* (Berne Convention) support more strict conservation measures. This of course is not an absolute divide as the *Carpathian Convention and its Protocol on Conservation and Sustainable Use of Biological and Landscape Diversity* represents an European perspective inclusive of sustainable use. Allen & Edwards "The sustainable-use debate: observations from IUCN" (1995) *Oryx*. *ibid.* ; Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS*; Burhenne-Guilmin "Biodiversity and International Law: Historical Perspectives and Present

based conservation initiatives in developed countries primarily focused on large spaces perceived⁴² to be unpopulated⁴³ that aligned with the stricter interpretation of conservation. However, developing countries have favoured greater flexibility to account for food security, livelihood opportunities, and cultural continuance.⁴⁴ This creates questions about by who and how conservation is defined,⁴⁵ and which needs are prioritised.⁴⁶

The Ramsar Convention pioneered a dual mission of conservation and wise use,⁴⁷ noting that throughout history much of the natural world had undergone human-induced transformations.⁴⁸ It also recognised that as more developing nations joined, there was a need to expand and strengthen the aspects associated with sustainable and wise use.⁴⁹ Based on a similar premise, the 1980 World Conservation Strategy defined conservation as inclusive of the principle of sustainable use.⁵⁰ It described conservation as the “management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations”.⁵¹

The CBD reflected the broader approach by adopting the objectives of conservation, sustainable use, and fair and equitable benefit sharing.⁵² All parties are urged to integrate factors associated with conservation and sustainable use

Challenges: Where Do We Come From, Where Are We Going?” in Jeffery, et al. (eds) *Biodiversity Conservation, Law and Livelihoods. Bridging the North-South Divide: IUCN Academy of Environmental Law Research Studies* (2008) 33; Shafer “Arguments for and against IUCN category VI” (2020) *J Nat Conserv*.

⁴² Colonisers applied the notion of *terra nullius*, meaning the land of no one, to justify new conquests. This denied the recognition and agency of Indigenous peoples to control their traditional lands. Gilbert & Doyle “A New Dawn over the Land: Shedding Light on Collective Ownership and Consent” in Allen&Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011); Plumwood “Decolonizing relationships with nature” in *Decolonizing nature: Strategies for conservation in a post-colonial era* (2012).

⁴³ As exemplified in the creation of the Yosemite and Yellowstone national parks. Holdgate *The green web* (2014) 6-7; Watson, et al. “Performance and potential of protected areas” (2014) *Nature* 67.

⁴⁴ Allen & Edwards “The sustainable-use debate” (1995) *Oryx* 92-93.

⁴⁵ Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS*; Jonas, et al. “New steps of change: Beyond protected areas to consider OECMs” (2014) *PARKS*.

⁴⁶ Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS*; Jonas, et al. “New steps of change: Beyond protected areas to consider OECMs” (2014) *PARKS*.

⁴⁷ Recommendation 3.3: *Wise use of wetlands*, defined wise use as the ‘sustainable utilization for the benefit of humankind in a way compatible with the maintenance of the natural properties of the ecosystem. The recommendation gave further clarity by defining sustainable utilization as “human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations”.

⁴⁸ Matthews *The Ramsar Convention on Wetlands: its history and development* (1993) 47; IPBES *Summary for policymakers of the global assessment report* (2019).

⁴⁹ Matthews *Ramsar Convention history* (1993) 47-61. Resolution XI.13 *An Integrated Framework for linking wetland conservation and wise use with poverty eradication*.

⁵⁰ Jonas, et al. “New steps of change: Beyond protected areas to consider OECMs” (2014) *PARKS*. During the same time period the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) 19 ILM 841 defined conservation to be inclusive of rational use. While some consider rational use to be synonymous with sustainable use, the convention’s text fails to offer a definition thus leading to various and divergent interpretations.⁵⁰ For further discussion see: Jacquet, et al. “‘Rational use’ in Antarctic waters” (2016) *Mar Policy*.

⁵¹ IUCN *World Conservation Strategy* (1980).

⁵² UNEP *Ad Hoc Working Group of Experts on Biological Diversity Report of the ad hoc working group on the work of its first session* (1989).

into decision-making processes⁵³ and extend recognition to the relevant practices of IPLCs.⁵⁴ The CBD continues to reinforce the complementary aspects of conservation and sustainable use through various decisions⁵⁵ and guidelines.⁵⁶

The 1992 IUCN World Congress on National Parks and Protected Areas identified a number of challenges facing the global protected area estate.⁵⁷ This highlighted the diverse range of competing needs testing management functions⁵⁸ and subsequently led to a recommendation for the new protected area management Category VI: Protected Area with Sustainable Use of Natural Resources.⁵⁹ Despite continued debate,⁶⁰ the IUCN sought to “tighten”⁶¹ its definition of a protected area to be more restrictive.⁶² It acknowledges that establishing and managing protected areas may require “trade-offs”⁶³ yet should maintain the primary objective of achieving long-term conservation outcomes.⁶⁴

Today, advocates of sustainable use draw attention to the role biodiversity plays in meeting basic human needs and supporting economic livelihoods for a significant proportion of the global population.⁶⁵ However, other commentators counter that the “emergency situation” of biodiversity conservation⁶⁶ necessitates the employment of the precautionary principle and strict interpretations of conservation.⁶⁷ While there could be value in reassessing more inclusive definitions for conservation and protected areas, OECMs may also provide an opportunity for greater inclusivity within legal frameworks.⁶⁸ As OECMs extend recognition to areas with conservation as a primary, secondary, or ancillary objective, it may provide opportunities to both narrow the objectives of protected areas to conservation while also broadening in-situ conservation measures to encompass areas of sustainable use.⁶⁹

⁵³ Article 10(a).

⁵⁴ Article 8(j).

⁵⁵ CBD COP Decision III/9: Implementation of Articles 6 and 8 of the Convention; CBD COP Decision V/24: Sustainable use as a cross-cutting issue; CBD COP Decision VII/11: Ecosystem Approach; CBD COP Decision VII/12: Sustainable Use (Article 10); CBD COP Decision VII/28: Protected areas (Articles 8(a) to (e)); CBD COP 10 Decision X/31: Protected areas; CBD COP Decision XII/5: Biodiversity for poverty eradication and sustainable development; CBD COP 10 Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets 2010 (UNEP/CBD/COP/DEC/X/2); CBD COP 14 Decision 14/13: *Glossary of relevant key terms and concepts within the context of Article 8(j) and related provisions* (2018).

⁵⁶ The Addis Ababa Principles and Guidelines confirms sustainable use as a “valuable tool to promote conservation of biological diversity”. Secretariat of the Convention on Biological Diversity *Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity (CBD Guidelines)* (2004). These principles and guidelines have been endorsed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora in Resolution 13.2.

⁵⁷ IUCN *Parks for Life: Report of the IVth World Congress on National Parks and Protected Areas* viii + 260 (1993).

⁵⁸ Watson, et al. “Performance and potential of protected areas” (2014) *Nature* 67-68.

⁵⁹ The first set of IUCN protected area management categories was adopted during the 19th session of IUCN General Assembly in Buenos Aires, and have undergone revisions in 2008 and 2013. Dudley *Guidelines for Protected Area Management Categories* (2013).

⁶⁰ Dudley, et al. “The revised IUCN protected area management categories: the debate and ways forward” (2010) *Oryx* 488-489.

⁶¹ Dudley *Guidelines for Protected Area Management Categories* (2008) x; Dudley *Guidelines for Protected Area Management Categories* (2013) x.

⁶² Jonas, et al. “New steps of change: Beyond protected areas to consider OECMs” (2014) *PARKS* 117.

⁶³ Dudley *Guidelines for Protected Area Management Categories* (2013) 3.

⁶⁴ Ibid. 35; Dudley, et al. “The revised IUCN protected area management categories” (2010) *Oryx* 487-488.

⁶⁵ Secretariat of the CBD *Addis Ababa Principles and Guidelines* (2004) Section A(d).

⁶⁶ Hutton, et al. “Back to the barriers? Changing narratives in biodiversity conservation” (2005) *Forum for development studies* 347.

⁶⁷ Allen & Edwards “The sustainable-use debate” (1995) *Oryx* 96-97.

⁶⁸ Jonas, et al. “New steps of change: Beyond protected areas to consider OECMs” (2014) *PARKS*.

⁶⁹ See section 3.2 of this text.

2.1.2 Emphasis on ecosystem-based approaches

The Convention on the Conservation of Antarctic Marine Living Resources⁷⁰ (CCAMLR) introduced the first interpretation of the ecosystem approach⁷¹ into international environmental law⁷² as it sought to foster “ecological relationships”.⁷³ However, the narrow reach of the CCAMLR to the Antarctic region⁷⁴ may have limited its scope. The 1995 adoption of the ecosystem approach by the CBD as the “primary framework of action” advanced the concept by recognising it for implementing and balancing the Convention’s three main objectives.⁷⁵

The CBD defines an ecosystem as a “dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”.⁷⁶ While there are arguments for an eco-centric position, it has generally been represented by a more anthropocentric position within modern environmental frameworks.⁷⁷ This affords an opportunity to manage human activities.⁷⁸ Observing that the UNCED served as a “catalyst”,⁷⁹ it is perhaps unsurprising that the ecosystem approach draws parallels to the discourse of sustainable development, recognising the social, economic, and cultural influences that may potentially impact conservation outcomes.⁸⁰

The ecosystem approach was born out of a response to the failures of single-focused, reactive, and sometimes impromptu environmental protection and management approaches.⁸¹ During its early adoption, the ecosystem approach was considered a mechanism and policy tool to overcome certain limitations of conservation, such as site-specific management failing to account for linkages with other sites, excessive emphasis on specific species characteristics, a failure to account for biodiversity outside of protected areas, inadequate engagement of a diverse array of stakeholders in management decision making, and a lack of consideration given to the integration of nature and culture.⁸² The inefficiencies of sectoral

⁷⁰ *Convention on the Conservation of Antarctic Marine Living Resources* (1980) 19 ILM 841.

⁷¹ Various terminologies have been used to reflect the ecosystem approach. This includes: ecosystem management, ecosystem-based approach to management, ecosystem-based management, ecosystem process-oriented approach, total ecosystem management, integrated approach, integrated agro-ecosystem approaches, holistic approaches, amongst others. De Lucia “Competing narratives and complex genealogies: The ecosystem approach in international environmental law” (2015) *Journal of Environmental Law* 100.

⁷² *Ibid.* 107-108.

⁷³ CCAMLR. Article II(3)(b).

⁷⁴ CCAMLR. Article I(1).

⁷⁵ CBD COP 2 *Decision II/8: Preliminary consideration of components of a Biological Diversity particularly under threat and action which could be taken under the Convention* (1995) para 1. This is emphasised again in *Decision VII/11*.

⁷⁶ CBD. Article 2.

⁷⁷ De Lucia “Competing narratives and complex genealogies” (2015) *Journal of Environmental Law*; Bell “Non-human nature and the ecosystem approach: the limits of anthropocentrism in Great Lakes management” (1994) *Alternatives Journal*. CBD COP 5 *Decision V/6: Ecosystem approach* (2000) para A(2).

⁷⁸ This was explicitly stated by the United Nations General Assembly in Resolution 61/222 on *Oceans and the Law of the Sea* (20 December 2006), para. 119(b); Resolution 62/215 (22 December 2007), para. 99(b); Resolution 63/111 (5 December 2008), para. 117(b). De Lucia “Competing narratives and complex genealogies” (2015) *Journal of Environmental Law*.

⁷⁹ Trouwborst “The precautionary principle and the ecosystem approach in international law: differences, similarities and linkages” (2009) *Review of European Community & International Environmental Law*.

⁸⁰ Secretariat of the Convention on Biological Diversity *The Ecosystem Approach (CBD Guidelines)* (2004).

⁸¹ Trouwborst “Precautionary principle and ecosystem approach in international law” (2009) *Review of European Community & International Environmental Law*.

⁸² CBD *Report of the Workshop on the Ecosystem Approach* (1998) para 14.

segmentation within domestic frameworks were also noted as negatively impacting both biodiversity and people.⁸³ The ecosystem approach sought to address these challenges by providing an adaptive legal and governance strategy⁸⁴ that equitably promotes conservation and sustainable use through integrated management of land, water, and living resources.⁸⁵ Yet, on a practical level, competing land uses, diverse perspectives, and various special interests create challenges for integration into the broader policy environment.⁸⁶

Although generally agreed within the international community as fundamentally important, there is no single method for implementing the ecosystem approach.⁸⁷ The CBD has produced guidance to the parties, which is supported by a set of twelve principles as voluntary instructions that can be translated into the domestic context.⁸⁸ While balancing these principles may require value judgements,⁸⁹ they encourage management to be fair, equitable, participative, balanced, and dynamic.⁹⁰ Numerous international⁹¹ and regional⁹² instruments have endorsed concepts of the ecosystem approach. The expectations set out in the CBD principles for OECMs encourage the management regime to align with the ecosystem approach.⁹³ This is further highlighted in the IUCN guidance as fostering area-based conservation for the whole of nature.⁹⁴ Observing that biodiversity is part of an interconnected web, in-situ conservation cannot fully succeed by affording protection to a single species.⁹⁵

⁸³ Ibid.

⁸⁴ De Lucia “Competing narratives and complex genealogies” (2015) *Journal of Environmental Law* 91.

⁸⁵ CBD COP 5 *Decision V/6: Ecosystem approach* (2000) Annex, Section A(1); CBD COP 7 *Decision VII/11: Ecosystem approach* (2004).

⁸⁶ Shepherd *The ecosystem approach: learning from experience* (2008).

⁸⁷ The need for guidance was noted in CBD COP 7 *Decision VII/11: Ecosystem approach* (2004) Annex I, para A(9). This led to the publication of *The Ecosystem Approach (CBD Guidelines)*. De Lucia “Competing narratives and complex genealogies” (2015) *Journal of Environmental Law*.

⁸⁸ CBD COP 5 *Decision V/6: Ecosystem approach* (2000). CBD COP 7 *Decision VII/11: Ecosystem approach* (2004) Annex, section B.

⁸⁹ De Lucia “Competing narratives and complex genealogies” (2015) *Journal of Environmental Law* 111-113.

⁹⁰ CBD COP 7 *Decision VII/11: Ecosystem approach* (2004) Annex, section B.

⁹¹ Several examples include the Ramsar Convention, CITES, and CCAMLR, to various extents. CCAMLR was the first to incorporate ecosystem approach. For detailed information see: *CCAMLR Extent which CCAMLR decisions incorporate ecosystem approach* (accessed 2024). The Ramsar Convention updated the definition of wise use as the “maintenance of their ecological character, achieved through the implementation of ecosystem approaches, within the context of sustainable development”. Resolution IX.1 *A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character*. Annex A para 22; Although an indirect reference, parties to CITES are expected to monitor listed species to maintain its role within the ecosystem (Article IV para 3), thus incorporating elements of the ecosystem approach. CITES has identified the ecosystem approach as an opportunity to improve synergies with the CBD (CoP13 Doc. 12.1.1 *Achieving greater synergy in CITES and CBD implementation*).

⁹² Such as: *Agreement Between the United States and Canada on the Water Quality of the Great Lakes* (1978) 30 UST 1383, *Association of Southeast Asian Nations Agreement on the Conservation of Nature and Natural Resources* (1985) 15 EPL 64, *Convention for Co-operation in the Protection and Sustainable Development of the Marine and Coastal Environment of the North-East Pacific Barcelona Convention*; 2001 Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem

⁹³ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III, A(e).

⁹⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 6.

⁹⁵ Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 6.

2.1.3 Landscape approaches

Similar to the ecosystem approach, landscape approaches⁹⁶ acknowledge the connection between humans and the environment.⁹⁷ Landscape approaches acknowledge the larger picture of a “mosaic” of conservation tools, land uses, ownership, tenure, and management categories⁹⁸ employed by local people as stewards of the natural environment.⁹⁹ This shifts the discourse away from the dichotomy of being purely eco-centric or anthropocentric to one of interdependency and integration.¹⁰⁰

The landscape approach was founded in the geographical sciences in the early 1800s.¹⁰¹ However, it was not until the 1980s that it formally entered into modern conservation strategies as a mechanism to address the trade-offs of conservation and livelihood activities, particularly within the global south.¹⁰² As the international community focused attention on the goals of sustainable development, landscape approaches proved a natural fit.¹⁰³ More contemporary models have also integrated the objectives of climate change, land-use planning, development, and natural resource management.¹⁰⁴ From a legal perspective, landscape approaches can afford decision-makers a more holistic perspective that acknowledges the potential influence of internal and external factors on land use.¹⁰⁵ Importantly, the literature underscores the challenge of achieving win-win outcomes; thus landscape approaches may encourage planning to minimise trade-offs and compromise from competing land uses.¹⁰⁶

The IUCN drives the landscape approach through the management Category V¹⁰⁷ that recognises protected landscapes and seascapes.¹⁰⁸ This seeks to protect the environmental values as well as those manifested by human societies, culture, and spiritual beliefs.¹⁰⁹ The concept of landscape approaches has also been evolving within other forums. During a similar

⁹⁶ The literature identifies a number of terms that may fall under the umbrella of an integrated landscape approach, thus this thesis has adopted the plural form. Reed, et al. “Integrated landscape approaches to managing social and environmental issues in the tropics: learning from the past to guide the future” (2016) *Global Change Biology* 2543.

⁹⁷ Brown, et al. *The protected landscape approach: linking nature, culture and community* (2005) 3.

⁹⁸ Ibid. 5.

⁹⁹ Ibid. 3-6.

¹⁰⁰ Reed, et al. “Integrated landscape approaches in the tropics: A brief stock-take” (2020) *Land Use Policy* 2.

¹⁰¹ Arts, et al. “Landscape approaches: a state-of-the-art review” (2017) *Annual Review of Environment and Resources* 441.

¹⁰² Ibid. 442; Reed, et al. “What are ‘Integrated Landscape Approaches’ and how effectively have they been implemented in the tropics: a systematic map protocol” (2015) *Environmental Evidence* 2.

¹⁰³ Arts, et al. “Landscape approaches” (2017) *Annual Review of Environment and Resources* 442; Phillips “Landscape as a meeting ground: Category V Protected Landscapes/Seascapes and World Heritage Cultural Landscapes” in Brown, et al. (eds) *The protected landscape approach: linking nature, culture and community* (2005) 21; Reed, et al. “Integrated landscape approaches to managing social and environmental issues” (2016) *Global Change Biology* 2550.

¹⁰⁴ Arts, et al. “Landscape approaches” (2017) *Annual Review of Environment and Resources* 442; Reed, et al. “Integrated landscape approaches to managing social and environmental issues” (2016) *Global Change Biology* 2541.

¹⁰⁵ Reed, et al. “Integrated Landscape Approaches” (2015) *Environmental Evidence* 2.

¹⁰⁶ Arts, et al. “Landscape approaches” (2017) *Annual Review of Environment and Resources* 440; Reed, et al. “Integrated landscape approaches in the tropics” (2020) *Land Use Policy* 3.

¹⁰⁷ This was predated by a 1978 report that suggested ten protected area categories including one with relevance to protected landscapes. Phillips “History of protected area management categories” (2004) *PARKS* 7; Brown, et al. “Protected landscapes: a conservation approach that links nature, culture and community” in Brown, et al. (eds) *The protected landscape approach: linking nature, culture and community* (2005) 11.

¹⁰⁸ See section 2.2.3 of this text. Dudley *Guidelines for Protected Area Management Categories* (2013) 20-22.

¹⁰⁹ Ibid. 20.

time period as the IUCN, the idea of cultural landscapes gained recognition within the WHC based on the outstanding value of the interaction between people and their environment.¹¹⁰ The nexus of the IUCN and WHC provided the foundation for the European Landscape Convention¹¹¹ (ELC)¹¹² that has shaped the legal environment on a regional scale. Although the global community lacks consensus regarding a definition,¹¹³ “landscape” has been explicitly defined by the ELC as “an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors”.¹¹⁴

The CBD has implicitly endorsed the landscape approach through reference to the Man and Biosphere Programme¹¹⁵ and the Satoyama Initiative.¹¹⁶ Most recently, the KMGBF Target 3 calls for a system of protected areas and OECMs to be integrated into the broader landscapes and seascapes. The inclusion of OECMs within a landscape may address spatial gaps and afford legal recognition to areas where biodiversity may not be a primary objective, such as those associated with cultural and spiritual values, sustainable use, and some ICCAs.

2.2 GLOBAL SHIFTS IN THE DISCOURSE RELEVANT TO PROTECTED AREAS AND OECMS

The Stockholm Declaration called on the global community to safeguard and manage the Earth’s air, water, land, fauna and flora for present and future generations.¹¹⁷ This set the momentum for a pronounced increase in the global protected area estate.¹¹⁸ During the first IUCN World Conference on National Parks held in 1962, a total of 9,214 protected areas were recognised globally.¹¹⁹ Just sixty years later, the World Database on Protected Areas now identifies 286,810 terrestrial and inland water protected areas, 16,502 marine protected areas, 6261 terrestrial and 202 marine OECMs.¹²⁰

¹¹⁰ Phillips “Landscape as a meeting ground” in *Protected landscape approach* (2005) 26-27.

¹¹¹ *European Landscape Convention* (20.X.2000) ETS No. 176.

¹¹² The title of the convention was changed by the 2016 Protocol (CETS No. 219) to the Council of Europe Landscape Convention.

¹¹³ Reed, et al. “Integrated landscape approaches to managing social and environmental issues” (2016) *Global Change Biology* 2541.

¹¹⁴ Article 1a.

¹¹⁵ CBD COP 10 *Decision X/32: Sustainable use of biodiversity* (2010) para 3(d).

¹¹⁶ Ibid. para 6-9; CBD COP 11 *Decision XI/25: Sustainable use of biodiversity: bushmeat and sustainable wildlife management* (2012) para 7. An introduction to the Satoyama Initiative is found in Takeuchi “Rebuilding the relationship between people and nature: the Satoyama Initiative” (2010) *Ecological research*.

¹¹⁷ *Stockholm Declaration on the Human Environment* (1972) 11 ILM 1461. Principle 2.

¹¹⁸ Watson, et al. “Performance and potential of protected areas” (2014) *Nature* 67-68.

¹¹⁹ Worboys “Protected Area Governance and Management” in (2015) 21.

¹²⁰ UNEP-WCMC & IUCN *Protected Planet: WDPA* (accessed January 2025).

Undoubtedly, a number of factors have contributed to this expansion of the protected area estate,¹²¹ including political,¹²² socio-cultural,¹²³ and scientific¹²⁴ motivators.

The growth of the protected area estate may also reflect the escalating ambition set by global targets. In 1982, the IUCN World Park's Congress set a goal of protecting 10% of the Earth's surface, a target that drew criticism as being unattainable at the time.¹²⁵ Yet over the decades to follow, the collective targets have undergone a progressive "upscaling of ambition", nurturing the expansion of the protected area estate.¹²⁶ From 2011 to 2020, the Aichi Biodiversity Targets raised the mark, seeking to achieve a total of 17% terrestrial and 10% marine area under some form of protected area or other effective area-based conservation measures.¹²⁷ Over the next decade, the target has been elevated to 30%.¹²⁸ While this reflects an impressive leap, it is perhaps even more so because these areas should be important for biodiversity and ecosystem services, effective, equitably governed, ecologically representative, well-connected and integrated into the broader landscapes and seascapes.¹²⁹ Notably, as protected areas have become cemented as the foundational tool for area-based conservation,¹³⁰ the international community has been slow to explore and recognise the role of OECMs.¹³¹ Protected areas alone cannot meet the mounting ambition of the international community.¹³² This section shall draw attention to both the developing discourse that has shaped protected areas and OECMs as complementary tools.

2.2.1 A realignment from protectionist to human-centred approaches

The broad dichotomy of conservation versus sustainable use¹³³ can be further refined within the question of protectionism versus human-centred approaches within the discourse of protected areas and OECMs. During the latter part of the 19th century, the North American model of protected areas was replicated in Australia, Canada, New Zealand, and South Africa.¹³⁴ These early protected areas favoured large spaces void of human populations, which afforded little other

¹²¹ The literature refers to the 1992 World Congress on National Parks and Protected Areas as a key moment for the future expansion of the protected area network. Of particular importance was Recommendation 16: *Expanding the global network of protected areas*, and Recommendation 17: *Protected area categories, management effectiveness*, which recommended the creation of a new protected area management category. The report of the congress can be read here: <https://portals.iucn.org/library/sites/library/files/documents/1993-007.pdf>.

¹²² Adams & Mulligan *Decolonizing nature: strategies for conservation in a post-colonial era* (2012); Tran, et al. "Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) *Biol Conserv*.

¹²³ Tran, et al. "Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) *Biol Conserv* 5.

¹²⁴ Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation*; Butchart, et al. "Shortfalls and Solutions for Meeting National and Global Conservation Area Targets" (2015) *Conserv Lett*; Dudley, et al. "Where now for protected areas?" (2014) *Oryx*.

¹²⁵ Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation*.

¹²⁶ Laffoley, et al. 2017 *Aquat Conserv* 132.

¹²⁷ CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010).

¹²⁸ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section H, Target 3.

¹²⁹ *Ibid*.

¹³⁰ Watson, et al. "Bolder Science" (2016) *Conservation Biology* 244.

¹³¹ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 3.

¹³² Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation* 4-5.

¹³³ See section 2.1.1 of this text.

¹³⁴ Holdgate *The green web* (2014) 6-7; Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67; Phillips "History of protected area management categories" (2004) *PARKS*.

economic benefits, to preserve iconic landscapes and endangered wildlife.¹³⁵ Throughout the 20th century, the creation of protected areas continued to favour strict protection and exclusion of people¹³⁶ from natural resources.¹³⁷ The protectionist approach viewed humans as potentially damaging to conservation objectives and therefore they should be physically removed from protected areas, as well as from their governance structures.¹³⁸ This approach to protected areas flourished as it trailed the spread of colonialism and European values.¹³⁹ The colonial powers dispossessed and excluded people from their lands and introduced changes in environmental governance which disempowered local people and denied them of their sovereignties.¹⁴⁰ The role of governance and decision-making was generally left to the responsibility of the state,¹⁴¹ which often neglected to recognise customary management practices. This induced further damaging consequences as it intensified interpersonal conflict and negatively changed the relationship between local people and nature.¹⁴²

As recently as the 1980s, the paradigm began to shift toward more human-centred approaches¹⁴³ that recognised the inseparable relationship between humans and the environment.¹⁴⁴ In addition to environmental protection, this new human-centred paradigm necessitated the need to equitably and inclusively address economic, social, spiritual, and cultural dynamics.¹⁴⁵ It seeks to facilitate the inclusion of people, both physically and politically, within protected areas and OECMs, accepting the ethical obligation and impracticality of exclusion.¹⁴⁶ As few protected and conserved areas are entirely free from human pressures,¹⁴⁷ human-centred approaches pragmatically recognise the needs of people and the human drivers of environmental change.

¹³⁵ Holdgate *The green web* (2014) 6-7; Watson, et al. "Performance and potential of protected areas" (2014) *Nature* 67.

¹³⁶ This is sometimes referred to as "fortress conservation" or the "fences and fines approach" within the literature.

¹³⁷ Hutton, et al. "Back to the barriers?" (2005) *Forum for development studies*.

¹³⁸ Kothari "Managing resource use and development" in G. L. Worboys (ed) *Protected Area Governance and Management* (2015); Waithaka & Njoroge "The Role of Potential OECMs in Safeguarding Space for Nature in Kenya: A Case Study of Wildlife Conservancies" (2018) *PARKS* 101; Holdgate & Phillips "Protected areas in context" in *Integrated protected area management* (1999) 4.

¹³⁹ Holdgate *The green web* (2014) 6; Adams & Mulligan *Decolonizing nature* (2012); Hutton, et al. "Back to the barriers?" (2005) *Forum for development studies*.

¹⁴⁰ Waithaka & Njoroge "OECMs in Safeguarding Space for Nature" (2018) *PARKS* 101; Adams & Mulligan "Introduction" in *Decolonizing nature: Strategies for conservation in a post-colonial era* (2012).

¹⁴¹ Kothari "Managing resource use and development" in *Protected Area Governance and Management* (2015); Stevens "Indigenous peoples, biocultural diversity, and protected areas" in Stevens (ed) *Indigenous Peoples, National Parks, and Protected Areas: A New Paradigm Linking Conservation, Culture, and Rights* (2014) 18-19.

¹⁴² Andrade & Rhodes "Protected areas and local communities: an inevitable partnership toward successful conservation strategies?" (2012) *Ecology and society* 6-8; Adams "Nature and the colonial mind" in *Decolonizing nature: Strategies for conservation in a post-colonial era* (2012).

¹⁴³ While notably diverse, human-centered approaches advanced during the 1980-1990's included community-based conservation models, co-management arrangements, community-based natural resource management, and integrated conservation and development programs. Hutton, et al. "Back to the barriers?" (2005) *Forum for development studies*.

¹⁴⁴ Bhola, et al. "Perspectives on area-based conservation and its meaning for future biodiversity policy" (2021) *Conservation Biology*. Büscher, et al. "Half-Earth or Whole Earth? Radical ideas for conservation, and their implications" (2017) *Oryx*.

¹⁴⁵ Shafer "Arguments for and against IUCN category VI" (2020) *J Nat Conserv* 2.

¹⁴⁶ Hutton, et al. "Back to the barriers?" (2005) *Forum for development studies*; Kothari "Managing resource use and development" in *Protected Area Governance and Management* (2015).

¹⁴⁷ Holdgate *The green web* (2014).

The 1972 Stockholm Conference was foremost to declare humankind to be “both creature and moulder” of the environment.¹⁴⁸ During this time, several documents emphasised the role of humans and their relationship with nature, drawing parallels between the development of human-centred approaches to conservation and sustainable development.¹⁴⁹ The Bali Action Plan, the result of the 1982 IUCN World Parks Congress, not only explicitly referenced the promotion of the linkages¹⁵⁰ but also the need to “help ensure that protected area resources are conserved to form an inseparable part of the modern human ecosystem”.¹⁵¹

However, the “turning point” in the new conservation paradigm may have been the following IUCN World Congress on National Parks and Protected Areas in 1992.¹⁵² This Congress concluded that human needs and well-being, including the social, cultural, political, and economic, are central determinants of area-based conservation.¹⁵³ The CBD also recognises humans as an “integral component of many ecosystems”¹⁵⁴ and has embraced the synergies between conservation and sustainable development through a number of decisions¹⁵⁵ and technical guidance.¹⁵⁶

In recent years, the role of IPLCs in area-based conservation has garnered increasing attention.¹⁵⁷ Human-centred approaches align with the principles of human rights to ensure IPLCs are not only meaningfully acknowledged and valued within conservation initiatives but also seek to prevent the loss of associated rights. Over the years, the IUCN has adopted over 150 resolutions that directly or indirectly reference Indigenous peoples’ rights, knowledge, or conservation.¹⁵⁸ The

¹⁴⁸ *Stockholm Declaration on the Human Environment* (1972) 11 ILM 1461. Chapter 1(1).

¹⁴⁹ Such as the *World Charter for Nature* (1982) 22 ILM 455; *Our Common Future* (1987) Report of the World Commission on Environment and Development ; *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development and Agenda 21* (1992) 31 ILM 874.

¹⁵⁰ IUCN *Bali Action Plan* (1987) Objective 5.

¹⁵¹ *Ibid.* 10.

¹⁵² Holdgate & Phillips “Protected areas in context” in *Integrated protected area management* (1999).

¹⁵³ IUCN *Parks for Life: Report of the IVth World Congress on National Parks and Protected Areas* viii + 260 (1993).

¹⁵⁴ CBD COP 7 *Decision VII/11: Ecosystem approach* (2004) Annex 1, A(2). Secretariat of the CBD *Ecosystem Approach* (2004) 6.

¹⁵⁵ Such as: CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018); CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010); CBD COP 10 *Decision X/31: Protected areas* (2010); CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004).

¹⁵⁶ Such as: Secretariat of the Convention on Biological Diversity *Protected Areas in Today's World: Their Values and Benefits for the Welfare of the Planet* (2008); Kothari, et al. *Recognising and supporting territories and areas conserved by indigenous peoples and local communities: global overview and national case studies* (2012); Dudley, et al. *Towards Effective Protected Area Systems. An Action Guide to Implement the Convention on Biological Diversity Programme of Work on Protected Areas* (2005); Secretariat of the Convention on Biological Diversity *Biodiversity issues for consideration in the planning, establishment and management of protected area sites and networks* (2004).

¹⁵⁷ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation*.

¹⁵⁸ Resolution 7.002 Strengthened institutional inclusion concerning indigenous peoples.

CBD has supported the inclusion of IPLCs within the convention's text¹⁵⁹ and through subsequent decisions taken by the Conference of the Parties (COP)¹⁶⁰ and the Programme of Work on Protected Areas (PoWPA).¹⁶¹

The CBD's KMGBF draws attention to the need for participation and inclusivity from the "whole-of-society" to accomplish the 2050 goals and 2030 milestones.¹⁶² As the global community calls for more ambitious targets of area-based conservation, it is imperative not to repeat the exclusion and dispossession of the past.¹⁶³ Although the shift toward more human-centred approaches is notable within the international policy frameworks, particular management objectives may compel strict approaches to conservation.¹⁶⁴ A diversity of protected area management categories,¹⁶⁵ coupled with the capabilities of OECMs to afford nuanced recognition to a diversity of management objectives,¹⁶⁶ may provide an opportunity to equitably acknowledge a spectrum of protectionism and human-centred approaches.

2.2.2 Coverage targets

The establishment of collective targets for area-based conservation was born out of the need for collective action to address biodiversity loss. In 1982 the IUCN's 3rd World Park's Congress agreed to set a goal to safeguard 10% of the Earth's surface under the status of protected areas.¹⁶⁷ At the time, critics argued that this was an unattainable feat.¹⁶⁸ However, the ensuing decades have witnessed a progressive "upscaling of ambition".¹⁶⁹ The CBD's Strategic Plan later adopted the coverage target of 10%.¹⁷⁰

Aichi Target 11 of the 2011-2020 CBD Strategic Plan for Biodiversity extended coverage goals to protect 17% of terrestrial and inland water areas, and 10% of marine and coastal areas.¹⁷¹ This target also advanced coverage to include qualitative elements emphasising the design and management of protected areas and OECMs.¹⁷² Target 11 served as the first formal

¹⁵⁹ Article 8(j).

¹⁶⁰ CBD COP 14 *Decision 14/16: Methodological guidance concerning the contributions of indigenous peoples and local communities* (2018); CBD COP 9 *Decision IX/18: Protected areas* (2008); CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010); CBD COP 14 *Decision 14/13: Glossary of relevant key terms and concepts within the context of Article 8(j) and related provisions* (2018).

¹⁶¹ IPLCs are referred throughout, however Goal 2.2 is unambiguously "to enhance and secure involvement of indigenous and local communities and relevant stakeholders". CBD *Programme of Work on Protected Areas* (2004); CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004).

¹⁶² CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section C, para 10.

¹⁶³ Critiques within the literature contend that the CBD biodiversity targets promote a persistent focus on quantity over quality, as well as to potentially place physical and economic burdens on communities who are displaced or deprived from use of their natural resources as a result of protected area expansion. Bhola, et al. "Perspectives on area-based conservation" (2021) *Conservation Biology*.

¹⁶⁴ Ferreira, et al. "Strict protected areas are essential for the conservation of larger and threatened mammals in a priority region of the Brazilian Cerrado" (2020) *Biol Conserv*; Oldekop, et al. "A global assessment of the social and conservation outcomes of protected areas" (2016) *Conservation Biology* 139.

¹⁶⁵ See section 2.2.3 of this text.

¹⁶⁶ See section 3.3.2.2 of this text.

¹⁶⁷ Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation* 2.

¹⁶⁸ Ibid.

¹⁶⁹ Laffoley, et al. "OECMs under Aichi Target 11" (2017) *Aquat Conserv* 132.

¹⁷⁰ Gurney, et al. "Area-based conservation" (2023) *One Earth* 99.

¹⁷¹ CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010) Annex, para 13, Target 11.

¹⁷² Gurney, et al. "Area-based conservation" (2023) *One Earth* 99.

inclusion of OECMs within international environmental law as a complementary tool for protected areas.¹⁷³ Although the primary focus remained on expanding the protected area network, the recognition and reporting of OECMs has gradually gained momentum.¹⁷⁴

Despite significant progress toward the Aichi Targets, conservation scientists argued that the quantitative targets were inadequate to conserve biodiversity.¹⁷⁵ In 2022, the CBD's KMGBF called for the most ambitious targets for collective action.¹⁷⁶ It seeks to guide biodiversity conservation by enhancing the coverage target to at least 30% of terrestrial and inland waters and coastal and marine areas under a system of protected areas and OECMs by 2030. The coverage target is further qualified as areas being effectively managed, ecologically representative, connective, equitably governed, and provide recognition and respect to the rights and territories of IPLCs.¹⁷⁷ Importantly, this is the first explicit acknowledgement of IPLCs within area-based conservation targets,¹⁷⁸ thus presenting an opportunity to recognise and report contributions from various worldviews. Given the extensive geographical area required to meet the coverage target, the land and territories of non-state actors and IPLCs will likely play a significant role.¹⁷⁹

Importantly, the qualitative measures of the CBD targets contribute to managing the threat of sacrificing quality over quantity¹⁸⁰ as area coverage alone is inadequate for mitigating biodiversity declines.¹⁸¹ Nevertheless, it is observed within the literature that the performance of the qualitative elements of Aichi Target 11 was “lacklustre”.¹⁸² This has fuelled criticism that the escalating ambition may be prone to potential misuse and “greenwashing” where parties focus on coverage targets without addressing effectiveness, equity, representativeness, connectivity, and integration into the broader landscapes and seascapes.¹⁸³ A new monitoring framework complements the KMGBF to standardise the monitoring and reporting of indicators by parties to the CBD. Optimistically, the shifting paradigm of conservation may

¹⁷³ CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010) Annex, para 13, Target 11; Jonas, et al. “OECMs: Aichi Target 11 to Post-2020 Framework” (2018) *PARKS*; Jonas, et al. “Equitable and effective conservation” (2021) *PARKS*.

¹⁷⁴ Cook “Progress developing the concept of OECMs” (2024) *Conservation biology* 3.

¹⁷⁵ Woodley, et al. “Review of evidence for the post-2020 Framework” (Nov 2019) *PARKS*; Woodley, et al. “Area-Based Conservation Beyond 2020” (Nov 2019) *PARKS*; Butchart, et al. “Shortfalls and solutions for meeting conservation targets” (2015) *Conserv Lett*; Bhola, et al. “Perspectives on area-based conservation” (2021) *Conservation Biology*.

¹⁷⁶ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section H.

¹⁷⁷ Ibid. Annex, Section H, Target 3.

¹⁷⁸ Gurney, et al. “Area-based conservation” (2023) *One Earth* 99; Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 2.

¹⁷⁹ Cook “Progress developing the concept of OECMs” (2024) *Conservation biology* 3.

¹⁸⁰ Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970; Lemieux, et al. “Running to stand still: The application of substandard OECMs” (2022) *Biol Conserv* 2-3; Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation” (2019) *Mar Policy*.

¹⁸¹ MacKinnon, et al. “Protected and conserved areas: Contributing to ambitious outcomes post-2020” (May 2021) *PARKS* 8; Visconti, et al. “Protected area targets post-2020” (2019) *Science* 239; Geldmann, et al. “Effectiveness of protected areas at resisting anthropogenic pressures” (2019) *Proceedings of the National Academy of Sciences*; Hausner, et al. “Policy Indicators for Use in Impact Evaluations” (2017) *Ecol Indic* 1; Montesino Pouzols, et al. “Global Protected Area Expansion is Compromised” (2014) *Nature* 385.

¹⁸² Gurney, et al. “Area-based conservation” (2023) *One Earth* 100-101.

¹⁸³ Ibid. 101.

foster positive progress towards the KMGBF. However, institutional changes¹⁸⁴ and robust legal guidance may be required to ensure credibility.

2.2.3 Management categories

As the modern conservation movement took hold in the 19th and 20th centuries, area-based measures lacked a unifying lexicon.¹⁸⁵ The 1933 International Conference for the Protection of Fauna and Flora first sought to foster clarity¹⁸⁶ by producing a set of four protected area categories: national park, strict nature reserve, fauna and flora reserve, and reserve with prohibition for hunting and collecting.¹⁸⁷ Yet the defining elements remained ambiguous.¹⁸⁸ It was only in 1969 that the IUCN defined a national park as “a relatively large area where one or several ecosystems are not materially altered by human exploitation and occupation”.¹⁸⁹ This definition reflected the early protected area model based on the North American experience that sought to protect and preserve large landscapes absent of human populations.¹⁹⁰

During the 2nd World Conference on National Parks in 1974, recognition was given to the need to develop definitions and classifications of protected areas that reflected the broader context of the global community.¹⁹¹ Over the decades, the concept of a protected area has become more complex, recognising a diversity of management categories.¹⁹² Although ten categories were initially proposed, this was scaled back in subsequent updates to reflect the current categories.¹⁹³ Today the IUCN Protected Area Management Categories range from Category 1A: Strict Nature Reserve to Category VI: Protected Area with Sustainable Use of Natural Resources. Other categories along the spectrum include Category 1B: Wilderness Area, Category II: National Park, Category III: Natural Monument, Category IV: Habitat/Species Management, and Category V: Protected Landscape/Seascape.¹⁹⁴ Importantly, these categories do not represent a hierarchy of quality, importance, or naturalness. Rather they should reflect the objectives, needs, and situation of the individual protected area.¹⁹⁵ Although states are not required to use these management categories in their domestic legal frameworks, the

¹⁸⁴ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4.

¹⁸⁵ Allen & Edwards 1995 *Oryx* 92-98.

¹⁸⁶ Dudley *Guidelines for Protected Area Management Categories* (2013) 3.

¹⁸⁷ This classification was simplified as national parks, scientific reserves and natural monuments in the 1966 UN List of Protected Areas. Phillips “History of protected area management categories” (2004) *PARKS* 6; Dudley, et al. “The revised IUCN protected area management categories” (2010) *Oryx* 485.

¹⁸⁸ Phillips “History of protected area management categories” (2004) *PARKS*.

¹⁸⁹ *Ibid.* 6.

¹⁹⁰ Holdgate *The green web* (2014) 6-7; Watson, et al. “Performance and potential of protected areas” (2014) *Nature* 67.

¹⁹¹ Elliot *Second World Conference on National Parks, Proceedings* (1974) Recommendation 10, 445; Phillips “History of protected area management categories” (2004) *PARKS* 6.

¹⁹² For a more thorough overview of the history of the IUCN protected area categories see: Phillips “History of protected area management categories” (2004) *PARKS*; Dudley *Guidelines for Protected Area Management Categories* (2013) 3-5.

¹⁹³ Dudley *Guidelines for Protected Area Management Categories* (2013) 4; Phillips “History of protected area management categories” (2004) *PARKS* 8.

¹⁹⁴ Dudley *Guidelines for Protected Area Management Categories* (2013) 13-22.

¹⁹⁵ *Ibid.* 24.

CBD formally recognises the use of the IUCN management categories as a reporting tool to encourage consistency¹⁹⁶ and common language for describing similar experiences and objectives across the global community.¹⁹⁷

In recent years, the IUCN's Management Category VI has become the leading category globally, both in number and land area, attributed to its less restrictive provisions providing for an element of sustainable use.¹⁹⁸ The primary objective of conservation should apply to no less than 75% of the area covered by a protected area.¹⁹⁹ OECMs may recognise existing area-based conservation measures that do not meet this criterion by recognising conservation as a primary, secondary, or ancillary objective.²⁰⁰ As the development of management categories sought to recognise a diversity of protected areas,²⁰¹ the inclusion of OECMs may likewise establish a clear interpretation of conservation and thresholds for the management objective for consistent reporting.

2.2.4 Governance diversity and the adoption of the principles of good governance

Although initial protected area models focused heavily on management aims and objectives, more contemporary approaches consider the influence and role of governance. Until recently, the term management was used exclusively to reference conservation decision-making and actions.²⁰² While a close association between management and governance exists, the former is about what is done in pursuit of conservation objectives, and the latter focuses on the who, how, and responsibility of decision-making.²⁰³ Governance has been defined as “the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken and how citizens or other stakeholders have their say”.²⁰⁴

Concepts of governance, including aspects of type²⁰⁵ and quality,²⁰⁶ first gained elevated attention during the 2003 IUCN World Parks Congress.²⁰⁷ Further emphasising the importance of governance, a resolution during the 2004 IUCN World Conservation Congress in Bangkok called for action from across the IUCN Commissions to advance the concepts of governance within their mandates.²⁰⁸ In parallel to the developments under the IUCN, the parties of the CBD were also advancing the inclusion of governance within its framework. Recognising the threat of poor governance hindering the

¹⁹⁶ CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004) para 31.

¹⁹⁷ Worboys “Protected Area Governance and Management” in (2015) 16.

¹⁹⁸ Shafer “Arguments for and against IUCN category VI ” (2020) *J Nat Conserv* 2-3.

¹⁹⁹ Dudley *Guidelines for Protected Area Management Categories* (2013) 35.

²⁰⁰ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 3.

²⁰¹ Dudley *Guidelines for Protected Area Management Categories* (2013) 4; Phillips “History of protected area management categories” (2004) *PARKS* 7.

²⁰² Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10-11; Borrini-Feyerabend & Hill “Governance for conservation” in *Protected Area Governance and Management* (2015) 171.

²⁰³ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10-11; Borrini-Feyerabend & Hill “Governance for conservation” in *Protected Area Governance and Management* (2015) 171. WCC Resolution 3.012 Governance of natural resources for conservation and sustainable development.

²⁰⁴ Graham, et al. *Governance principles for protected areas in the 21st century* (2003) ii; Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10.

²⁰⁵ Recommendation 5.17 *Recognising and Supporting a Diversity of Governance Types for Protected Areas*.

²⁰⁶ Recommendation 5.16 *Good Governance of Protected Areas*.

²⁰⁷ Durban Action Plan Outcome 8; Lausche *Guidelines for Protected Area Legislation* (2011) 77.

²⁰⁸ WCC Resolution 3.012 Governance of natural resources for conservation and sustainable development.

objectives of the CBD,²⁰⁹ Element 2 of the PoWPA explicitly sought to address governance, participation, equity and benefit sharing.²¹⁰ However, subsequent COPs²¹¹ noted a “lag” in Element 2.²¹² To assist parties to resolve challenges, the IUCN was invited to develop technical guidance.²¹³ Today, the quality and diversity of governance is firmly integrated into the CBD’s KMGBF.²¹⁴

2.2.4.1 Governance diversity

Throughout most of the evolution of modern area-based conservation, the role of governance and environmental decision-making has rested predominantly with the state.²¹⁵ However, more contemporary legal frameworks may recognise the devolution of decision-making powers to include provincial, regional, and local level authorities, through innovative arrangements with government agencies, civil society organisations, private landowners, and IPLCs.²¹⁶ While IPLCs have governed traditional and sacred places throughout history, only recently have they gained explicit recognition within international frameworks²¹⁷ and guidance.²¹⁸ As the CBD’s PoWPA called on parties to promote governance diversity through policy, law, financial, and community mechanisms,²¹⁹ the number of state agencies identified as the sole decision-making authority for protected area management dropped from 42% to 12%.²²⁰

The IUCN Guidelines on Protected Area Management Categories recognise a total of four broad governance types and eleven sub-types.²²¹ Any of these types may be represented within any of the IUCN protected area management categories²²² and likewise may apply to OECMs.²²³ These include governance by government (Type A), shared

²⁰⁹ CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004) para 17.

²¹⁰ CBD *Programme of Work on Protected Areas* (2004) 15-18.

²¹¹ CBD COP 9 and COP 10.

²¹² Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) XV.

²¹³ CBD COP 10 *Decision X/31: Protected areas* (2010) A(3)(8).

²¹⁴ Several of the suggested indicators for Target 3 encompass aspects of governance including the coverage of protected areas and OECMs by governance type and the number of sites completing a site-level assessments of governance and equity (SAGE) CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022).

²¹⁵ Gurney, et al. “Area-based conservation” (2023) *One Earth* 100-101; Borrini-Feyerabend & Hill “Governance for conservation” in *Protected Area Governance and Management* (2015) 189; Lockwood “Good governance for terrestrial protected areas: A framework, principles and performance outcomes” (2010) *Journal of environmental management* 754; Jonas, et al. “Global status and emerging contribution of other effective area-based conservation measures (OECMs) towards the ‘30x30’ biodiversity Target 3” (2024) *Frontiers in Conservation Science*.

²¹⁶ Borrini-Feyerabend & Hill “Governance for conservation” in *Protected Area Governance and Management* (2015) 189-193. Jonas, et al. “Equitable and effective conservation” (2021) *PARKS* 77.

²¹⁷ CBD. Article 8(j); CBD *Programme of Work on Protected Areas* (2004) Goal 2.2; CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010).

²¹⁸ Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000); Kothari, et al. *Recognising and supporting territories and areas conserved by IPLCs* (2012); CBD COP 14 *Decision 14/16: Methodological guidance concerning the contributions of indigenous peoples and local communities* (2018).; Ramsar Resolution VII.8: *Guidelines for establishing and strengthening local communities’ and indigenous people’s participation in the management of wetlands*; CITES Decision 18.31 - 18.32 *Engagement of indigenous peoples and local communities* (guidance to be developed for COP19 in 2022).

²¹⁹ CBD *Programme of Work on Protected Areas* (2004) Element 2, Goal 2.1.2

²²⁰ Kothari “Protected areas and people: the future of the past” (2008) *PARKS* 25.

²²¹ Dudley *Guidelines for Protected Area Management Categories* (2013) 26-27; Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 44.

²²² Lausche *Guidelines for Protected Area Legislation* (2011) 77; Dudley *Guidelines for Protected Area Management Categories* (2013) 26-27; Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 43-44.

²²³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

governance (Type B), private governance (Type C), and governance by IPLC (Type D).²²⁴ During the 2012 World Conservation Congress, the IUCN encouraged states to apply a diversity of governance types towards meeting international obligations.²²⁵

In 2018, the CBD welcomed the voluntary guidance on governance and equity²²⁶ and encouraged parties to integrate the advice into legislation relevant to protected areas and OECMs.²²⁷ The CBD's guidance outlined the steps for parties to support governance diversity,²²⁸ including affording legal recognition to various actors and their contributions to area-based conservation, as well as ensuring the inclusion of clear roles, responsibilities and mandates.²²⁹ A complementary indicator for Target 3 of the CBD's KMGBF monitors the coverage of protected areas and OECMs by governance type.²³⁰

2.2.4.2 Good governance

It is not merely management that determines the effectiveness of protected areas and OECMs; poor governance can also weaken progress towards conservation outcomes.²³¹ Recognising this threat of hindering the objectives of the CBD,²³² the PoWPA was adopted.²³³ Element 2 of the PoWPA²³⁴ compels international cooperation to foster efforts associated with governance, participation, equity, and benefit-sharing with special emphasis on the inclusion and recognition of IPLCs.²³⁵ Yet, a 2010 review conducted by the Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) to the CBD noted that Element 2 was the most inadequately implemented programme citing challenges with poor involvement of IPLCs in planning and management of protected areas, local resistance to protected area designation, and governments failing to incorporate a range of governance types.²³⁶ In addressing these challenges, parties asked for further technical support for implementing Element 2.²³⁷

²²⁴ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 44; Dudley *Guidelines for Protected Area Management Categories* (2013) 26-27.

²²⁵ Resolution 5.035 Facilitating conservation through the establishment of protected areas as a basis for achieving Target 11 of the Strategic Plan for Biodiversity 2011–2020.

²²⁶ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II.

²²⁷ *Ibid.* para 4.

²²⁸ *Ibid.* Annex II (A).

²²⁹ *Ibid.* Annex II (A)(7).

²³⁰ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) 13.

²³¹ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 57-62; Borrini-Feyerabend & Hill "Governance for conservation" in *Protected Area Governance and Management* (2015).

²³² CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004) para 17.

²³³ *Ibid.* Annex.

²³⁴ *Ibid.* Annex, Element 2.

²³⁵ CBD *Programme of Work on Protected Areas* (2004) 15-18.

²³⁶ UNEP/CBD/SBSTTA/14/5

²³⁷ CBD COP 10 *Decision X/31: Protected areas* (2010) paras 7(b) and 8. This resulted in several documents from the CBD and IUCN, including: Secretariat of the Convention on Biological Diversity *Issues for consideration in the planning, establishment and management of protected area* (2004); Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013); Dudley *Guidelines for Protected Area Management Categories* (2008); Lausche *Guidelines for Protected Area Legislation* (2011); CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II.

Governance quality, with the intention of advancing good governance, is critical to all governance types²³⁸ and often embodies the underlying themes of equity, participation, accountability, transparency, and justice.²³⁹ Embracing these principles could remove obstacles to meeting the objectives of area-based conservation.²⁴⁰ The CBD's 2018 guidance notes that the concepts of good governance may implore the assessment, monitoring, and mitigation of potential impacts on human well-being.²⁴¹ The CBD's KMGBF has adopted the assessment of governance and equity as an indicator for Target 3.²⁴² As the concepts of good governance create the enabling environment for OECMs, they have been throughout the guidance.²⁴³

2.2.5 The emergence of management effectiveness

As the 20th century came to a close, the concept of management effectiveness was just emerging.²⁴⁴ While there has been growing interest in the need for evidence-based conservation since the 1982 IUCN World Parks Congress,²⁴⁵ it gained significant momentum during the subsequent two congresses.²⁴⁶ The international community recognised the need for biodiversity conservation policies to be based on sound evidence²⁴⁷ to foster accountability, efficiency, better resource allocation,²⁴⁸ and the safeguarding of values.²⁴⁹ The need for a system to monitor effectiveness was expressed and echoed ten years later in the decisions arising from the next World Parks Congress.²⁵⁰ In response, the IUCN developed a framework to assist protected area managers in monitoring activities.²⁵¹ This framework supports protected area managers to evaluate six key elements of the management cycle: context, planning, inputs, process, outputs, and outcomes.²⁵² These elements are contemplated under the three broad themes of design/planning (context and planning),

²³⁸ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 57.

²³⁹ Although the key principles may be expressed slightly different within the literature, this thesis has attempted to draw on the connections of the underlying themes. For example, the IUCN summarises good governance into a set of five principles: legitimacy and voice, direction, performance, accountability, fairness and rights. Borrini-Feyerabend, et al. *Governance of Protected Areas* 1-124 59-60; Borrini-Feyerabend & Hill "Governance for the Conservation of Nature" in *Protected Area Governance and Management* 169-206 190-191. There are nine principles identified in Dudley *Guidelines for Protected Area Management Categories* (2013) 28. Lausche *Guidelines for Protected Area Legislation* (2011) 40-42. The FAO outlines ten principles for the "responsible governance of tenure of land, fisheries and forests" FAO *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security* (2022) 4; Franks, et al. *Understanding and assessing equity in protected area conservation* (2018) 16.

²⁴⁰ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 57-62; Borrini-Feyerabend & Hill "Governance for conservation" in *Protected Area Governance and Management* (2015) 190.

²⁴¹ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B)(10).

²⁴² CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) 13.

²⁴³ Jonas, et al. *Guidance on OECMs* (2024).

²⁴⁴ Hockings, et al. *Evaluating Effectiveness: A framework for assessing management effectiveness of protected areas* (2006) ix.

²⁴⁵ Ibid.

²⁴⁶ These were held in Caracas in 1992 and Durban in 2003.

²⁴⁷ Sutherland, et al. "The need for evidence-based conservation" (2004) *Trends in ecology & evolution*.

²⁴⁸ Hockings, et al. *Evaluating Effectiveness* (2006) 891.

²⁴⁹ Vth IUCN World Parks Congress Recommendation 5.18 *Management effectiveness evaluation to support protected area management*

²⁵⁰ Recommendation 5.18: *Management effectiveness evaluation to support protected area management*; Recommendation 5.4 *Building comprehensive and effective protected area systems*

²⁵¹ A detailed description of background, purpose, and application can be found in Hockings, et al. *Evaluating Effectiveness* (2006).

²⁵² Ibid. 11-30.

appropriateness/adequacy (inputs and processes), and delivery (outputs and outcomes).²⁵³ The components of the framework range from a relatively subjective consideration of values to more objective factors such as input estimations.²⁵⁴

Similarly, the CBD confirmed management effectiveness as a goal under the PoWPA.²⁵⁵ Parties to the CBD were urged to undertake management effectiveness assessments for at least 30% of the total area of their national protected areas network by 2010²⁵⁶ and implement the resulting recommendations as a strategy for adaptive management.²⁵⁷ Although this target was not met,²⁵⁸ it was later expanded to include management effectiveness assessments for 60% of the protected area by 2015.²⁵⁹ Management effectiveness is now firmly established as a measure of progress toward the goals and objectives of the CBD.²⁶⁰ Both the Ramsar Convention and CMS have also endorsed management effectiveness within their respective strategic plans²⁶¹ to support a coordinated effort to enhance the management effectiveness of protected areas and OECMs.

Over the years, 95 different protected area management effectiveness (PAME) data collection methodologies have been employed around the globe.²⁶² Although primarily based on the underlying theory in the IUCN framework,²⁶³ the diversity of approaches demonstrates that the global community has not found agreement in a singular method or measure of effectiveness.²⁶⁴ It is generally accepted that assessments must be more holistic than simply a measure of anticipated outcomes; they should equitably account for qualitative and quantitative objectives, collect information on the protected areas' governance, seek to understand social impacts, identify benefits, and consider climate change.²⁶⁵ While many of the methodologies do not independently evaluate the direct outcomes for biodiversity and ecosystems,²⁶⁶ they provide a rapid assessment from a specific point in time of the systems, processes, inputs and activities in order to foster adaptive

²⁵³ Ibid.

²⁵⁴ Ibid.

²⁵⁵ Goal 1.4: To substantially improve site-based protected area planning and management, and Goal 4.2: To evaluate and improve the effectiveness of protected area management. Goal 1.4 calls for all protected areas to have effective management by 2012. Goal 4.2 sets a target for the implementation of monitoring and reporting protected area management effectiveness by 2010.

²⁵⁶ Activity 4.2.2 of the PoWPA.

²⁵⁷ Activity 4.2.4 of the PoWPA.

²⁵⁸ By 2012, only 90 of 194 parties to CBD had met 2010 target. Coad, et al. "Progress towards the CBD protected area management effectiveness targets" (2013) *PARKS* 18.

Hockings, et al. "Protected area management effectiveness" in G. L. Worboys, et al. (eds) *Protected Area Governance and Management* (2015); Coad, et al. "Progress towards management effectiveness targets" (2013) *PARKS*.

²⁵⁹ CBD COP 10 *Decision X/31: Protected areas* (2010) 19(a).

²⁶⁰ Hockings, et al. "Protected area management effectiveness" in *Protected Area Governance and Management* (2015).

²⁶¹ CMS Resolution 11.2: *Strategic Plan for Migratory Species 2015-2023*; Ramsar Resolution XII.2: *The Ramsar Strategic Plan 2016-2024*.

²⁶² Coad, et al. "Measuring impact of protected area management interventions: current and future use of the Global Database of Protected Area Management Effectiveness" (2015) *Philosophical Transactions of the Royal Society B: Biological Sciences* 3; Geldmann, et al. "Changes in protected area management effectiveness over time: A global analysis" (2015) *Biol Conserv* 693.

²⁶³ Coad, et al. "Measuring impact of protected area management interventions" (2015) *Philosophical Transactions of the Royal Society B: Biological Sciences*; Chape, et al. "Measuring the extent and effectiveness of protected areas as an indicator for meeting global biodiversity targets" (2005) *Philosophical Transactions of the Royal Society B: Biological Sciences*.

²⁶⁴ UNEP-WCMC & IUCN *Protected Planet Report* (accessed 2021); Chape, et al. "Extent and effectiveness of protected areas as indicator for targets" (2005) *Philosophical Transactions of the Royal Society B: Biological Sciences* 452.

²⁶⁵ CBD COP 10 *Decision X/31: Protected areas* (2010) B. Issues that need greater attention paras 3(19) a-c.

²⁶⁶ Maxwell, et al. "Area-based conservation in the twenty-first century" (2020) *Nature* 224; UNEP-WCMC & IUCN *Protected Planet Report* (accessed 2021).

management.²⁶⁷ Thus, it may prove beneficial to couple PAME evaluations with other tools and technologies that measure land-use change or species abundance.²⁶⁸

Although PAME continues to be employed as an indicator for the KMGBF, the management effectiveness of protected and conserved areas (MEPCA) has been included as a complementary indicator under Target 3.²⁶⁹ This new metric utilises a weighted system to foster improved monitoring of conservation outcomes.²⁷⁰ Although the recent development and introduction of MEPCA provides little literature regarding its application, it may present a future opportunity for monitoring OECMs.²⁷¹

OECMs inherently have a burden to prove effectiveness.²⁷² However, few studies have explicitly extended to evaluate and monitor the effectiveness of OECMs.²⁷³ As the quality of conservation efforts cannot be sacrificed for the opportunity to increase the extent of coverage,²⁷⁴ legal frameworks may seek to support appropriate regulation and encourage evidence-based data to inform decision-making functions.²⁷⁵

2.2.6 Recognition of the importance of connectivity

As human activity transforms global landscapes and seascapes, there is a growing awareness of the threat of protected areas and OECMs becoming geographically isolated.²⁷⁶ The 1st World Conference on National Parks in 1962 acknowledged a sense of urgency to safeguard “islands of nature”²⁷⁷ within a “sea of human modification”²⁷⁸ and unhindered development.²⁷⁹ Now considered a leading driver of biodiversity loss globally,²⁸⁰ habitat and ecosystem fragmentation have been shown to have negative and long-term implications for maintaining ecological and evolutionary processes²⁸¹ that may ultimately threaten to undermine conservation objectives.²⁸² The legal environment relevant to connectivity is less developed than that of the scientific community.²⁸³ However, the IUCN’s adoption of more than twenty

²⁶⁷ UNEP-WCMC & IUCN *Protected Planet Report* (accessed 2021); Geldmann, et al. “Changes in PAME ” (2015) *Biol Conserv.*

²⁶⁸ Coad, et al. “Measuring impact of protected area management interventions” (2015) *Philosophical Transactions of the Royal Society B: Biological Sciences*; Geldmann, et al. “Changes in PAME ” (2015) *Biol Conserv.*

²⁶⁹ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) Annex I, Table 2.

²⁷⁰ Gurney, et al. “Area-based conservation” (2023) *One Earth* 103.

²⁷¹ Further information: *Department for Environment Food & Rural Affairs Progress in development of MEPCA* (2022).

²⁷² Cook “Progress developing the concept of OECMs” (2024) *Conservation biology* 12.

²⁷³ *Ibid.*

²⁷⁴ Lemieux, et al. 2019 *Mar Policy* 312-323; Laffoley, et al. 2017 *Aquat Conserv* 130-137.

²⁷⁵ Sutherland, et al. “Evidence-based conservation” (2004) *Trends in ecology & evolution* 306.

²⁷⁶ Hilty, et al. *Guidelines for conserving connectivity* (2020).

²⁷⁷ Holdgate & Phillips “Protected areas in context” in *Integrated protected area management* (1999) 3.

²⁷⁸ *Ibid.*

²⁷⁹ *Ibid.* 21.

²⁸⁰ Hilty, et al. *Guidelines for conserving connectivity* (2020) 6; Montesino Pouzols, et al. “Global Protected Area Expansion is Compromised ” (2014) *Nature*.

²⁸¹ Maxwell, et al. “Conservation in the twenty-first century” (2020) *Nature*; Hilty, et al. *Guidelines for conserving connectivity* (2020); Haddad, et al. “Habitat fragmentation and its lasting impact on Earth’s ecosystems” (2015) *Science advances*.

²⁸² Haddad, et al. “Habitat fragmentation and its impact on ecosystems” (2015) *Science advances*; Saura, et al. “Protected area connectivity: Shortfalls in global targets and country-level priorities” (2018) *Biol Conserv.*

²⁸³ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 53-56.

resolutions addressing connectivity to advance nature conservation since 1996²⁸⁴ could signal the direction of international policy toward fostering greater inclusion.

Increasingly, connectivity has been employed in relation to climate change policy.²⁸⁵ In addition to technical guidance²⁸⁶ and decisions²⁸⁷ adopted by the CBD, the Ramsar Convention has noted the value of ecosystem connectivity to enable the adaption to climate change and encourage movement through corridors, flyways, and other migratory pathways.²⁸⁸ The role of connectivity relevant to climate change adaptation is also addressed through the CMS²⁸⁹ and its international agreements²⁹⁰ to support functioning migration systems.²⁹¹ The CMS has simply defined ecological connectivity²⁹² as “the unimpeded movement of species and the flow of natural processes that sustain life on Earth”.²⁹³ Not only are concepts of connectivity central to the CMS’s overall objectives, but they also play an essential role in implementing regional agreements created under its auspices.²⁹⁴ The CMS encourages regional and international cooperation in developing and supporting systems of protected and conserved areas both within national borders and in areas beyond national jurisdiction.²⁹⁵

Although the CBD does not explicitly reference connectivity within the convention text, it may be implied as it calls for parties to establish *systems* of protected areas.²⁹⁶ The explicit significance attributed to connectivity is contained within a

²⁸⁴ This includes Resolution 7.073 *Ecological connectivity conservation in the post-2020 global biodiversity framework: from local to international levels*, Resolution 7.081 *Strengthening national spatial planning to ensure the global persistence of biodiversity*, Resolution 6.087 *Awareness of connectivity conservation definition and guidelines*, Resolution 6.096 *Safeguarding space for nature and securing our future: developing a post-2020 strategy*, Resolution 5.056 *Enhancing connectivity conservation through international networking of best practice management*, Resolution 4.062 *Enhancing ecological networks and connectivity conservation areas*, Recommendation 1.38 *Ecological Networks and Corridors of Natural and Semi-Natural Areas* adopted by the 1st IUCN World Conservation Congress.

²⁸⁵ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013).

²⁸⁶ CBD Technical Series No. 41: Connecting biodiversity and climate change mitigation and adaptation.

²⁸⁷ *Decision VIII/30: Biodiversity and climate change: guidance to promote synergy among activities for biodiversity conservation, mitigating or adapting to climate change and combating land degradation*; *Decision X/33: Biodiversity and climate change*.

²⁸⁸ Resolution X.24: Climate change and wetlands, para 12; Ramsar XI.14: Climate change and wetlands: implications for the Ramsar Convention on Wetlands.

²⁸⁹ Resolution 12.21 Climate change and migratory species.

²⁹⁰ For example, the Agreement on the African-Eurasian Migratory Waterbirds recognises the importance of climate change resiliency and adaptation in Resolution 7.9 *Climate Resilient Flyways*, Resolution 6.6 *Climate Change Adaptation Measures for Waterbirds*, Resolution 5.13 *Climate Change Adaptation Measures of Waterbirds*, Resolution 4.14 *The Effects of Climate Change on Migratory Waterbirds* and Resolution 3.17 on *Climate Change and Migratory Waterbirds*.

²⁹¹ Resolution 10.3 *The role of ecological networks in the conservation of migratory species*; Resolution 10.10 *Guidance on global flyway conservation and options for policy arrangements*; Resolution 11.25 *Advancing ecological networks to address the needs of migratory species*; Resolution 12.11 (Rev.COP13) *Flyways*; Resolution 12.21 *Climate change and migratory species*; Resolution 12.26 (Rev. COP13) *Improving ways of addressing connectivity in the conservation of migratory species*; Resolution 12.07 (Rev.COP13) *The role of ecological networks in the conservation of migratory species* (this resolution repeals 10.3 and 11.25).

²⁹² Referred to connectivity throughout this thesis.

²⁹³ 12.26 (Rev. COP13) *Improving ways of addressing connectivity in the conservation of migratory species*; Resolution 12.26 (Rev. COP13) *Improving ways of addressing connectivity in the conservation of migratory species*.

²⁹⁴ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 61-63. An example is the *Agreement on the Conservation of Gorillas and their Habitats* which calls for a “network of suitable habitats” (Article III(2)(c)).

²⁹⁵ Resolution 12.07 (Rev.COP13) *The role of ecological networks in the conservation of migratory species*.

²⁹⁶ CBD. Article 8(a).

number of non-binding decisions, targets,²⁹⁷ and goals²⁹⁸ that encourage states to promote transboundary cooperation for protected area planning and management,²⁹⁹ as well as the development of well-connected ecological networks and corridors as appropriate under national priorities.³⁰⁰ The monitoring framework for the CBD's KMGBF proposes the monitoring of connectivity as an indicator.³⁰¹ However, it has thus far failed to provide a clear definition or measurable target to assess progress.³⁰²

As connectivity will likely play a key role in future policy formation, it may prove essential to overcome gaps in the legal frameworks. As the international community continues to shape the discourse and goals for area-based conservation, OECMs are increasingly recognised as an opportunity to foster connectivity and meet conservation objectives.³⁰³ OECMs may enhance connectivity by linking protected areas and other OECMs across a diversity of governance types, land tenures, and ownership rights, that may have constrained traditional protected area models.³⁰⁴ Legal frameworks may strengthen connectivity through improved coverage of protected areas and OECMs, targeted designation of strategic areas, safeguarding of the permeability of landscapes to support movement, unconstrained connectivity within boundaries, and enhanced coordination both within and between states.³⁰⁵

2.3 GLOBAL SHIFTS IN OTHER DISCOURSES RELEVANT TO AREA-BASED *IN-SITU* CONSERVATION

The CBD's KMGBF not only sets a vision for biodiversity, it highlights an association with planetary health and the benefits afforded by nature to people.³⁰⁶ The alignment of area-based conservation within the discourse of sustainable development, human rights, and climate change has been well-documented within the literature³⁰⁷ and CBD decisions.

²⁹⁷ Including those explicitly relevant to OECMs such as CBD COP 10 *Decision X/2: The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets* (2010) Target 11; CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section H, Target 3.

²⁹⁸ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 58-60; Hilty, et al. *Guidelines for conserving connectivity* (2020) 43-46.

²⁹⁹ CBD COP *Decision X/31: Protected Areas, Decision VIII/30: Biodiversity and climate change: guidance to promote synergy among activities for biodiversity conservation, mitigating or adapting to climate change and combating land degradation*.

³⁰⁰ CBD COP *Decision X/31: Protected Areas, Decision X/33: Biodiversity and climate change, Decision 14/8: Protected areas and other effective area-based conservation measures, Decision VII/28 Protected areas (Articles 8 (a) to (e))*.

³⁰¹ Such as through the use of Protected Connected Index (ProtConn), Protected Area Connectedness Index (PARC-Connectedness), and an connectivity indicator in development. CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) Annex I, Table 2.

³⁰² UNEP-WCMC & IUCN *Protected Planet Report* (accessed 2021); WWF & IUCN-WCPA *A Guide to Inclusive, Equitable and Effective Implementation of Target 3 of the Kunming-Montreal Global Biodiversity Framework (Version 1)* (2023).

³⁰³ Saura, et al. "Global trends in protected area connectivity from 2010 to 2018" (2019) *Biol Conserv* 4; Maxwell, et al. "Conservation in the twenty-first century" (2020) *Nature* 223; Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation* 4; Gurney, et al. "Biodiversity needs every tool in the box: use OECMs" (2021) *Nature* 648.

³⁰⁴ WWF & IUCN-WCPA *Inclusive, Equitable and Effective Implementation of Target 3* (2023) 55.

³⁰⁵ Saura, et al. "Protected area connectivity" (2018) *Biol Conserv*.

³⁰⁶ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section F.

³⁰⁷ Generally see: Diz, et al. "Mainstreaming marine biodiversity into the SDGs: The role of other effective area-based conservation measures (SDG 14.5)" (2018) *Mar Policy*; Robinson "Biodiversity Through the UN SDGs" in *Biodiversity and Law* (2017); Brockington & Wilkie "Protected areas and poverty" (2015) *Phil. Trans. R. Soc. B*; Roe "The origins and evolution of the

The UNEP was first to recognise the environmental rule of law³⁰⁸ which emphasises the connections between environmental protections, human rights, and sustainable development.³⁰⁹ It is not within the scope of this thesis to provide a thorough discussion of this historical background. However, as the more contemporary developments may provide specific relevance for recognising and reporting OECMs, the global shifts within this broader discourse are canvassed briefly below.

2.3.1 Shifts in the sustainable development discourse with relevance to OECMs

The theoretical underpinnings of sustainable development existed before the global community formalised its terminology and meaning.³¹⁰ The 1972 United Nations Conference on the Human Environment produced the Stockholm Declaration.³¹¹ While pre-dating the term “sustainable development”, this document is celebrated as establishing the foundations for future discourse.³¹² It outlines 26 principles for the “protection and improvement of the human environment”³¹³ that have formed the foundations for incorporation into subsequent documents.³¹⁴ Several principles have facilitated the inclusion of OECMs within international instruments. This includes the need to safeguard ecosystems for present and future generations,³¹⁵ humankind’s responsibility to wisely manage wildlife and its habitat,³¹⁶ the importance of adopting an integrated and coordinated approach,³¹⁷ and finding a balance between development and environmental protection.³¹⁸

In 1987, the World Commission on Environment and Development Report, entitled *Our Common Future*, introduced the now widely accepted definition of sustainable development as: “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.³¹⁹ While this definition continues to permeate the core premise of sustainable development, it has been further elaborated through the Rio Declaration and Agenda 21³²⁰

conservation-poverty debate: a review of key literature, events and policy processes” (2008) *Oryx*; Cannizzo, et al. “Climate Change—Protected Areas as a Tool to Address a Global Crisis” in *Managing Protected Areas: People and Places* (2023). UNEP *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders* (2023).

³⁰⁸ For further information see: UNEP *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders* (2023).

³⁰⁹ UNEP Governing Council Decision 27/9: *Advancing justice, governance and law for environmental sustainability* (2013).

³¹⁰ A thorough account of the origins of the Stockholm Declaration can be found in: Sohn “The Stockholm Declaration on the Human Environment” (1973) *Harv. Int’l. L.J.*

³¹¹ *Stockholm Declaration on the Human Environment* (1972) 11 ILM 1461.

³¹² Schrijver *The evolution of sustainable development in international law: inception, meaning and status* (2008); Marong “From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development” (2003) *Geo. Int’l Env’tl. L. Rev.*

³¹³ *Stockholm Declaration on the Human Environment* (1972) 11 ILM 1461. chapter 1 para 2.

³¹⁴ Including *Our Common Future* (1987) Report of the World Commission on Environment and Development; *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development and Agenda 21* (1992) 31 ILM 874; *Johannesburg Plan of Implementation* (2002) ; UN General Assembly *Transforming Our World: Agenda 2030 for Sustainable Development* (2015); *The Future We Want* (2012) United Nations Conference on Sustainable Development. A/RES/66/288

³¹⁵ Stockholm Principle 2.

³¹⁶ Stockholm Principle 4.

³¹⁷ Stockholm Principle 13.

³¹⁸ Stockholm Principle 14.

³¹⁹ *Our Common Future* (1987) Report of the World Commission on Environment and Development chapter 2 para 1.

³²⁰ *Rio Declaration on Environment and Development, Report of the United Nations Conference on Environment and Development and Agenda 21* (1992) 31 ILM 874.

and the Johannesburg Plan of Implementation.³²¹ Our Common Future aimed to provide the international community with the tools to effectively manage environmental challenges, building upon the principles of inter-generational equity, conservation, sustainable use, and cooperation. Although the report highlights the distinctive economic, social, and ecological conditions of individual states, it advocates for collective efforts to achieve long-term sustainability.³²²

Today, Agenda 2030 for Sustainable Development³²³ drives the global conversation. Comprised of seventeen sustainable development goals (SDGs) and 169 targets, the sustainable development discourse has evolved to address the root cause of poverty and inequality while advancing social and economic development, environmental protection, and good governance.³²⁴ States are encouraged to translate this broad international vision into domestic legal frameworks. The SDGs are designed to be “integrated and indivisible”.³²⁵ Goal 15 is particularly applicable to area-based conservation as it seeks to “protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss”.³²⁶ The goal is supported by twelve targets and fourteen indicators, many of which align directly with area-based conservation.³²⁷ Although OECMs are not explicitly referenced, policy makers and law makers are encouraged to facilitate the alignment with the CBD targets as the inclusion of OECMs may positively contribute to the agenda for sustainable development.³²⁸

Over the years, the sustainable development agenda has been enriched through greater inclusivity, recognition of local influences, integration into national frameworks, and encouragement of multi-stakeholder collaboration.³²⁹ Various international instruments have adopted decisions,³³⁰ recommendations, and resolutions³³¹ to facilitate the advancement of the sustainable development agenda and embed it within international environmental law.³³² The CBD maintains biodiversity underpins sustainable development and is an “essential instrument” for its successful realisation.³³³ The CBD’s KMGBF explicitly recognises the relationship with the 2030 Agenda for Sustainable Development as being complementary

³²¹ *Johannesburg Plan of Implementation* (2002).

³²² *Our Common Future* (1987) Report of the World Commission on Environment and Development.

³²³ UN General Assembly *Transforming Our World* (2015).

³²⁴ *Ibid.*

³²⁵ Persson, et al. “Follow-up and review of the sustainable development goals: Alignment vs. internalization” (2016) *Review of European, Comparative & International Environmental Law*.

³²⁶ UN General Assembly *Transforming Our World* (2015) 27.

³²⁷ Several other goals complement Goal 15 to address the more qualitative elements such as equity, equality, and representation (Goal 10); and effective institutions and participatory decision-making (Goal 16). *Ibid.*

³²⁸ Gurney, et al. “Biodiversity needs every tool in the box” (2021) *Nature* 649; Marong “The Role of International Legal Norms in Sustainable Development” (2003) *Geo. Int’l Env’tl. L. Rev.*

³²⁹ UN General Assembly *Economic and Social Council Progress towards the Sustainable Development Goals: towards a rescue plan for people and planet* (2023) 27-30.

³³⁰ CBD Decision XII/4: *Integrating biodiversity into the post-2015 United Nations development agenda and the sustainable development goals*, CBD Decision XII/5: *Biodiversity for poverty eradication and sustainable development*.

³³¹ Ramsar Resolution XI.13: *An Integrated Framework for linking wetland conservation and wise use with poverty eradication*; CMS Resolution 12.3: *Manila Declaration on Sustainable Development and Migratory Species*; CMS Resolution 7.10: *Implications for CMS of the World Summit On Sustainable Development*; World Heritage Convention Resolution 20 GA 13: *World Heritage and Sustainable Development*; World Heritage Convention Resolution 21 GA 10: *World Heritage and Sustainable Development*.

³³² Barral “Sustainable development in international law: nature and operation of an evolutive legal norm” (2012) *European Journal of International Law*.

³³³ CBD COP 6 *Decision VI/26: Strategic Plan for the Convention on Biological Diversity* (2002).

and mutually supportive.³³⁴ It further advances that the pursuit of sustainable development creates the enabling conditions to meet the goals and targets of the KMGBF,³³⁵ including those associated with area-based conservation.³³⁶

2.3.2 Shifts in the human rights discourse with relevance to OECMs

Early religious and philosophical thought laid the foundations for the origins of human rights.³³⁷ Although the Declaration on the Rights of Man and of the Citizen³³⁸ and the United States Declaration of Independence and Bill of Rights³³⁹ were among the first regional declarations to acknowledge elements of the human rights doctrine, the theory and professed values were often drastically different from reality.³⁴⁰ The belief that rights applied to white men fostered widespread acceptance of religious persecutions, practices of servitude and slavery, and discrimination against women and children well into the 20th century.³⁴¹

The conclusion of World War II brought momentum to the recognition of human rights³⁴² with a focus on security, peace, and justice.³⁴³ The American Declaration on the Rights and Duties of Man³⁴⁴ and the United Nations Declaration of Human Rights (UNDHR), in the same year, marked the turning point.³⁴⁵ The rights contained with the UNDHR were echoed in the binding provisions of the International Covenant on Civil and Political Rights³⁴⁶ and the International Covenant on Economic, Social and Cultural Rights,³⁴⁷ thus forming the International Bill of Human Rights.

The convergence of human rights law and environmental law has gained traction, driven by the principles of sustainable development and area-based conservation.³⁴⁸ This encompasses both substantive³⁴⁹ and procedural rights³⁵⁰ relevant to the recognition and regulation of OECMs.³⁵¹ For example, land ownership, and the rights to use and control land, are

³³⁴ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section D, para 26.

³³⁵ *Ibid.*

³³⁶ See section 2.2.2 of this text.

³³⁷ Lauren *The evolution of international human rights* (2013) 5-42.

³³⁸ *Déclaration des droits de l'homme et du citoyen de 1789*.

³³⁹ Janis "The Declaration of Independence, the Declaration of the Rights of Man and Citizen, and the Bill of Rights Book Reviews" (1992) *Human Rights Quarterly*.

³⁴⁰ Lauren *Evolution of human rights* (2013) 33.

³⁴¹ Originally the Declaration on the Rights of Man and of the Citizen supported certain rights for free blacks, however, this was rescinded less than a year later. *Ibid.*

³⁴² *Ibid.* 3.

³⁴³ *Ibid.* 227-266.

³⁴⁴ This document was later superseded with the ratification of the American Convention on Human Rights in 1969.

³⁴⁵ Both were adopted in 1948.

³⁴⁶ International Covenant on Civil and Political Rights 6 ILM 368 (1967)

³⁴⁷ International Covenant on Economic, Social and Cultural Rights 6 ILM 360 (1967)

³⁴⁸ For an analysis of the applicability of human rights law to area-based conservation see:

Makagon, et al. *Human Rights Standards for Conservation, Part I. To Which Conservation Actors do International Standards Apply?* (2014); Jonas, et al. *Human Rights Standards for Conservation, Part II. Which International Standards Apply to Conservation Initiatives?* (2014).

³⁴⁹ These may include rights such as those of Indigenous people, traditional governance systems, customary law, development, cultural traditions, customary and sustainable use, land tenure, amongst others.

³⁵⁰ Common procedural rights include access to justice, decision making, FPIC, and cultural, environmental and social impact assessments.

³⁵¹ Jonas, et al. *Human Rights Standards for Conservation, Part II* (2014); Jonas, et al. "Will OECMs increase recognition and support for ICCAs?" (2017) *PARKS*.

increasingly coupled with the protection of procedural rights under international law. Recently, the United Nations Human Rights Council (UNHRC) and the United Nations General Assembly (UNGA) formally recognised the right to a clean, healthy, and sustainable environment³⁵² thus explicitly linking human rights law and environmental law.

Under environmental law, heightened attention has been given to the inclusion and recognition of IPLCs within area-based conservation to address historical injustices. Early colonial administrations often sought to dispossess and exclude Indigenous peoples from their ancestral lands and resources, justifying their actions through the application of the principle of *terra nullius* coupled with the belief of Indigenous people as non-existent.³⁵³ The ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries³⁵⁴ (ILO Convention 169) and the United Nations Declaration on the Rights of Indigenous Peoples³⁵⁵ (UNDRIP) have specifically sought to affirm the rights of Indigenous peoples. These international instruments uphold Indigenous peoples not merely as stakeholders but as custodians of inherent rights and responsibilities for area-based conservation. Although the ILO Convention 169 pre-dates the UNDRIP by nearly two decades, the rights are mutually reinforcing. These rights impact, either directly or indirectly, on the processes and outcomes of area-based conservation. The CBD contains language emphasising these rights.³⁵⁶ The robust inclusion of land rights within the human rights doctrine represents an encouraging development within international law,³⁵⁷ such as the right not to be forcibly removed from lands or territories without undertaking FPIC and only after reaching an agreement as to compensation that is both just and fair;³⁵⁸ the right to maintain and strengthen spiritual relationships with lands, territories, waters and coastal seas, and other resources both for current and future generations;³⁵⁹ the right to conserve and protect their environment;³⁶⁰ and the right to own, use, develop, and control the lands, territories, and resources that have been traditionally owned, occupied, or acquired.³⁶¹

The modern conservation ideology increasingly emphasises equity and good governance, as championed by the UNDRIP through the rights to maintain political, legal, economic, social and cultural institutions,³⁶² and to participate in decision-making which may affect their rights and to maintain their own decision-making institutions.³⁶³ States are obliged to legally recognise and protect the lands, territories, and resources of Indigenous people,³⁶⁴ and to act in good faith by obtaining FPIC before adopting or implementing legislative or administrative measures,³⁶⁵ or approving projects associated with the

³⁵² UNGA Resolution 76/300 and UNHRC Resolution 48/13.

³⁵³ Gilbert & Doyle "A New Dawn over the Land" in *Reflections on the UNDRIP* (2011); Adams & Mulligan *Decolonizing nature* (2012).

³⁵⁴ *ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 ILM 1382.

³⁵⁵ *United Nations Declaration on the Rights of Indigenous Peoples* (2007) 46 ILM 1013.

³⁵⁶ CBD. Article 8(J) and Article 10.

³⁵⁷ Xanthaki "Indigenous rights in international law over the last 10 years and future developments" (2009) *Melbourne Journal of International Law*.

³⁵⁸ *UNDRIP* Article 10.

³⁵⁹ *Ibid.* Article 25.

³⁶⁰ *ibid.* Article 29(1).

³⁶¹ *ibid.* Article 26(2).

³⁶² *ibid.* Article 5.

³⁶³ *ibid.* Article 18.

³⁶⁴ *ibid.* Article 26(3).

³⁶⁵ *ibid.* Article 19.

development, utilisation, or exploitation of their resources.³⁶⁶ The 2008 World Conservation Congress endorsed these rights by passing resolutions on implementing the UNDRIP³⁶⁷ and Rights-based Approaches to Conservation.³⁶⁸

The CBD's COP decisions have increasingly acknowledged IPLCs, with the 2018 outcomes demonstrating a marked increase in recognition compared to 2004.³⁶⁹ Driven by the growing ambition of area-based conservation and a mounting global population, the intersection of human rights and environmental law will likely intensify. Finding equitable balance may prove essential.

Importantly, some protected areas have historically had a dark side that threatened the rights and livelihoods of people and communities through physical or economic displacement.³⁷⁰ Protectionist and other exclusionary approaches may be cautious not to exacerbate poverty, violence,³⁷¹ and political instability³⁷² as an unintended consequence of producing environmental refugees.³⁷³ OECMs may foster a transition away from the view of people as threats to conservation, but rather as stewards.³⁷⁴ The CBD's KMGBF urges consistency with a human rights-based approach that extends to the implementation and reporting of its goals and targets.³⁷⁵ OECMs may afford an opportunity to champion area-based conservation “without causing a humanitarian crisis, undermining human rights or creating massive political resistance, leading to a politically unstable and practically non-viable protected area system”.³⁷⁶

2.3.3 Shifts in the climate change discourse with relevance to OECMs

The United Nations Framework Convention on Climate Change (UNFCCC)³⁷⁷ was adopted alongside the CBD during the UNCED in 1992 and entered into force in March 1994. The UNFCCC endeavours to draw attention and action to address the Earth's changing climate and its adverse effects.³⁷⁸ Climate change is defined as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.³⁷⁹ Together, the UNCCD, the UNFCCC, and the CBD form the “Rio Conventions”, which aim to enhance cooperation and foster synergies.³⁸⁰ Although the discourse within

³⁶⁶ *ibid.* Article 32(2).

³⁶⁷ Resolution 4.052 Implementing the UN Declaration on Rights of Indigenous Peoples.

³⁶⁸ Resolution 4.056 Rights-based Approaches to Conservation.

³⁶⁹ Jonas, et al. *Human Rights Standards for Conservation, Part II* (2014); CBD COP 7 *Report of the seventh meeting of the conference of the parties to the convention on biological diversity* 1-412 (2004) Annex.

³⁷⁰ Brockington & Wilkie “Protected areas and poverty” (2015) *Phil. Trans. R. Soc. B* 3.

³⁷¹ *Ibid.* 2.

³⁷² Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4.

³⁷³ Brockington, et al. “Conservation, human rights, and poverty reduction” (2006) *Conservation Biology* 250.

³⁷⁴ Gurney, et al. “Area-based conservation” (2023) *One Earth* 101.

³⁷⁵ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section C, para 14.

³⁷⁶ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4.

³⁷⁷ *United Nations Framework Convention on Climate Change* (1992) 31 *ILM* 849.

³⁷⁸ *Ibid.* Preamble.

³⁷⁹ *Ibid.* Article 1.

³⁸⁰ This has been emphasised in a number of decisions and resolutions. In 2001 the Rio Conventions established a Joint Liaison Group to explore opportunities for cooperation and synergies through the various scientific subsidiary bodies, executive secretaries, and secretariats. CBD COP Decision VI/20, CCD Decision 12/COP.6, FCCC Decision 13/CP.8.

the UNFCCC has undergone several significant shifts throughout the past decades,³⁸¹ it is not within the remit of this thesis to provide a comprehensive analysis. However, the increasing emphasis on nature-based solutions (NbS) for climate mitigation and adaptation highlights the opportunities for alignment with protected areas and OECMs.³⁸² The UNFCCC affirms the essential contribution of nature in addressing climate change and highlights the need for an integrated approach to address biodiversity loss.³⁸³

The adoption of the Paris Agreement was pivotal as it explicitly sought to limit global temperature through the triple objectives of mitigation, adaptation, and finance.³⁸⁴ Parties have the responsibility to develop and implement³⁸⁵ adaptation plans to strengthen resilience and reduce vulnerability.³⁸⁶ Protected areas and OECMs have been recognised as part of the broader strategies.³⁸⁷ As some terrestrial species face an increased risk of extinction as a result of climate change, national adaptation plans may include efforts to protect terrestrial ecosystems, expand coverage, and increase connectivity of protected areas and OECMs.³⁸⁸ Adaptation strategies may also afford the co-benefit of climate mitigation.³⁸⁹ The Paris Agreement facilitates a bottom-up model that utilises self-determined national determined contributions (NDC) to establish domestic mitigation measures.³⁹⁰ Notably, 37% of parties explicitly reference the role of protected areas and OECMs within their NDC.³⁹¹

A number of IUCN resolutions underscore the synergies between climate change and conservation,³⁹² including the proposal to develop a new Climate Crisis Commission within the IUCN.³⁹³ During the 2016 World Conservation Congress the IUCN formally recognised the definition and framework for NbS. This is defined as the “actions to protect, sustainably manage, and restore natural or modified ecosystems, that address societal challenges effectively and adaptively, simultaneously providing human well-being and biodiversity benefits”.³⁹⁴ The IUCN Global Standard for Nature-based Solutions has been developed to foster robust design and verifiable outcomes.³⁹⁵ The IUCN continues to advocate for

³⁸¹ Kuyper, et al. “The evolution of the UNFCCC” (2018) *Annual Review of Environment and Resources*.

³⁸² Seddon, et al. “Getting the message right on nature-based solutions to climate change” (2021) *Global Change Biology* 1521.

³⁸³ UNFCCC Decision 1/CP.25 para 15.

³⁸⁴ *Ibid.* Article 2.

³⁸⁵ *Paris Agreement* Article 7.

³⁸⁶ *Ibid.* 7(1).

³⁸⁷ Carroll & Ray “Maximizing the effectiveness of national commitments to protected area expansion for conserving biodiversity and ecosystem carbon under climate change” (2021) *Global Change Biology*; Cannizzo, et al. “Climate Change — Protected Areas as a Tool” in *Managing Protected Areas* (2023); Dinerstein, et al. “A Global Deal For Nature: Guiding principles, milestones, and targets” (2019) *Science Advances*.

³⁸⁸ Woodley, et al. “Ensuring area-based conservation meets the twin challenges of biodiversity loss and climate change” (2021) *Parks Stewardship Forum* 460-463; *ibid.*

³⁸⁹ *Paris Agreement* Article 4(7).

³⁹⁰ *Ibid.* 4; Sands, et al. “Climate Change” in *Principles of IEL* (2018) 295-296.

³⁹¹ Hehmeyer, et al. *Enhancing nationally determined contributions through protected areas* (2019) 13.

³⁹² Including, but not limited to, IUCN Resolution 5.086 Integrating protected areas into climate change adaptation and mitigation strategies, Resolution 4.076 Biodiversity conservation and climate change mitigation and adaptation in national policies and strategies.

³⁹³ IUCN Resolution 7.110 Establishing a Climate Change Commission.

³⁹⁴ IUCN Resolution 6.069 Defining Nature-based Solutions. Annex I (1).

³⁹⁵ IUCN *Global Standard for Nature-based Solutions. A user-friendly framework for the verification, design and scaling up of NbS* (2020).

NbS that promote biodiversity conservation,³⁹⁶ such as through protected areas and OECMs,³⁹⁷ and integrate efforts to address the interconnected crises of biodiversity loss and climate change.³⁹⁸

2.4 IMPLICATIONS AND OUTLOOK FOR OECMS

This chapter has sought to explore the evolution of the discourse relevant to the modern conservation movement by reflecting on how these trends have shaped contemporary models for *in-situ* area-based conservation and the recognition afforded within international law. The development of this discourse has not been a stagnant process, but rather one that has been consistently evolving to reflect scientific, social, and legal advancements. The chapter first broadly surveyed the global shifts that are generally relevant to *in-situ* area-based conservation, such as the recognition of sustainable use, ecosystem-based approach and landscape approach. It then narrowed the inquiry to protected areas as this has given space for the recognition of OECMs through the refocusing on human-centred approaches, management categories and effectiveness, and governance diversity and quality. Finally, the chapter examined the influence of sustainable development, human rights, and climate change. The evolution of these discourses has collectively led to the formal recognition of OECMs within international legal frameworks as area-based measures that could complement protected areas. The inclusion of OECMs into international instruments and law, some observe, represents a significant advancement in the conservation discourse as it broadens the concept of area-based conservation to extend more equitable recognition to a variety of areas that have positive outcomes for biodiversity.³⁹⁹

This chapter will inform the development of a theoretical legal framework in Chapter 3 for exploring the potential role of law relevant to recognising, regulating, and reporting OECMs. Domestic legal frameworks often reflect in the political or scientific understanding of the international community over time.⁴⁰⁰ As such, the themes canvassed within this chapter will also be relevant for undertaking the critical review of PNG's legal frameworks in Part II of this thesis.

³⁹⁶ IUCN Resolution 7.114 Integrated solutions to the climate change and biodiversity crises, para 5.

³⁹⁷ Jonas, et al. Guidance on OECMs (2024) 48.

³⁹⁸ Ibid., para 1.

³⁹⁹ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 9-10.

⁴⁰⁰ Robinson "Biodiversity Through the UN SDGs" in *Biodiversity and Law* (2017) 28.

Chapter 3 OECMs and the Potential Role of Law

Target 3 of the KMGBF aligns protected areas and OECMs to collectively protect at least 30% of terrestrial and inland waters, and coastal and marine areas by 2030.¹ It is argued that both area-based conservation tools should have consistent treatment under the law to ensure credibility and manage the risk of diluting the global protected area estate.² Notably, the legal frameworks may be challenged to balance the flexibility to adapt to the scope of potential OECMs while being robust enough to afford the clarity, certainty, and consistency required of law.³

The previous chapter outlined the breadth of global shifts in area-based conservation thinking relevant to the inclusion of OECMs within international law and policy. This chapter narrows the focus to the domestic legal environment to theoretically assess how the role of law may enable or hinder the recognition, regulation, and reporting of OECMs. It is critical to first understand the relevance of law within the discourse surrounding OECMs. The first part of the chapter will briefly discuss the role of law and the potential sources of law as this will serve as the foundation for developing a theoretical legal framework. The second part will then connect, utilise, and build upon the IUCN's OECM guidance and site-level tool to interrogate the potential role of law against each of the criteria for an OECM. The OECM site-level tool has been selected as the basis for the theoretical framework for this thesis as it has been adopted as good practice by the most recent guidance for OECMs.⁴ This tool refines the definitional elements established by the CBD⁵ into eight criteria to assess the qualification of a site as an OECM.⁶ For each criterion, the theoretical framework endeavours to identify the potential role of law and establish the criteria against which to critically assess a domestic legal regime (Chapter 5). Several criteria explored within this chapter have been combined to reduce repetition and emphasise a holistic application of potential legal tools.⁷

Over the past few years, domestic policy makers and law makers have been challenged to keep pace with the evolving legal guidance provided for OECMs.⁸ Although few countries have legally recognised and reported OECMs, guidance

¹ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) 9.

² *Paterson OECM Legal Review - South Africa* (2024) 1.

³ *Ibid.* 8.

⁴ Jonas, et al. *Guidance on OECMs* (2024).

⁵ Including not being a protected area; being governed and managed; providing sustained and effective *in-situ* biodiversity conservation; and the associated ecosystem functions and services and cultural, spiritual, socio-economic and other locally relevant values. CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019).

⁶ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

⁷ In step 1 (criterion 2) of the site-level tool a potential OECM should have a “reasonable likelihood” of supporting importing biodiversity values. These values are then required to be confirmed through proof from a “credible source” in step 3 (criterion 4). As these criteria are interdependent, they have been combined for the purpose of this thesis. Similarly, as the institutions to govern and manage (criterion 5) should address equity considerations (criterion 8) these will be canvassed collectively. The outcome-based criteria of achieving effective (criterion 6) and long-term (criterion 7) *in-situ* conservation also have been combined to mitigate repetition of monitoring and reporting mechanisms.

⁸ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019); Garcia, et al. *OECMs in Marine Capture Fisheries* (2021); FAO *OECMs marine fisheries* (2022); Jonas, et al. *Site-level tool for identifying OECMs* (2023); Jonas, et al. *Guidance on*

drawn from an array of sectors may be relevant given the broad nature of OECMs.⁹ This thesis will highlight best practices to facilitate the recognition, regulation, and reporting of OECMs by drawing upon the international guidance related to protected areas,¹⁰ privately protected areas,¹¹ governance¹² and management regimes,¹³ contributions of IPLCs,¹⁴ fostering the sustainable use of biodiversity,¹⁵ the ecosystem approach,¹⁶ connectivity conservation,¹⁷ and specifically the OECM guidance.¹⁸ Given the parallels between protected areas and OECMs, various legal tools within protected area legislation may have particular relevance to the broader classification of area-based measures encompassing OECMs. However, as protected areas and OECMs are mutually exclusive, it also will be imperative to undertake a broader scoping exercise to encompass laws associated generally with the environment, forestry, coastal and marine, inland, and fresh water, biodiversity, climate change, natural and cultural heritage, land-use and planning, property, and land tenure.

3.1 RELEVANCE OF LAW TO OECMS

The law represents a set of rules that creates binding obligations, duties, and rights for the interface between the state, local communities, and external actors.¹⁹ Laws may be complemented by non-binding policies that serve the function of informing and guiding decisions and actions.²⁰ While the law can be used to inform and guide international, regional, and domestic levels, this chapter narrows to its relevance within the domestic context. The OECM guidance encourages the review and revision of national and sub-national policies and laws to support and strengthen OECMs.²¹ It is recommended to identify and understand the influence on OECMs during the earliest stages of recognition, as the law can create benefits and constraints.²² The benefits of law may include certainty, clarity, consistency, credibility, and security.²³ However,

OECMs (2024); Dalton, et al. *A framework for monitoring biodiversity in protected areas and other effective area-based conservation measures: Concepts, methods and technologies* (2024); Fitzsimons, et al. *Defining 'Long-term' for Protected Areas and Other Effective Area-Based Conservation Measures (IUCN WCPA Technical Note No. 14)* (2024).

⁹ Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011).

¹⁰ Lausche *Guidelines for Protected Area Legislation* (2011); Lausche *Guidelines for Protected Areas Legislation* (1980).

¹¹ Mitchell, et al. *Guidelines for PPAs* (2018).

¹² Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013); Worboys, et al. *Protected Area Governance and Management* (2015).

¹³ Dudley *Guidelines for Protected Area Management Categories* (2013); Worboys, et al. *Protected Area Governance and Management* (2015); Thomas & Middleton *Guidelines for management planning* (2003).

¹⁴ CBD COP 14 *Decision 14/16: Methodological guidance concerning the contributions of indigenous peoples and local communities* (2018); Beltrán *Indigenous and Traditional Peoples and Protected Areas* (2000).

¹⁵ Secretariat of the Convention on Biological Diversity *Addis Ababa Principles and Guidelines* (2004).

¹⁶ Secretariat of the Convention on Biological Diversity *Ecosystem Approach* (2004).

¹⁷ Hilty, et al. *Guidelines for conserving connectivity* (2020); Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013).

¹⁸ Jonas, et al. *Guidance on OECMs* (2024).

¹⁹ Ibid. xv; Paterson *OECM Legal Review - South Africa* (2024) 6-7; Techera "Enhancing legal frameworks for biodiversity conservation in the Pacific" (2015) *Pacific Conservation Biology* 92.

²⁰ Jonas, et al. *Guidance on OECMs* (2024) xv; Paterson *OECM Legal Review - South Africa* (2024) 7.

²¹ Jonas, et al. *Guidance on OECMs* (2024) 25-26, 74-75.

²² Ibid. ; Paterson "Other effective area-based conservation measures, biodiversity stewardship and statutory intervention— a South African perspective" (2023) *Potchefstroom Electronic Law Journal*.

²³ Paterson *OECM Legal Review - South Africa* (2024).

excessively restrictive, rigid, fragmented, inconsistent, or centralised laws may have the unintended consequence of hindering the recognition of OECMs.²⁴

Where laws and policies uphold colonial legacies or conflict with various worldviews, they can discourage effective participation from non-state actors, including IPLCs, in area-based measures.²⁵ Domestic policy makers and law makers may be encouraged to undertake prior consultation with non-state actors who might be affected by legal changes. IPLCs should have an opportunity to be consulted and provide input for laws²⁶ that may impede their right to self-determination.²⁷ While formal recognition of OECMs could promote clarity for counting the contributions of non-state actors towards international targets,²⁸ policy makers and law makers should be cognisant not to foster unintended consequences that negatively impact people and biodiversity by introducing new rules and obligations.²⁹ This will require consideration of the relationship between formal and informal legal systems, such as that expressed through customary law.

3.1.1 Potential role of law

With relevance to this thesis, the law may broadly serve the dual role of enabling and regulating OECMs.³⁰ These roles may be expressed through both substantive and procedural laws, thus leading to a diversity of actors and institutions mandated to implement and oversee them.³¹ Relevant legal provisions that enable OECMs may include the identification of triggers for procedures and development of agreements, support given to FPIC, provision of clear definitions, establishment of institutions, recognition and credibility given to various measures, promotion of good governance, facilitation of effective management, and links to incentives for long-term security, amongst others.³² OECMs may be regulated through laws that prescribe management objectives, activities, prohibitions, access rights, incentives and compliance mechanisms, timeframes, monitoring, and reporting.³³ The law may also compel the consideration of certain criteria for decision-making. As the legal frameworks relating to OECMs are amended or developed, adequately addressing both the enabling and regulatory provisions could enhance overall outcomes.

The role of law may be conveyed through primary legislation, subsidiary legislation, policies,³⁴ court decisions, common law,³⁵ and customary law³⁶ as applicable to the domestic context.³⁷ Primary legislation may be supported by subsidiary

²⁴ Jonas, et al. *Guidance on OECMs* (2024) 25; *Paterson OECM Legal Review - South Africa* (2024) 8-9.

²⁵ Tran, et al. "Successes, Challenges, and Lessons from Indigenous Protected and Conserved Areas" (2020) *Biol Conserv* 10; Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*; Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy*.

²⁶ UNDRIP. Article 19.

²⁷ *Ibid.* Article 3.

²⁸ Techera "Enhancing legal frameworks in Pacific" (2015) *Pacific Conservation Biology* 92.

²⁹ Estradivari, et al. "Marine conservation beyond MPAs in Indonesia" (2022) *Mar Policy* 9.

³⁰ Jonas, et al. *Guidance on OECMs* (2024) 25-26; *Paterson OECM Legal Review - South Africa* (2024) 7-14.

³¹ Jonas, et al. *Guidance on OECMs* (2024) 25-26; *Paterson OECM Legal Review - South Africa* (2024) 6-9.

³² Jonas, et al. *Guidance on OECMs* (2024) 25-26; *Paterson OECM Legal Review - South Africa* (2024) 7-8.

³³ Jonas, et al. *Guidance on OECMs* (2024) 25-26; *Paterson OECM Legal Review - South Africa* (2024) 7-8.

³⁴ See section 3.1 of this text.

³⁵ See section 3.1.2.4 of this text.

³⁶ See section 3.1.2.3 of this text.

³⁷ *Paterson OECM Legal Review - South Africa* (2024) 6-7.

legislation, such as regulations or operating standards, that provide an opportunity to establish further guidance or elaborate on provisions contained within the primary legislation.³⁸ Notably, the subsidiary legislation may not introduce new content that is not linked to the primary legislation.³⁹ The primary legislation may grant the authority to create subsidiary legislation to a high-level office or individual, thus affording greater flexibility to create and amend as it does not require Parliament. However, provisions that require long-term security may be more suited to the primary legislation.⁴⁰ As legal frameworks for OECMs are amended or developed, the key components for enabling and regulating may be considered for placement within primary or subsidiary legislation.

3.1.2 Potential sources of law relevant to OECMs

This section seeks to outline the sources of law that may potentially enable the recognition and regulation of OECMs. This will encompass a review of the relevant components that may be found within a state's constitution, statutory laws, customary laws, and common law. Collectively, these sources create the overarching legal framework that will guide, inform, and regulate the activities, institutions, mechanisms, and ultimately outcomes of OECMs domestically. Importantly, systems of legal pluralism may be recognised to varying degrees by the state. The specific political and cultural environment within the domestic context may influence the relationship and expression of various legal systems.⁴¹ OECMs may provide an opportunity to draw on both state and customary law to foster synergies and strengthen area-based conservation.⁴²

3.1.2.1 Constitution

A state's constitution establishes the unique values and general guiding principles that defines its national identity.⁴³ The concept of constitutional supremacy assumes that all other laws, legal decisions, institutions, and acts committed by the state remain subject to the national constitution.⁴⁴ Importantly, a constitution imparts rights, responsibilities, and duties⁴⁵ upon both the state and non-state actors. These are often expected to persist for generations.⁴⁶ A "resistance to constitutional reform" may have the beneficial outcome of providing the most enduring protections for constitutional provisions.⁴⁷ The rights and duties enshrined within a constitution may also be broadly and equally enjoyed across the

³⁸ Lausche *Guidelines for Protected Area Legislation* (2011) 5.

³⁹ Paterson *OECM Legal Review - South Africa* (2024) 42-43.

⁴⁰ Ibid.

⁴¹ Jonas, et al. *Guidance on OECMs* (2024) 25-26.

⁴² Rose "Revisiting grassroots biodiversity conservation in Pacific Island countries" (2021) *Journal of South Pacific Law* 18-20.

⁴³ Lausche *Guidelines for Protected Area Legislation* (2011) 116-118; Kotzé "Six Constitutional Elements for Implementing Environmental Constitutionalism in the Anthropocene" in Daly&May (eds) *Implementing Environmental Constitutionalism: Current Global Challenges* (2018) 16-17.

⁴⁴ Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018) 27; May & Daly *Global environmental constitutionalism* (2015) 58.

⁴⁵ May & Daly *Global environmental constitutionalism* (2015) 73.

⁴⁶ Ibid. 38.

⁴⁷ Ibid. 65.

diverse populations as inalienable privileges.⁴⁸ A constitution does not need to be standardised; each state may adopt provisions representative of their distinct circumstances and values.⁴⁹

The examination of more contemporary constitutions has shown the proliferation of rights, responsibilities and duties being extended to conservation and environmental protections.⁵⁰ These have been expressed through anthropocentric provisions such as the right to a quality environment and the right to water.⁵¹ There are also examples of constitutions adopting more eco-centric provisions by extending rights to nature.⁵² The literature emphasises the importance of these constitutional rights being self-executing to address the risk of insufficient legislation implementation.⁵³ This may be achieved through the structural placement of environmental rights alongside the fundamental first-generation rights within a state's constitution.⁵⁴

As a constitution may impart environmental duties, give recognition to protections, or establish special procedural rights,⁵⁵ it may also set limits on the state, such as those associated with the deprivation of property rights or the taking of private lands without fair compensation.⁵⁶ These limits could be relevant for the recognition of OECMs. As a state may be cognisant of such constitutional limits, employing OECMs as an area-based conservation measure may provide a viable alternative to meet international obligations when constraints are placed upon the expansion of formal protected areas under state ownership.

Importantly, the absence of explicit environmental constitutional provisions does not necessarily denote the absence of environmental protections. States may give powers to the judiciary to elucidate the implicit interpretations of the Constitution.⁵⁷ For example, domestic judicial systems have found that the constitutional right to life implicitly provides for

⁴⁸ Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018) 30.

⁴⁹ May & Daly *Global environmental constitutionalism* (2015) 37. For a review of constitutional provisions see: Cuskelly *Customs and Constitutions: State recognition of customary law around the world* (2011); Lausche *Guidelines for Protected Area Legislation* (2011) 116-117.

⁵⁰ For a review of constitutional provisions see: Cuskelly *Customs and Constitutions* (2011); Lausche *Guidelines for Protected Area Legislation* (2011) 116-117; May & Daly *Global environmental constitutionalism* (2015); Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018); Kotzé & Villavicencio Calzadilla "Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador" (2017) *Transnational Environmental Law*. Daly & May *Implementing Environmental Constitutionalism: Current Global Challenges* (2018) discuss global examples and lessons learned from implementing environmental constitutionalism.

⁵¹ May & Daly *Global environmental constitutionalism* (2015) 56 and Appendices A-I; Kotzé & Villavicencio Calzadilla "Somewhere between Rhetoric and Reality" (2017) *Transnational Environmental Law* 402-403.

⁵² Kotzé & Villavicencio Calzadilla "Somewhere between Rhetoric and Reality" (2017) *Transnational Environmental Law*.

⁵³ May & Daly *Global environmental constitutionalism* (2015) 78.

⁵⁴ May & Daly "Textualizing environmental constitutionalism" in Daly & May (eds) *Global Environmental Constitutionalism* (2014) 78-84.

⁵⁵ May & Daly *Global environmental constitutionalism* (2015) 56 and Appendices A-I.

⁵⁶ Lausche *Guidelines for Protected Area Legislation* (2011) 141-142; Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 78-80.

⁵⁷ Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018) 26-28.

the right to a healthy environment.⁵⁸ The contemporary inclusion of environmental rights and duties supports the paradigm shift discussed in Chapter 2, which recognises the intertwined relationship between humans and the environment.

Beyond recognising the rights, responsibilities and duties granted to society and the environment, the constitution may seek to identify the state's structure of government, including the separation and distribution of power, mandates, and functions of government authorities, as well as their connections and the promotion of cooperation.⁵⁹ This separation and distribution of powers can contribute to institutional accountability and efficiency.⁶⁰ A constitution could also endeavour to define the relationship between the state and non-state actors⁶¹ which may encompass recognition of legal pluralism. As the international community emphasises the need to acknowledge the contributions of IPLCs to area-based conservation targets,⁶² the degree of recognition afforded by a state to the consideration of customary law and systems of legal pluralism may prove imperative.⁶³ A constitution may give full recognition to customary law or acknowledge its existence within the domestic legal hierarchy.⁶⁴ Various provisions may extend entitlements for IPLCS, such as the control and governance over traditional territories and natural resources, acceptance of customary laws and institutions, and respect for cultural identity.⁶⁵ It is noted within the literature, however, that constitutional provisions are often developed from a Western worldview and developed to fit within Western legal systems.⁶⁶ This may be alleviated by providing for consultation and customary advisory bodies.⁶⁷

Understanding the enabling environment established by a constitution facilitates a clearer assessment of the potential role of law in promoting OECMs within a state's legal framework. The inclusion of constitutional provisions has been shown to filter down to promote statutory and regulatory environmental frameworks.⁶⁸ Thus, a state's constitution plays a critical underlying role in creating the enabling and regulating environment for OECMs.⁶⁹

⁵⁸ May & Daly *Global environmental constitutionalism* (2015) 59.

⁵⁹ Ibid. 37-38; Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018) 24-25.

⁶⁰ Kotzé "Elements for environmental constitutionalism in the Anthropocene" in *Implementing Environmental Constitutionalism* (2018) 24.

⁶¹ May & Daly *Global environmental constitutionalism* (2015) 38.

⁶² CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) Annex, Section C (8); Gurney, et al. "Biodiversity needs every tool in the box" (2021) *Nature*; Donald, et al. "Prevalence, characteristics and effectiveness OECMs in KBAs" (2019) *Conserv Lett*; Jonas & Mckinnon *Framing the Issues* (2015); Laffoley, et al. "OECMs under Aichi Target 11" (2017) *Aquat Conserv*; Jonas, et al. "Will OECMs increase recognition and support for ICCAs?" (2017) *PARKS*. Also see discussion in Chapter 2.

⁶³ Paterson "Scoping the Potential Influence of Law on Terrestrial OECMs" (2023) *Law, Environment and Development Journal* 49.

⁶⁴ Corrin & Young "Constitutional promises of indigenous recognition: Canada, Vanuatu and the challenges of pluralism" (2019) *Common law world review* 264; Techera "Legal Pluralism, Indigenous People and Small Island Developing States: Achieving Good Environmental Governance in the South Pacific" (2010) *Journal of legal pluralism and unofficial law* 176; Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 98.

⁶⁵ For a detailed survey of the representation of customary law in state constitutions see: Cuskelly *Customs and Constitutions* (2011). Corrin & Young "Constitutional promises of indigenous recognition" (2019) *Common law world review* 246 and 260. Lausche *Guidelines for Protected Area Legislation* (2011) 116-118.

⁶⁶ Corrin & Young "Constitutional promises of indigenous recognition" (2019) *Common law world review* 234.

⁶⁷ Ibid. 246.

⁶⁸ May & Daly *Global environmental constitutionalism* (2015) 39.

⁶⁹ Lausche *Guidelines for Protected Area Legislation* (2011) 116-118.

3.1.2.2 Statutory law

The written law will play a key role in enabling or hindering the recognition, regulation, and reporting of OECMs.⁷⁰ As states commit to international obligations, they are tasked to consider how best to integrate these commitments into their domestic context. This may involve the employment of overarching environmental frameworks, more narrowly defined legislation for area-based conservation, or site-specific laws tailored to a particular OECM.⁷¹ The OECM guidance recommends undertaking an assessment of legal frameworks to identify those that may enable or hinder the recognition of OECMs.⁷² Given the potential scope of OECMs, it will be advantageous initially to canvas a broad array of legal frameworks such as those associated with protected areas, biodiversity, natural resources, and climate change, as well as human rights, property law, land-use and development planning laws, agricultural law, and fiscal laws. It may be useful to canvas current domestic legal frameworks for opportunities to create subsidiary legislation to meet immediate needs for recognising, regulating, and reporting OECMs. However, as some caution against using existing laws to expedite recognition as they may endanger the effectiveness and security of OECMs,⁷³ states may also decide to create new legal frameworks specifically intended to recognise, regulate, and report OECMs.

Statutory legal tools may be found in substantive and procedural laws.⁷⁴ The tools for implementing substantive laws may foster recognition or provide direct regulation to achieve desired outcomes.⁷⁵ This may include requirements and procedures for various permits and licenses, establish standards and conditions, provide incentives, prohibit certain activities, and necessitate environmental impact assessments (EIAs). The compilation of tools within the scope of protected areas has proven to afford a mechanism to establish the rules for the interactions amongst various state and non-state actors.⁷⁶ In relation to OECMs, given the diversity of potential actors, these “rules” may seek to facilitate procedures that give effect to the principles of good governance, FPIC, and public participation. Rigid top-down laws may undermine area-based conservation if considered too restrictive, regulated, or constrain the ability to adapt to environmental and social changes.⁷⁷ Legal frameworks may seek to balance clarity and certainty with the flexibility required for the nuanced governance and management required by individual OECMs.⁷⁸

⁷⁰ Jonas, et al. *Guidance on OECMs* (2024) 25-26.

⁷¹ Kelleher, et al. “Law and Governance” in Nimwegen, et al. (eds) *Conserving our sea of islands: State of protected and conserved areas in Oceania* (2022) 69-70.

⁷² Jonas, et al. *Guidance on OECMs* (2024) 25-26.

⁷³ Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation ” (2019) *Mar Policy*.

⁷⁴ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 78; Jonas, et al. *Guidance on OECMs* (2024).

⁷⁵ Paterson *OECM Legal Review - South Africa* (2024) 16.

⁷⁶ Techera “Enhancing legal frameworks in Pacific” (2015) *Pacific Conservation Biology* 92; Rose “Grassroots conservation in Pacific” (2021) *Journal of South Pacific Law* 21.

⁷⁷ Paterson “OECMs, biodiversity stewardship and statutory intervention” (2023) *Potchefstroom Electronic Law Journal* 110; Techera “Enhancing legal frameworks in Pacific” (2015) *Pacific Conservation Biology* 92.

⁷⁸ Jonas, et al. “Equitable and effective conservation” (2021) *PARKS*; Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal*.

3.1.2.3 Customary law

As states seek to implement the guidance from international policy and law on OECMs, they must negotiate the complexities arising at the nexus between statutory and customary laws.⁷⁹ Despite an overarching domestic legal framework, custom may serve as the law *de facto*. This can be an essential source of law for regulating land and resource rights and obligations, governance practices and processes, decision-making, and conflict resolutions.⁸⁰ Some states have “harmonised” national law and custom by giving effect to the customary laws and institutions within the constitution and other statutory legislation.⁸¹

OECMs may possess the potential to enrich the legal environment through “just approaches to conservation”⁸² by recognising customary laws that may exist outside of the formal written rule of law of the state.⁸³ However, they could also present several challenges for area-based conservation. First, customs are not uniform or static⁸⁴ and may vary across spatial and temporal scales. Secondly, there is the challenge of jurisdiction, specifically whether customary law applies to everyone within the geographical boundaries or to only members of a particular customary group.⁸⁵ There is no universal answer to this question, but it would need to be addressed by the specific domestic legal system. There are numerous examples of courts being tasked with deciphering the existence of customary law.⁸⁶ In jurisdictions where customary law may be applied, it may be beneficial to have specific guidelines and evidence required to ascertain its existence and application.

3.1.2.4 Common law

The common law may also provide a source of law for recognising, regulating, and reporting OECMs. The common law develops slowly as the courts interpret rules and apply decisions.⁸⁷ It is suggested within the literature that the common law may serve a dual function with relevance to OECMs.⁸⁸ First, it may establish the legal foundation for contractual agreements that may be used to recognise OECMs.⁸⁹ Secondly, it may serve an important regulatory function for

⁷⁹ Techera “Legal Pluralism, Indigenous People and SIDS” (2010) *Journal of legal pluralism and unofficial law* 172.

⁸⁰ Coyle “*E Pluribus Plures*: Legal pluralism and the recognition of indigenous legal orders” in Berman (ed) *The Oxford handbook of global legal pluralism* (2020) 821-822. For an exploration on the various aspects of customary law including the rights to land, territory, resources, culture, traditional knowledge, autonomy and self-determination see: Tobin *Indigenous peoples, customary law and human rights-why living law matters* (2014).

⁸¹ Techera “Enhancing legal frameworks in Pacific” (2015) *Pacific Conservation Biology* 89.

⁸² Jonas, et al. “Will OECMs increase recognition and support for ICCAs?” (2017) *PARKS*.

⁸³ Techera “Legal Pluralism, Indigenous People and SIDS” (2010) *Journal of legal pluralism and unofficial law*.

⁸⁴ Corrin “A Question of Identity: Complexities of State Law Pluralism in the South Pacific” (2010) *The Journal of Legal Pluralism and Unofficial Law* 147; Tobin *Indigenous peoples, customary law and human rights* (2014); Cuskelly *Customs and Constitutions* (2011); Coyle “*E Pluribus Plures*” in *Handbook of global legal pluralism* (2020).

⁸⁵ Corrin “Complexities of State Law Pluralism” (2010) *The Journal of Legal Pluralism and Unofficial Law* 165.

⁸⁶ Corrin & Young “Constitutional promises of indigenous recognition” (2019) *Common law world review*; Corrin “Complexities of State Law Pluralism” (2010) *The Journal of Legal Pluralism and Unofficial Law*.

⁸⁷ Chng “Conceptualising A Role for The Common Law in Environmental Protection in Singapore” (2021) *Asian Journal of Comparative Law* 221; Paterson *OECM Legal Review - South Africa* (2024) 29.

⁸⁸ Paterson *OECM Legal Review - South Africa* (2024) 29.

⁸⁹ Ibid. Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal* 37.

conservation servitudes and easements as these tools may create certain rights and obligations.⁹⁰ The common law may also inform matters of procedural fairness that facilitate appropriate public participation and consultation.⁹¹

3.2 IDENTIFYING POTENTIAL OECMS

To date, only a limited number of countries have identified and submitted data on OECMs to the World Database on OECMs (WD-OECM).⁹² Over the past few years, several documents have formed the guidance for developing legal frameworks to recognise OECMs. These include the CBD's Scientific and Technical Advice on OECMs,⁹³ the IUCN's guidelines⁹⁴ and site-level tool.⁹⁵ The IUCN's guidance and tool distil the OECM criteria into a multi-part test⁹⁶ to screen potential and assess candidate OECMs.⁹⁷ To provide clarity, a potential and a candidate OECM are distinguished by the degree of consent obtained.⁹⁸ A potential OECM has "OECM-like characteristics" but has yet to obtain consent from the relevant governance authority.⁹⁹ A candidate OECM meets the criteria of a potential OECM and has obtained consent from the governance authority to undertake a full assessment.¹⁰⁰ The OECM guidance provides several examples of potential OECMs.¹⁰¹ The governance authority may desire to pursue legal recognition as an OECM as the benefits may include, but not limited to, the acknowledgement of the efforts and contributions of non-state actors to area-based conservation, opportunities to leverage additional support and resources, and meeting international commitments such as those established by the KMGBF.¹⁰²

Fundamentally, OECMs may afford recognition to existing area-based measures that deliver effective conservation.¹⁰³ In contrast to protected areas, OECMs are not limited to sites where conservation is the primary management objective.¹⁰⁴ Perhaps foremost, the law may facilitate the screening of potential OECMs by explicitly defining OECMs within legal

⁹⁰ Paterson OECM Legal Review - South Africa (2024) 29. Paterson "Scoping the Potential Influence of Law on Terrestrial OECMs" (2023) *Law, Environment and Development Journal* 37.

⁹¹ Chng "Common Law in Environmental Protection in Singapore" (2021) *Asian Journal of Comparative Law* 228.

⁹² At the time of writing, the WD-OECMs lists records of OECMs from 15 countries. UNEP-WCMC & IUCN *Protected Planet: WDPA* (accessed January 2025). No OECMs have been reported as having conservation as an ancillary objective. Jonas, et al. "Status and emerging contribution of OECMs" (2024) *Frontiers in Conservation Science* 9.

⁹³ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III.

⁹⁴ Jonas, et al. *Guidance on OECMs* (2024); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019).

⁹⁵ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

⁹⁶ The 2019 screening tool distils the OECM criteria into a four-part test while the proposed site-level tool evaluates the OECM criteria through two tests in the screening phase and six in the full assessment site-level draft.

⁹⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 8-9; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 1; Jonas, et al. *Guidance on OECMs* (2024) 38-58.

⁹⁸ Further discussion in section 3.3.

⁹⁹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 1.

¹⁰⁰ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 2.

¹⁰¹ Jonas, et al. *Guidance on OECMs* (2024) 29-30.

¹⁰² Jonas, et al. *Site-level tool for identifying OECMs* (2023) 1.

¹⁰³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 11.

¹⁰⁴ *Ibid.* 9-12. See section 3.2 of this text.

frameworks. There may be merit in adopting the broad definition provided by the CBD for consistency in reporting on international commitments, namely:

A geographically defined area other than a Protected Area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.¹⁰⁵

Should a state desire to refine this to suit their domestic context, it could introduce provisions to identify types of areas that may be managed under various existing frameworks automatically as potential OECMs. For example, the state may use legislation to provide forests with a formal designation that acknowledges its function in establishing connectivity conservation and providing buffer zones. While not all these areas will meet the definition of a protected area, they may meet the criteria of a potential OECM. Several other examples drawn from the OECM guidance are locally managed marine areas (LMMAs), permanent fishery closures, sacred and heritage sites, and conserved water catchment areas.¹⁰⁶ As conservation without legal recognition remains vulnerable to exploitation,¹⁰⁷ there may be merit in some cases to recognise proposed protected areas, world heritage sites, and Ramsar sites pending approval should they meet the OECM criteria.

The law could explicitly compel the relevant decision-makers to consult existing plans and priorities to identify potential OECMs. Areas of high biodiversity value may be identified within systematic conservation plans, land and marine spatial plans, or as key biodiversity areas (KBA) outside of protected areas that could trigger review as potential OECMs.¹⁰⁸ The state may also have plans developed to align with international commitments, such as a National Biodiversity Strategy and Action Plan (NBSAP) under the CBD, National Forest Plans related to the UN Forest Forum, and National Adaptation Plans under UNFCCC. Such plans, however, may only capture priority areas for biodiversity and the associated habitat. The broadly defined nature of OECMs may compel a more extensive review of other sectoral plans, including those mentioning important geological, cultural, or heritage features, where conservation may be a secondary or ancillary management objective. Depending upon a state's domestic legal frameworks, areas covered by a conservation or biodiversity management agreement, conservation easement, or deed endorsement may also trigger review as a potential OECM.

Noting the risk of creating “paper” OECMs,¹⁰⁹ the flagging of certain areas as potential OECMs does not negate the need for these to meet the criteria identified within this chapter and obtain consent from the governance authority before recognising and reporting the area as an OECM. Importantly, as OECMs may need to be assessed on a “case-by-case”

¹⁰⁵ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018).

¹⁰⁶ For a list of potential OECM see: IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 9-12.

¹⁰⁷ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 52.

¹⁰⁸ Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation ” (2019) *Mar Policy* 320.

¹⁰⁹ The notion of ‘paper parks’ is well documented throughout the literature. These parks exist in law but lack either an appropriate or functional management regime to have effective in-situ conservation. Holdgate & Phillips “Protected areas in context” in *Integrated protected area management* (1999) 11 and 22.

basis, this could strain resources and ultimately prove prohibitive.¹¹⁰ Establishing clear guidance and adapting existing tools to identify potential OECMs may alleviate the burden. Legal frameworks may provide powers to both state and non-state actors to identify potential OECMs and request further assessment. It could be beneficial for subsidiary legislation to provide specific guidance for non-state actors to self-identify as a potential OECM. Provision may explicitly prescribe who will assess the validity of OECMs and the expectations for public participation. Including the governance and management authorities in the assessment process could foster clarity and transparency. Employing a set of criteria, including the elements discussed throughout this chapter, could support a consistent decision-making process. The law may clarify the status of potential and candidate OECMs, such as the allowable activities, uses, and access, while awaiting the outcome of a pending assessment.

3.3 A THEORETICAL LEGAL FRAMEWORK FOR OECMS

The theoretical legal framework developed within this section will interrogate the potential role of law against the IUCN's site-level tool for identifying OECMs as it has been adopted a good practice by the most recent guidance for OECMs.¹¹¹ The site-level tool applies eight criteria by which to assess the qualification of a site as an OECM.¹¹² This set of criteria refines and builds upon the overarching criteria and definitional elements established by the CBD.¹¹³ The site-level tool has been selected as the basis for the theoretical framework for this thesis as it reflects the most current and complete guidance for recognising OECMs as compiled by the international community. For each criterion, the theoretical legal framework will highlight the international guidance, with both direct and indirect relevance to OECMs, and identify the potential role of law that could inform the opportunities and reforms required of domestic laws to adequately recognise, regulate, and report on OECMs. Several of the criteria explored within this chapter have been combined to reduce repetition and emphasise a holistic application of potential legal tools.¹¹⁴ The theoretical legal framework will provide the structure to assess PNG's relevant legal regime to support and strengthen area-based conservation (Chapter 5 and Chapter 6).

¹¹⁰ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 13.

¹¹¹ Jonas, et al. *Guidance on OECMs* (2024).

¹¹² Jonas, et al. *Site-level tool for identifying OECMs* (2023).

¹¹³ Including not being a protected area; being governed and managed; providing sustained and effective *in-situ* biodiversity conservation; and the associated ecosystem functions and services and cultural, spiritual, socio-economic and other locally relevant values. CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019).

¹¹⁴ In step 1 (criterion 2) of the site-level tool a potential OECM should have a "reasonable likelihood" of supporting importing biodiversity values. These values are then required to be confirmed through proof from a "credible source" in step 3 (criterion 4). As these criteria are interdependent, they have been combined for the purpose of this thesis. Similarly, as the institutions to govern and manage (criterion 5) should address equity considerations (criterion 8) these will be canvassed collectively. The outcome-based criteria of achieving effective (criterion 6) and long-term (criterion 7) *in-situ* conservation also have been combined to mitigate repetition of monitoring and reporting mechanisms.

3.3.1 Securing consent for OECMs

The need to secure consent has emerged as a central criterion for recognising and reporting OECMs. Within a domestic context, this may be given effect through various legal frameworks that apply to both state and non-state actors. This respects the international legal principle of free, prior and informed consent (FPIC)¹¹⁵ as shaped by the UNDRIP right to consultation and consent undertaking actions that may affect the lands, territories, or resources of IPLCs.¹¹⁶ Although a site may “tick the boxes” to recognise and report an OECM, it is inappropriate and idealistic to simply assume that the governance authority will consent to the obligations required for long-term commitment to conservation.¹¹⁷ The OECM guidance respects the possibility of IPLCs to deny or revoke consent at any time.¹¹⁸

The undertaking of gaining consent may begin at the earliest stages of recognition, as well as throughout the lifespan of the OECM,¹¹⁹ and may be required from the governance authority, owners, resource users, and IPLCs.¹²⁰ Domestic legal frameworks may explicitly compel written consent prior to proceeding with an assessment¹²¹ recognition and reporting of an OECM.¹²² Legal frameworks could provide clarity for whom consent should be sought, mechanisms for documentation, the means for review, and the associated timeframes. Non-state actors, especially IPLCs, women, and marginalised groups, should be fully aware of their rights and responsibilities before giving consent.¹²³ This may include costs, benefits, changes in access and use rights, management responsibilities, and decision-making functions. Informational materials may be required to be produced in the local language or presented orally to alleviate the risk of misunderstanding.¹²⁴ The process of obtaining consent may require multiple opportunities to meet with the community and gather questions over a stated period of time to promote clarity and understanding. This may include elements of public participation¹²⁵ as well as potential opportunities for legal counsel.¹²⁶ The law may provide guidelines for documenting all permission given or rejected. This could also include specific criteria to account for communal ownership and rights, as well as the means of validation.

¹¹⁵ Eghenter “Indigenous OECMs in North Kalimantan” (2018) *PARKS* 70; Jonas, et al. “Equitable and effective conservation” (2021) *PARKS* 76.

¹¹⁶ UNDRIP Articles 10 and 32(2).

¹¹⁷ Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation* 4-5; Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS* 77.

¹¹⁸ Jonas, et al. Guidance on OECMs (2024) 32-33.

¹¹⁹ Ibid.

¹²⁰ Ibid. 42.

¹²¹ Obtaining and documenting consent is included as Step 2 of the site-level assessment tool. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 6-7.

¹²² Ibid. 1-2, 6-7, 18.

¹²³ See section 3.3.1 of this text.

¹²⁴ Experience from implementing pilot OECM assessments has noted the need to ensure IPLC fully understand the criteria and associated questions which may require rephrasing. Marnewick, et al. “Extent of OECMs in South Africa” (2021) *PARKS* 63.

¹²⁵ See section 3.3.5.2 of this text.

¹²⁶ UNDRIP Article 29(1) allows for states to provide assistance programs to build the capacity of IPLC to conserve and protect their lands.

3.3.2 Ensuring the area is not a protected area

The first criterion of an OECM is that it may not be currently recognised or reported as a protected area nor as part of a protected area.¹²⁷ While the two area-based tools may be used together to strengthen the overall protected area network, they must be mutually exclusive. Although this criterion screens for current protected areas, the law may provide pathways for an OECM to become a protected area in the future.¹²⁸ As the criterion explicitly refers to not being a protected area, a first step is to distinguish the definition of a protected area and then set apart the objectives of the area-based conservation tools. The sections above sought to provide guidance as to what may constitute an OECM; however, perhaps equally important is what it is not. This section seeks to establish the exclusionary criteria by first defining a protected area and then differentiating protected areas and OECMs as per their management objective. These definitions and distinguishing criteria can be included within legal frameworks to foster clarity and consistency. Existing legal frameworks may be scanned and updated as necessary to explicitly reflect the inclusion of OECMs into domestic policy and law.

The OECM guidance offers a two-part qualifier as a protected area must both meet the IUCN definition and be recognised as such by the governing authority.¹²⁹ Despite meeting the IUCN definition, a governance authority may not desire to seek protected area designation for various reasons. The literature cites a number of examples of IPLCs expressing suspicion and mistrust in declaring their territorial lands as protected areas due to a history of dispossession of lands for conservation, an anticipated loss of power, or constraints on resource use.¹³⁰ Recognition as an OECM may afford an alternative mechanism for these communities to strengthen conservation, leverage additional resources, foster secure tenure, and acknowledge their contributions to international goals and targets.¹³¹ Legal frameworks may provide pathways for areas that meet the IUCN definition of a protected area, but are not recognised as protected areas by the governing authority, to be automatically flagged as potential OECMs.¹³² Importantly, such an automatic identification as a potential OECM would not negate the need to secure consent¹³³ and screen the area against the other OECM criteria outlined below.

3.3.2.1 Definition of a protected area

Given the explicit need to be distinct, it is critical first to understand the definition of a protected area as differentiated from that of an OECM.¹³⁴ The CBD and IUCN definitions of a protected area are recognised as comparable,¹³⁵ with the latter

¹²⁷ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4; CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B).

¹²⁸ However, once recognised as a protected area, the OECM designation should be removed. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4.

¹²⁹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 3. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4.

¹³⁰ Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS* 77; Jonas & Lucas *Legal Aspects of Aichi Target 11* (2011) 14; Barrow & Pathak “Conserving “unprotected” protected areas” in *Protected Landscape Approach* (2004) 69; Borri-Feyerabend, et al. *Governance of Protected Areas* (2013) 51-52.

¹³¹ Alves-Pinto, et al. “Opportunities and challenges of other effective area-based conservation measures (OECMs) for biodiversity conservation” (2021) *Perspectives in Ecology and Conservation* 116; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 1.

¹³² Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4.

¹³³ See section 3.3.1 of this text.

¹³⁴ See section 3.2 of this text.

¹³⁵ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii-ix.

being slightly more detailed.¹³⁶ As the OECM criteria explicitly excludes areas that meet the IUCN definition of a protected area,¹³⁷ this is applied throughout this thesis. According to the IUCN, a protected area is:

a clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.¹³⁸

Importantly, this definition reflects the evolution in conservation thinking, as discussed in Chapter 2. However, domestic legal frameworks may trail behind with remnants of previous versions of a protected area definition continuing to linger, thus contributing to uncertainty. While many states have adopted the guidance as to what constitutes a protected area, they are not explicitly required to do so.¹³⁹ Likewise, a state may choose to reflect upon the definition of an OECM and distinguish as necessary to fit the domestic context. Although this provides an opportunity to reflect national circumstances, it risks creating a broad lexicon that challenges consistent reporting.¹⁴⁰ The IUCN terminology and definitions provide a common language for describing similar experiences and objectives within the global community.¹⁴¹

Under some domestic frameworks, the definition of a protected area may not align with that of the IUCN.¹⁴² This definitional conflict may encompass whole areas or parts of an area¹⁴³ where recognition as protected areas by the WDPA is not likely. These may qualify as an OECM with consent of the governance authority. The literature predominantly draws on examples from the relationship between OECMs and PPAs,¹⁴⁴ ICCAs,¹⁴⁵ and MPAs.¹⁴⁶ Notably, caution should be taken to address the threat of green-washing and blue-washing, with a focus on quantity over quality of area-based conservation

¹³⁶ The CBD defines a protected area as “a geographically defined area which is designated or regulated and managed to achieve specific conservation objectives.” Article 2.

¹³⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 3. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4.

¹³⁸ Dudley *Guidelines for Applying Protected Area Management Categories* 8.

¹³⁹ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 51.

¹⁴⁰ CBD COP 7 *Decision VII/28: Protected Areas (Articles 8 (a) to (e))* (2004) para 31.

¹⁴¹ Worboys “Protected Area Governance and Management” in (2015) 16.

¹⁴² Govan, et al. “Status and potential of locally-managed marine areas in the South Pacific” (2009); Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS*; Bartlett, et al. “Policy Implications of Protected Area Discourse in Pacific” (2010) *Mar Policy*.

¹⁴³ Govan & Jupiter “Can IUCN management categories support Pacific approaches?” (2013) *PARKS*; Govan, et al. “Status and potential of locally-managed marine areas in the South Pacific” (2009) 29-30; Agardy, et al. “Dangerous targets? Unresolved issues and ideological clashes around marine protected areas” (2003) *Aquat Conserv* 355-356.

¹⁴⁴ For further discussion on PPAs and OECMs see: Mitchell, et al. “PPA or OECM? Differentiating Between Privately Protected Areas and Other Effective Area-Based Conservation Measures on Private Land” (2018) *PARKS*; Mitchell, et al. *Guidelines for PPAs* (2018); Bingham, et al. *Privately protected areas: international reporting and their relationship with OECMs* (2020).

¹⁴⁵ For further discussion of ICCAs and OECMs see: Jonas, et al. “Will OECMs increase recognition and support for ICCAs?” (2017) *PARKS*; Dudley, et al. “Essential role of OECMs in achieving conservation targets” (2018) *Global Ecology and Conservation*.

¹⁴⁶ For further discussion of the risks and opportunities of OECMs within the marine environment see: Estradivari, et al. “Marine conservation beyond MPAs in Indonesia” (2022) *Mar Policy*; Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth*; Maini, et al. “Charting the value and limits of other effective conservation measures (OECMs) for marine conservation: A Delphi study” (2023) *Mar Policy*; Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation” (2019) *Mar Policy*.

measures.¹⁴⁷ The law may provide mechanisms to assess and monitor a commitment to long-term effective conservation to manage this risk.¹⁴⁸

The authorities with the primary mandate for conservation and protected areas may be best positioned to update and establish clear definitions and guidance as to what constitute protected areas and OECMs.¹⁴⁹ The legal frameworks for OECMs may cross-reference the definition of a protected area as contained in existing legislation. It may be important to note instances where terrestrial and marine protected areas are defined under separate legislation to address ambiguity. A state may also have other statutory laws that identify specific kinds of conserved areas, such as forest areas. These could be reviewed to appropriately align with the definition of a protected area or OECM. If the latter, the state may consider the specific triggers for assessment as a potential OECM.

3.3.2.2 Management objective

The IUCN definition of a protected area is accompanied by a set of principles. The first principle provides perhaps the clearest distinction between a protected area and an OECM.

Only those areas where the main objective is conserving nature can be considered protected areas; this can include many areas with other goals as well, at the same level, but in the case of conflict, nature conservation will be the priority.¹⁵⁰

Conversely, although an OECM still must deliver long-term conservation outcomes, it provides an opportunity to broaden the scope to include areas that may have conservation as a primary, secondary, or ancillary objective.¹⁵¹ This may be simply interpreted as protected areas having an intention-based management objective, while OECMs are outcome-based.¹⁵² The OECM guidance encourages the management objectives to positively contribute to supporting the important biodiversity values of the site.¹⁵³

Protected areas and OECMs may be terrestrial or marine-based and exist in a variety of sizes, encompassing various management objectives and governance types.¹⁵⁴ It is observed within the literature that identifying a protected area can be complicated to discern given the “sometimes bewildering array” of designations.¹⁵⁵ Different area-based legislation

¹⁴⁷ Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation ” (2019) *Mar Policy* 318; Lemieux, et al. “Running to stand still: The application of substandard OECMs ” (2022) *Biol Conserv* 1-5; Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970.

¹⁴⁸ See section 3.3.6 of this text.

¹⁴⁹ It may also be advantageous to ensure this aligns with the authority given the mandate for international reporting obligations under the CBD to reduce the threat of double reporting of protected areas and OECMs.

¹⁵⁰ Dudley *Guidelines for Protected Area Management Categories* (2013) 10.

¹⁵¹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 9-12; Jonas, et al. *Guidance on OECMs* (2024) 12.

¹⁵² Eghenter “Indigenous OECMs in North Kalimantan” (2018) *PARKS* 70.

¹⁵³ Jonas, et al. *Guidance on OECMs* (2024) 9-14.

¹⁵⁴ Dudley *Guidelines for Protected Area Management Categories* (2013) 3; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

¹⁵⁵ Dudley *Guidelines for Protected Area Management Categories* (2013) 3.

may recognise and regulate terrestrial protected areas and marine protected areas.¹⁵⁶ They can be recognised, regulated, and reported under numerous legal tools connected to forestry, land use, natural heritage, coastal and marine ecosystems, biodiversity and protected species.¹⁵⁷ Protected areas may also align with other international agreements. For example, many natural World Heritage sites and Ramsar sites are recognised as protected areas, although states are not obligated to designate them as such.¹⁵⁸ A Biosphere Reserve could potentially contain mixed zoning of a core protected area and non-protected sustainable use zones.¹⁵⁹ The IUCN specifies that a protected area may have up to 25% of the area zoned for other uses, provided that they remain compatible with the core objective.¹⁶⁰

Fragmented legal frameworks compound the complexities in identifying a protected area.¹⁶¹ To alleviate fragmentation, an overarching domestic framework could encompass protected areas and OECMs. However, this should clearly distinguish between the two tools. The legal frameworks may seek to mitigate the risk of the “compartmentalisation of conservation”,¹⁶² by recognising a variety of management objectives that may be represented within the landscape or seascape. Subsidiary legislation could be utilised to clarify the relationship and overlap of management objectives.

3.3.3 Supporting important biodiversity values

The IUCN guidance for recognising OECMs stresses the significance of supporting and maintaining the important biodiversity values of the site.¹⁶³ Although conservation is not required to be the primary objective, important biodiversity values must be present for consideration as an OECM.¹⁶⁴ The IUCN site-level tool suggests a two-step process that first screens for potential OECMs that have a “reasonable likelihood” of supporting important biodiversity values.¹⁶⁵ The assessment then necessitates the confirmation of values through “credible” and “reliable” sources.¹⁶⁶ At a minimum, an OECM should support at least one important biodiversity value.¹⁶⁷ The management regime may clearly identify and employ strategies to manage the potential threats to these values, including the internal pressures stemming from the

¹⁵⁶ Techera “Mangrove ecosystems and services: Legal recognition and protection in Indo-Pacific Island States” (2020) *University of Queensland Law Journal* 490; Dudley *Guidelines for Protected Area Management Categories* (2013) 51-68.

¹⁵⁷ Techera “Mangrove ecosystems and services” (2020) *University of Queensland Law Journal*; Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal*.

¹⁵⁸ Dudley *Guidelines for Protected Area Management Categories* (2013) 70-75.

¹⁵⁹ *Ibid.* 39.

¹⁶⁰ *Ibid.* 35.

¹⁶¹ Techera “Mangrove ecosystems and services” (2020) *University of Queensland Law Journal* 495; Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal* 41.

¹⁶² Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970.

¹⁶³ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 5 and 10; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7; Jonas, et al. *Guidance on OECMs* (2024) 47-49.

¹⁶⁴ The site-level tool reminds assessors that ecosystem services and local economic values are not components of this criteria. The identification of such values may complement and strengthen the overall objectives of the OECM. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 10.

¹⁶⁵ *Ibid.* 5.

¹⁶⁶ *Ibid.* 10.

¹⁶⁷ The six values listed in the IUCN guidance include areas with rare, threatened, or endangered species or ecosystems; domestically under-represented natural ecosystems; significant intactness; endemic or range-restricted populations or ecosystems; important for species aggregation; and ecological connectivity. *Ibid.* 5 and 10; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7. It may also be advantageous to consider areas that serve as climate refugia and those containing high levels of carbon. Jonas, et al. *Guidance on OECMs* (2024) 48.

presence of other cultural, spiritual, socio-economic, or locally relevant values.¹⁶⁸ Although the important biodiversity values may be grounded in contemporary protected area thinking and science, the alignment with local values to appropriately address threats and encourage compliance could be encouraged.¹⁶⁹ The values of an OECM may underpin monitoring and reporting mechanisms to ensure they remain relevant and safeguarded over the long-term.¹⁷⁰ This section shall first discuss the potential role of law in identifying the values of an OECM and then will turn to mechanisms to strengthen protection.

3.3.3.1 Identifying values

The values of an OECM, as well as the mechanisms for their identification, may be specific to the domestic context. As all potential OECMs must support one or more of the six values listed in the IUCN guidance,¹⁷¹ domestic legal frameworks may adopt these values as appropriate to foster consistency in identifying OECMs and encourage alignment with reporting obligations. The values expressed through Western worldviews may not align with those of some OECMs.¹⁷² Therefore, the frameworks could include both international and local values to encourage support and compliance. The law may stipulate a process of public participation, including mechanisms to capture the nuanced values of IPLCs.¹⁷³ The confirmation of values may require coordination with various state and non-state actors to foster a holistic approach. Notably, balancing various, and potentially conflicting, values is complex. The legal frameworks could identify opportunities for technical advice and support where appropriate.

The important biodiversity values may be identified in the early stages of recognition as they may influence the boundaries and management objectives of an OECM. The legal frameworks could oblige the inclusion of values as a core component of the management plan. It may also be advantageous for all arrangements to clearly state the values to foster transparency and accountability. The state may have a developed system of spatial planning that includes sources of information for identifying biodiversity values, such as key biodiversity areas, IUCN Red Listed species and ecosystems, and Ecologically or Biologically Significant Marine Areas (EBSAs), amongst others.¹⁷⁴ Documenting the status and coverage of these areas may also facilitate alignment with monitoring and reporting for international obligations.¹⁷⁵

¹⁶⁸ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7; Lausche *Guidelines for Protected Area Legislation* (2011) 16.

¹⁶⁹ Claudet, et al. "Avoiding misuse of OECMs in the blue economy" (2022) *One Earth* 969.

¹⁷⁰ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7.

¹⁷¹ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 5 and 10; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7.

¹⁷² *West Conservation is Our Government* (2006); Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

¹⁷³ The site-level tool explicitly includes IPLCs as "credible" and "reliable" source for information. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 10.

¹⁷⁴ A list of potential sources is included in *ibid*.

¹⁷⁵ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) Annex I, Table 2.

3.3.3.2 Protecting values

The protection of biodiversity values may be supported through various mechanisms, including EIAs, conditions attached to permits, and the inclusion in spatial plans and zoning.¹⁷⁶ Legal frameworks may explicitly prohibit activities, such as those associated with the extractive industries, that are incompatible with the important biodiversity values of an OECM. This could extend to activities both within the OECM as well as those outside the boundaries but with the potential to negatively impact values.¹⁷⁷ Spatial planning and zoning tools may oblige adjacent lands to maintain a buffer area to protect values. The state could utilise management effectiveness assessments that evaluate the degree to which values are maintained to inform future decision-making.¹⁷⁸

The law may establish a duty to undertake an EIA to foster sound decision-making.¹⁷⁹ The literature underscores that undertaking an EIA does not guarantee the security of important biodiversity values.¹⁸⁰ However, the legal frameworks for EIAs could compel decision-makers to give them consideration. The values of an OECM may be weighted to prioritise important biodiversity values to mitigate the discretion of decision-makers.

The triggers for undertaking an EIA may be listed within subsidiary legislation to encourage review and updating as required to keep pace with scientific understanding and best practice. For clarity, specific OECM legislation may also include provisions to cross-reference the relevant triggers. Fundamentally, the triggers for an EIA should include activities that may cause significant alterations or adverse impacts to the landscape or seascape.¹⁸¹ This may be within the boundaries of the OECM or adjacent areas. The state may have an existing authority for oversight of the EIA procedures and approvals, whose mandate may be updated to include those related to OECMs.¹⁸²

An integral component of the EIA process may be the undertaking of public participation.¹⁸³ The law may compel the employment of the precautionary principle for any development that may impact a protected area or OECM.¹⁸⁴ This may be complemented by specific provisions where the proposed activity is within or bordering the territories' of IPLCs. Legal frameworks may provide for the inclusion of traditional knowledge and practices of IPLCs to inform decision-making. This could be accomplished through subsidiary legislation referencing the Akwé: Kon Voluntary Guidelines for taking into account traditional peoples' knowledge, innovations and practices as part of environmental and social impact assessment processes.¹⁸⁵ The law may provide triggers and guidance for undertaking a special EIA and associated social impact

¹⁷⁶ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 114.

¹⁷⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5-6.

¹⁷⁸ Leverington, et al. *Management effectiveness evaluation in protected areas - a global study (Second edition)* (2010) 40 and 46.

¹⁷⁹ Paterson "Scoping the Potential Influence of Law on Terrestrial OECMs" (2023) *Law, Environment and Development Journal* 45.

¹⁸⁰ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 120.

¹⁸¹ Lausche *Guidelines for Protected Area Legislation* (2011) 202.

¹⁸² Lausche *Integrated planning: Policy and law tools for biodiversity conservation and climate change* (2019) 66.

¹⁸³ See section 3.3.5.2 of this text. Ibid. 97.

¹⁸⁴ Lausche *Guidelines for Protected Area Legislation* (2011) 202.

¹⁸⁵ Secretariat of the Convention on Biological Diversity *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (2004).

assessment. Legal frameworks could include provisions to provide for sensitive information, traditional knowledge, and intellectual property rights, such as who collects the data, how is it shared, and stored.

An environmental authorisation granted under an EIA may contain conditions to compel the protection of values and establish provisions for monitoring and reporting to reduce the threat of degradation.¹⁸⁶ As a “last resort” to avoid negative impacts, a potential developer may be required to establish a biodiversity offset. A biodiversity offset seeks to achieve “no net loss” of biodiversity values, although given the scientific uncertainties, this may be difficult realistically to achieve.¹⁸⁷ Where the potential developer fails to meet the burden of proof of no net loss, the law may explicitly prohibit the development activities. The legal frameworks may also contain provisions to exclude certain OECMs, such as those with critically endangered species and ecosystems, from being eligible for biodiversity offsetting. As the negative impacts associated with development may have long-term, or even enduring, consequences, the law may propose a suitable duration for the off-set intervention. It could also compel a conservation easement or covenant to be registered against the title deed of the land to foster legal security. The mechanisms and conditions for the transfer of the governance and management of the area after the terms of the initial permit expire may be documented for clarity and certainty.¹⁸⁸ Importantly, the literature notes that this does not necessarily translate into effective long-term conservation.¹⁸⁹

3.3.4 Geographically defining the area

An OECM should have “agreed and demarcated boundaries”¹⁹⁰ that reflect the size and area of the site, encompassing terrestrial, inland waters, coastal and marine areas.¹⁹¹ Boundaries may be defined by customary practices, administrative limits, geographic features, ecosystem type or other natural boundaries within the landscape, with the condition that they are capable of being mapped.¹⁹² The literature draws attention to the need to observe the three dimensions of geographical space: airspace, surface, and subsurface.¹⁹³ As such, legal frameworks associated with the demarcation of boundaries may need to regulate both horizontal and vertical dimensions to ensure adequate protection.¹⁹⁴ Each dimension may carry distinct ownership rights and tenure status that should be adequately addressed within the legal frameworks. This section will canvas three aspects associated with the legal demarcation of OECMs. First, it will address the recognition of land tenure and resource rights as it provides the enabling environment. It will then turn to the process of demarcation, with specific attention given to who has the power to demarcate and verify the boundaries. Finally, this

¹⁸⁶ Lausche *Integrated planning* (2019) 100; Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 121-124.

¹⁸⁷ Lausche *Integrated planning* (2019) 100; Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 121-124.

¹⁸⁸ Paterson “OECMs, biodiversity stewardship and statutory intervention” (2023) *Potchefstroom Electronic Law Journal* 18-19.

¹⁸⁹ *Ibid.*

¹⁹⁰ The term ‘clear’ is also used as a condensed reference to agreed and demarcated boundaries. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 9. IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4.

¹⁹¹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4.

¹⁹² Jonas, et al. *Site-level tool for identifying OECMs* (2023) 10.

¹⁹³ Dudley *Guidelines for Protected Area Management Categories* (2013) 8; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4-5.

¹⁹⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 1-22.

section explores the mechanisms for aligning OECMs with other strategic planning and land-use management tools to foster integration and security.

3.3.4.1 Recognition of tenure and resource rights

Legal recognition and clarity of tenure and resource rights provides the enabling environment for strengthening the recognition and long-term security of OECMs.¹⁹⁵ Where tenure or rights have not been legally recognised, or where the status is under dispute, there is a risk of loss of land or resource use that could prevent effective management.¹⁹⁶ As the degree of legal security may influence land use decisions,¹⁹⁷ the identification and planning for these potential threats could strengthen conservation outcomes.¹⁹⁸

The IUCN defines tenure as:

Socially defined agreements held by individuals or groups, recognised by legal statutes or customary practice, regarding the “bundle of rights and duties” of ownership, holding, access and/or usage of a particular land unit or the associated resources there within (such as individual trees, plant species, water, minerals, etc).¹⁹⁹

Within a state, the specific tenure system has evolved to reflect the historical and cultural context, as well as the unique values and norms that convey the national identity.²⁰⁰ Tenure and resource rights may be recognised within the national constitution, statutory law, or customary law²⁰¹ and administered under the authority of the state, a statutory body, or custom, depending upon the state’s legal system.²⁰² An OECM may encompass a range of overlapping or nested tenure and resource rights, especially within larger areas.²⁰³ This could include government-owned, long-term leases, freehold, customary, communal or collectively held areas that cover land, inland waters, coastal, and marine environments.²⁰⁴ Notably, given the criterion of an OECM to provide sustained long-term conservation,²⁰⁵ short-term leases and time-bound easements or covenants may have the additional burden of proving longevity.

¹⁹⁵ Jonas, et al. *Guidance on OECMs* (2024) 25; Almeida *Legislative pathways for securing community-based property rights* (2017) 2; Lausche *Guidelines for Protected Area Legislation* (2011) 18-19. Techera “Enhancing legal frameworks in Pacific” (2015) *Pacific Conservation Biology* 92-93; Barrow & Pathak “Conserving “unprotected” protected areas” in *Protected Landscape Approach* (2004) 78; Kothari, et al. “Conservation as if people also mattered: policy and practice of community-based conservation” (2013) *Conserv Soc* 12.

¹⁹⁶ Lausche *Guidelines for Protected Area Legislation* (2011) 99. Jonas, et al. *Guidance on OECMs* (2024) 25.

¹⁹⁷ Robinson, et al. “Incorporating land tenure security into conservation” (2018) *Conserv Lett* 5-6.

¹⁹⁸ Lausche *Guidelines for Protected Area Legislation* (2011) 141.

¹⁹⁹ IUCN *Glossary of Definitions* (accessed May 2021).

²⁰⁰ Kasimbazi *Land tenure and rights* (2017) 6; Lausche *Guidelines for Protected Area Legislation* (2011) 99.

²⁰¹ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 46; Lausche *Guidelines for Protected Area Legislation* (2011) 99; Almeida *Legislative pathways for community-based property rights* (2017).

²⁰² Kasimbazi *Land tenure and rights* (2017) 16.

²⁰³ Lausche *Integrated planning* (2019) 43.

²⁰⁴ Lausche *Guidelines for Protected Area Legislation* (2011) 99; Kasimbazi *Land tenure and rights* (2017) 8-9.

²⁰⁵ See section 3.3.6 of this text.

The security of tenure may be influenced by both the formal legal system and informal institutions.²⁰⁶ The local *de facto* tenure regime and rules may provide security without formal recognition until contested by external claims.²⁰⁷ However, such *de facto* systems may be increasingly exposed given the pressures of population growth and migration.²⁰⁸ *De facto* tenure regimes, including those governed by customary law, may be strengthened through explicit recognition within the legal frameworks.²⁰⁹

The type of resources present within an area will likely influence the legal frameworks associated with tenure and resource rights. For example, forest resource rights and water use rights may fall within separate legislation. Thus, a potential OECM may be compelled to consider a variety of legal frameworks. The vertical dimension may also carry different use rights, tenure, and ownership.²¹⁰ Most notably, this has implications for activities under the ground or within the marine context.²¹¹ Notably, the state may maintain control of resources under the ground or seabed. This can negatively impact the rights, use, and management of other resources.²¹² Ideally, the law should prohibit extractive activities from within protected areas and OECMs to protect important biodiversity values. However, in instances where domestic legislation allows for this, it would be advantageous for the legal frameworks to provide mechanisms for strict regulation by compelling environmental impact assessments, attaching conditions to permits, mandating zoning, and monitoring and reporting. The outcomes of FPIC and negotiated terms of overlapping tenure may be clearly documented and attached to the conditions of permits and licences.²¹³

In many parts of the world, insecure land tenure and resource rights hinder IPLCs' ability to legally implement long-term rules and management of their territories, thus leaving them exposed to external pressures and legal challenges.²¹⁴ IPLCs may face challenges in contesting their rights, such as the ability to show standing in court and the associated financial burden.²¹⁵ The law may create a statutory mandate to validate land claims and outline conflict resolution mechanisms. Legal frameworks can afford assurance that land tenure and resource rights will be recognised and upheld by society, local communities, and the state.²¹⁶

The law may require proof of tenure security as a precondition to entering into contracts and formal agreements.²¹⁷ Legal frameworks may provide opportunities for communities who desire to have communal or customary tenure recognised to

²⁰⁶ Robinson, et al. "Land tenure security in conservation" (2018) *Conserv Lett* 5.

²⁰⁷ Ibid.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Jonas, et al. *An Analysis of law interrelating with ICCAs* (2012) 120.

²¹¹ Hilty, et al. *Guidelines for conserving connectivity* (2020) 30-31; Dudley *Guidelines for Protected Area Management Categories* (2013) 55.

²¹² Almeida *Legislative pathways for community-based property rights* (2017) 18.

²¹³ Lausche *Guidelines for Protected Area Legislation* (2011) 158.

²¹⁴ Barrow & Pathak "Conserving "unprotected" protected areas" in *Protected Landscape Approach* (2004) 69; Jonas, et al. *An Analysis of law interrelating with ICCAs* (2012) 124; Lausche *Guidelines for Protected Area Legislation* (2011) 99.

²¹⁵ Jonas, et al. *An Analysis of law interrelating with ICCAs* (2012) 124.

²¹⁶ Kasimbazi *Land tenure and rights* (2017) 18; Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law* 25; Robinson, et al. "Land tenure security in conservation" (2018) *Conserv Lett* 4.

²¹⁷ Robinson, et al. "Land tenure security in conservation" (2018) *Conserv Lett* 6.

incorporate as a legal entity.²¹⁸ This may provide benefits to both the community and the state. The community may benefit from a secure title and protection from future disputes, as well as enable their ability to lease communal land and resource rights.²¹⁹ From the perspective of the state, it may facilitate the monitoring and reporting of various land and resource rights. For consistency, the specific legislation could identify the requirements and process for incorporation with clear cross-referencing across the sectoral frameworks. Notably, the literature provides caution that process of incorporation could create barriers when the procedures are complicated and expensive.²²⁰

3.3.4.2 Process to demarcate the boundaries of an OECM

To be geographically defined implies both the act of demarcation and agreement of boundaries.²²¹ The spatial scale and scope of an OECM will be influenced by the management objective of the site and the specific ecological requirements for the effective conservation of biodiversity.²²² Mapping may mitigate future conflicts²²³ through the clear demarcation of boundaries. Legislation may create an obligation to identify and map all existing land tenure and resource use rights, including those under custom, as part of the process to formally recognise land and resource rights. At a minimum, boundaries should be determined in collaboration with the governance authority.²²⁴ The law may provide for planning mechanisms to foster collaboration amongst all rightsholders and users.²²⁵ Such exercises should not cause prejudice against marginalised people or groups, including IPLC women, women, and youth.²²⁶ This may be a precondition for permits, licenses, and concessions as well as part of the process of formal incorporation of communal groups.

The legal frameworks may provide guidance for identifying by whom and how the boundaries will be drawn and verified.²²⁷ This could include the use of spatial data coupled with a process of public participation.²²⁸ Boundaries also may be drawn from existing agreements such as conservation easements or covenants and title deeds. The guidance for demarcation could clarify if mapping is required to reflect buffer, riparian, and other zones as per the management plan. Communal property may contain a bundle of various tenure and resource use rights which can pose challenges to physical demarcation. The law may allow for the designation of exterior boundaries to be complemented by zoning that includes clear descriptions of internal tenure and resource use rights.

²¹⁸ Almeida *Legislative pathways for community-based property rights* (2017) 23-25.

²¹⁹ Ibid. 5.

²²⁰ Ibid. 3; Kasimbazi *Land tenure and rights* (2017) 6.

²²¹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4.

²²² Ibid. 5; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 9.

²²³ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 103.

²²⁴ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 9.

²²⁵ Hilty, et al. *Guidelines for conserving connectivity* (2020) 30-31.

²²⁶ CBD COP 15 *Decision 15/6: Mechanism for planning, monitoring, reporting and review* (2022) Annex I(2).

²²⁷ Borri-Feyerabend, et al. *Governance of Protected Areas* (2013) 6.

²²⁸ The process to submit data to the WD-OECM requires GIS spatial data. IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 20; UNEP-WCMC *User Manual for the World Database on Protected Areas and world database on other effective area-based conservation measures: 1.6* (2019) 14-15.

Where boundaries and land tenure do not have agreement prior to recognition, internal politics and social norms could trigger conflicts during subsequent efforts to clarify them.²²⁹ It also cautions that the processes to legally recognise communal tenure could pose the unintended consequences of elite capture and internal land disputes.²³⁰ The legal frameworks can provide clarity as to who represents the legitimate authority for nominating, consenting, and recognising an area as an OECM to reduce these threats. This could be through the provision of evidence of legal tenure or criteria that establishes membership within a community where traditionally land is held communally. The legal frameworks could establish mechanisms to resolve land tenure disputes through judicial and administrative remedies.²³¹ The use of customary law may also be appropriate for dispute resolution, where it is deemed equitable and fair. It may be important for legal frameworks to stipulate conditions regarding land use pending the outcome of any disputes to manage potential threats. These provisions should be carefully developed to avoid potential challenges to the infringement of constitutional rights associated with land or property.

A map and description of the final uncontested boundaries could strengthen management planning and other agreements. Prior to granting recognition to an OECM, the law may oblige decision-makers to undertake a process of due diligence to verify the boundaries. The confirmation of boundaries by internal and external stakeholders and rightsholders, such as those that share boundaries, would bolster agreement. The legal framework for OECMs could mandate that public notice be given, with a time period allocated for response, and the boundaries be formally declared in a government gazette.²³² It may be appropriate for validation to be delegated to a local-level government authority familiar with cultural and traditional norms and dispute mechanisms. As boundaries may shift over time, especially those defined by certain physical features such as rivers or areas influenced by the impacts of climate change,²³³ the legal frameworks could establish clear procedures to reflect future changes and amendments with sufficient rigor.

3.3.4.3 Alignment with other strategic planning and land-use management tools

Once the boundaries of an OECM are demarcated, alignment with various planning frameworks such as conservation strategic plans, system plans, integrated land-use and marine spatial plans, integrated coastal zone management plans, and water management plans, amongst others, could foster legitimacy, security, and collaboration amongst actors and stakeholders.²³⁴ The inclusion of OECMs managed by IPLC may further assist in the equitable representation of their values and rights into the state's spatial and sectoral plans.²³⁵ The alignment of an OECM's boundaries with various planning tools may address conflicting land use.²³⁶

²²⁹ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 142; Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 104.

²³⁰ Almeida *Legislative pathways for community-based property rights* (2017) 2.

²³¹ FAO *Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in Food Security* (2022) 7.

²³² Lausche *Guidelines for Protected Area Legislation* (2011) 151.

²³³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 4.

²³⁴ Hilty, et al. *Guidelines for conserving connectivity* (2020) 30-31.

²³⁵ Estradivari, et al. "Marine conservation beyond MPAs in Indonesia" (2022) *Mar Policy* 10.

²³⁶ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 107 and 116; Lausche *Integrated planning* (2019) 71.

Systems planning has become an internationally recognised management tool for developing a comprehensive strategy that can alleviate the risks associated with areas becoming isolated islands.²³⁷ Systems planning holistically considers and accounts for the various influences that may impact the network of formal protected areas and OECMs. This may encompass not only the spatial aspects, but also the roles and mandates of various actors, mechanisms for coordination, management challenges, and potential funding strategies.²³⁸ The inclusion of OECMs within systems planning reinforces the guidance to foster integration through the ecosystems approach.²³⁹ States may establish a statutory duty to implement system planning to foster resiliency, representation, connectivity, and equity of conservation efforts.²⁴⁰

Planning frameworks may establish a hierarchy of plans that includes national, regional, and local level plans. The lower-level plans may be required to reflect the goals and objectives of the national plans. However, the legal frameworks could also contain mechanisms for lower-level plans to inform the regional and national plans to foster representation and inclusion. The various planning frameworks may be found throughout the different spheres of government and across sectors. Making provision to connect or integrate these plans may provide clarity for encouraging connectivity across terrestrial, coastal, and marine ecosystems. Spatial plans may be required under a number of statutory laws, such as those for development, and thus may not directly align with plans developed specifically for area-based conservation.²⁴¹ It may be beneficial for legal frameworks relevant to planning to oblige the integration and consideration of cross-sectoral spatial plans to promote coordination. This may extend beyond aspects directly related to OECMs to also include natural resources, transportation, and infrastructure development. The alignment of both content and timeframes for review and revision could support consistency. It is recommended that decision makers be charged with development approvals to be obliged to ensure all approvals reflect the relevant spatial plans. The associated legal frameworks could also include opportunities for administrative remedies should the decision-maker fail to consider the spatial plan.²⁴² Notably, it is observed within the literature that cross-sectoral planning can be complex and may be beyond the capacity of some states.²⁴³

3.3.5 Defining the institutions and mechanisms to govern and manage

OECMs may draw together a diverse collection of legal frameworks, management objectives, designs, institutions, and values. They may be governed and managed by various actors, including state bodies, non-governmental organisations, private individuals, corporations, and IPLCs. Therefore, it is expected that the governance and management approaches

²³⁷ Lausche *Guidelines for Protected Area Legislation* (2011) 19-22.

²³⁸ Davey *National system planning for protected areas* (1998) 9-10.

²³⁹ Lemieux, et al. "The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation" (2019) *Mar Policy* 320. IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 1-22.

²⁴⁰ Lausche *Guidelines for Protected Area Legislation* (2011) 19-21.

²⁴¹ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 108.

²⁴² Lausche *Integrated planning* (2019) 93.

²⁴³ Techera "Legal approaches to MPA governance" (2019) *Ocean & coastal management* 88-89.

will be nuanced.²⁴⁴ Legal guidance can support the clarity and credibility of an OECM's governance and management arrangements to facilitate long-term security.

Prior to addressing the specific governance and management functions, it will be advantageous to first distinguish and clarify these terms. Governance encompasses the expression of power and taking of responsibility over decision-making.²⁴⁵ This includes the process for how various stakeholders exercise their views and opinions, as well as informing the relationships among actors, structures, and institutions who have authority over decision-making.²⁴⁶ The concepts associated with governance are woven throughout this chapter, starting with the fundamental decision to establish an OECM.²⁴⁷ Governance seeks to address the questions of who, how, and by what means decisions are taken.²⁴⁸ These decisions may be made by different individuals or institutions depending on the distribution of power and responsibility.²⁴⁹ The discussion of governance may also address the quality of governance. Legal frameworks may seek to foster the principles of good governance through the recognition of equity, participation, accountability, transparency, and justice to secure sustained support by stakeholders and rightsholders.²⁵⁰

The international guidance explicitly specifies that an OECM should be managed in a way that supports effective and sustained long-term *in-situ* conservation of biodiversity. Although it does not necessitate conservation as the primary objective, it must show a “direct causal link” between management objectives²⁵¹ and *in-situ* biodiversity conservation.²⁵² To be managed implies the establishment of a management authority, objectives, and plans, as well as the monitoring, reporting, regulation, and enforcement through statutory or customary law.²⁵³ While management may include intentional decisions to leave the area in a natural state, the absence of a management regime does not meet the OECM criteria.²⁵⁴ This section will canvas the potential role of law as applicable to the governance and management of OECMs.

3.3.5.1 Identification of the governance authority

The recognition of an OECM necessitates the site to have a governance authority.²⁵⁵ This is defined as “the institution, individual, Indigenous peoples or communal group or other body acknowledged as having authority and responsibility for

²⁴⁴ CBD COP 14 Decision 14/8: *Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III C(1)(a).

²⁴⁵ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10-11.

²⁴⁶ Ibid. ; Zafra-Calvo & Geldmann “Protected areas to deliver biodiversity need management effectiveness and equity” (2020) *Global Ecology and Conservation* 2; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii.

²⁴⁷ See section 3.2 of this text.

²⁴⁸ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10-11.

²⁴⁹ Ibid. 10.

²⁵⁰ Ibid. 57-62; Borrini-Feyerabend & Hill “Governance for conservation” in *Protected Area Governance and Management* (2015) 190; Lausche *Guidelines for Protected Area Legislation* (2011) 40-43.

²⁵¹ See section 3.3.2.2 of this text.

²⁵² IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

²⁵³ Benidickson & Paterson “Biodiversity, Protected Areas and Law” in *Biodiversity and Law* (2017) 43.

²⁵⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 1-22.

²⁵⁵ CBD COP 14 Decision 14/8: *Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 9; Jonas, et al. *Site-level tool for identifying OECMs* (2023) 11-12.

decision-making and management of an area”²⁵⁶ and can be through statutory legal frameworks, custom or other means.²⁵⁷ Although governance may serve a separate function from management²⁵⁸ and tenure,²⁵⁹ there may be overlap.²⁶⁰ The governance authority may be the same entity as the management authority where the latter has the powers and capacity to undertake decision-making responsibility and may be held accountable for those decisions.²⁶¹ However, the governance authority may also be distinct.

The IUCN applies the same four broad governance types, including sub-types,²⁶² to OECMs as recognised for protected areas.²⁶³ The literature encourages the recognition of a broad spectrum of governance types, not neglecting unusual governance arrangements.²⁶⁴ Legal frameworks may recognise and respect existing governance structures and seek to ensure that the imposition of new rules does not have unintended consequences that undermine decision-making.²⁶⁵ As governance types for OECMs may mirror those of protected areas, the legal frameworks may seek to facilitate consistency. Where governance types are defined within the legal frameworks for protected areas, the legal frameworks for OECMs could explicitly cross reference the same provisions. In the event of changes to the governance types, this approach may reduce confusion and inconsistencies that result when the frameworks are not updated concurrently. To facilitate the consistent application by all actors and stakeholders, provisions may include an explicit reference to the IUCN governance types, as well as an associated description of who generally has the authority to make decisions, how those are taken, and who is accountable within the domestic context.²⁶⁶

Multiple governance types may co-exist or be “nested” within another,²⁶⁷ expressed through either the law *de jure* or *de facto*.²⁶⁸ This may be especially relevant to large-scale areas where a mixture of tenure, resources and rights may be present and require coordination.²⁶⁹ Legal frameworks may require shared governance arrangements, also called co-management,²⁷⁰ to be documented through legal agreements.

Rather than modifying existing or customary governance structures, the legal frameworks could strengthen and facilitate legitimacy through the recognition of OECMs.²⁷¹ The literature draws attention to the increased likelihood of positive

²⁵⁶ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii.

²⁵⁷ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 11.

²⁵⁸ Ibid. 10.

²⁵⁹ Ibid. 43.

²⁶⁰ Further discussion on management and tenure see section 3.3.5.4 and section 3.3.4.1 respectively.

²⁶¹ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 10-11.

²⁶² Ibid. 44; Dudley *Guidelines for Protected Area Management Categories* (2013) 26-27.

²⁶³ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5.

²⁶⁴ Borrini-Feyerabend & Hill “Governance for the Conservation of Nature” in *Protected Area Governance and Management* 169-206.

²⁶⁵ Lausche *Guidelines for Protected Area Legislation* (2011) 161; Rose “Grassroots conservation in Pacific” (2021) *Journal of South Pacific Law* 20.

²⁶⁶ Borrini-Feyerabend & Hill “Governance for the Conservation of Nature” in *Protected Area Governance and Management* 169-206.

²⁶⁷ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 46.

²⁶⁸ Benidickson & Paterson “Biodiversity, Protected Areas and Law” in *Biodiversity and Law* (2017) 52. Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 11.

²⁶⁹ Lausche *Integrated planning* (2019) 43.

²⁷⁰ This thesis applies the term co-management as it is often referred to within the literature. See section 3.3.5.3 of this text.

²⁷¹ Gurney, et al. “Biodiversity needs every tool in the box” (2021) *Nature* 648-649; Maini, et al. “Value and limits of OECMs for marine conservation” (2023) *Mar Policy* 4-5.

benefits when local people are engaged in governance structures.²⁷² Giving legal recognition to an abundance of governance types and arrangements supports area-based conservation that is suited to the local context and culture.²⁷³ As social, economic, and environmental factors can influence the stability and longevity of the governance authority, it may be beneficial for the legal frameworks to account for change and adaptation.²⁷⁴

Whereas a state may require protected areas to be established on land owned or controlled by the state, OECMs provide an opportunity to engage a range of non-state actors in governance arrangements.²⁷⁵ The inclusivity of OECMs may provide an opportunity to recognise the decentralisation of governance to local authorities or non-state actors, such as individuals and IPLCs, which may have been absent under protected area frameworks.²⁷⁶ Experience has demonstrated that some national governments may have little control over land use due to weak environmental governance and competing interests; the responsibility of national governments could therefore shift to foster an enabling environment for more equitable site-level governance.²⁷⁷ Recognising a range of governance models²⁷⁸ and ensuring active public participation is important not only to conservation effectiveness but also may be essential from a human rights perspective.²⁷⁹ An OECM does not need to be locked into a specific governance type indefinitely. For example, IPLCs may initially lack the capacity and resources for autonomous governance. However, as their skills, knowledge, and resources develop they may assume greater powers to participate in decision-making.²⁸⁰ The legal frameworks can provide explicit pathways and mechanisms to review, amend, and update any relevant governance agreement. Depending upon the resources of the state, this may mandate capacity development opportunities and access to resources for IPLCs²⁸¹ and other non-state actors.

3.3.5.2 Decision-making and good governance

The quality of governance may affect the effectiveness of the institutions and mechanisms of an OECM. Governance quality, with the intention of advancing good governance, often embodies the underlying themes of equity, participation, accountability, transparency, and justice.²⁸² This thesis will address equity separately to align with the framework of the OECM site-level tool.²⁸³ Domestic concepts of good governance may translate the broad themes to reflect locally relevant

²⁷² Gurney, et al. "Area-based conservation" (2023) *One Earth* 101.

²⁷³ Kelleher, et al. "Law and Governance" in *Conserving our sea of islands* (2022) 67.

²⁷⁴ Lausche *Guidelines for Protected Area Legislation* (2011) 78.

²⁷⁵ Stolton, et al. *The Futures of Privately Protected Areas* (2014) 52; Jonas, et al. "Status and emerging contribution of OECMs" (2024) *Frontiers in Conservation Science* 10.

²⁷⁶ Jonas, et al. *An Analysis of law interrelating with ICCAs* (2012) 127.

²⁷⁷ Maini, et al. "Value and limits of OECMs for marine conservation" (2023) *Mar Policy* 4-5.

²⁷⁸ Lausche *Guidelines for Protected Area Legislation* (2011) 77.

²⁷⁹ As enshrined in the UNDRIP and ILO Convention 169.

²⁸⁰ IPLC have the right to participate in decision-making processes and maintain their own institutions. UNDRIP Article 18

²⁸¹ This supports the UNDRIP Article 29(1).

²⁸² The IUCN summarises good governance into a set of five principles: legitimacy and voice, direction, performance, accountability, fairness and rights. Borrini-Feyerabend, et al. *Governance of Protected Areas* 1-124 59-60; Borrini-Feyerabend & Hill "Governance for the Conservation of Nature" in *Protected Area Governance and Management* 169-206 190-191. There are nine principles identified in Dudley *Guidelines for Protected Area Management Categories* (2013) 28. Lausche *Guidelines for Protected Area Legislation* (2011) 40-42. The FAO outlines ten principles for the "responsible governance of tenure of land, fisheries and forests" *FAO Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in Food Security* (2022) 4.

²⁸³ Criterion 8 provides explicitly for assessing equitable governance and management of an OECM. See section 3.3.5.5 of this text.

principles and values that are enshrined within the constitution, statutory law, custom, or cultural practices.²⁸⁴ Legal frameworks relating to OECMs can support the expression of good governance through the development of legal principles, as compulsory considerations for all decision-making, and as part of the management regime.²⁸⁵

Participation is a broad concept that runs on a continuum of engagement. Weak levels of participation may seek to inform, while greater participation in decision-making involves a process of collaboration and devolution of power.²⁸⁶ Domestic legal frameworks may adopt various methods along the continuum to suit the intended goals. As public participation may be prone to challenges in social translation, clear processes and procedures for meaningful and ongoing participation may help to alleviate conflicting expectations and could be developed to meet the capacities of all stakeholders and effectively reach the intended audience.²⁸⁷ The law can provide direction for when public participation could take place, including but not limited to a period before undertaking the screening assessment of potential and candidate OECMs,²⁸⁸ receiving recognition, appointing the governance²⁸⁹ and management authorities,²⁹⁰ management planning, establishing rules and penalties,²⁹¹ and at times throughout monitoring and reporting.²⁹² Where zoning is permitted in the OECM, the legal obligation to undertake a process of public participation could support the inclusion and consideration of views, access needs, and use rights from various resource users.²⁹³ The state could enhance clarity through the development of specific guidelines or policy direction for ensuring public participation is appropriately implemented.

The expectations of public participation may be interpreted differently depending on the local context. The law could allow for methods and tools to be adapted effectively to reach the intended audience. This may involve formal advisory committees, face-to-face community meetings, or notification via a variety of media channels with opportunities to provide input within a given timeframe. The international guidance on OECMs urges states to use a documented record of the consultation process, including the participation of the relevant governance and management bodies, IPLCs, and all other stakeholders and right-holders who may be affected.²⁹⁴ Importantly, as this may be comprised of numerous individuals and groups, it may be imperative to identify the legitimate voices of those who speak on behalf of the community, providing fair opportunities for marginalised people. The law may further qualify this by requiring public participation to be conducted in a format conducive to IPLCs,²⁹⁵ such as through the use of documents written in the local language, oral presentations, pictures, and diagrams. Legal frameworks may oblige decision-makers to consider the documented records from various phases of public participation not only for recognising the OECM but also for issuing any permits, licenses, EIAs, and other

²⁸⁴ Dudley *Guidelines for Protected Area Management Categories* (2013) 28.

²⁸⁵ Lausche *Guidelines for Protected Area Legislation* (2011) 43.

²⁸⁶ Techera "Legal approaches to MPA governance" (2019) *Ocean & coastal management* 89.

²⁸⁷ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 261; West *Conservation is Our Government* (2006) 44-45.

²⁸⁸ See section 3.3.5.2 of this text.

²⁸⁹ See section 3.3.5.1 of this text.

²⁹⁰ See section 3.3.5.3 of this text.

²⁹¹ See section 3.3.5.4 of this text.

²⁹² See section 3.3.6 of this text.

²⁹³ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 261.

²⁹⁴ Jonas, et al. *Site-level tool for identifying OECMs* (2023).

²⁹⁵ Almeida *Legislative pathways for community-based property rights* (2017) 5.

legal agreements. The law may also include procedures for administrative appeal where the right to public participation is not implemented.²⁹⁶

Clear and transparent decision-making underpins the structures, procedures, and processes that enable good governance. Transparency may be addressed through an open decision-making process, clear explanations of reasons for decisions taken, and the understanding of expectations.²⁹⁷ Decision-makers should have clear mandates as well as access to relevant information to make informed decisions and foster consistency. Specific decision-making procedures may be nuanced and adapted to equitably represent the governance structures and capacities. The alignment of decision-making bodies for protected areas and OECMs could minimise duplication and foster coordination, clarity, and consistency in decision-making functions. Statutory legal frameworks benefit from the establishment of principles that reflect national norms and values to guide policy and decision-making. This may include the recognition of customary laws, practices, and institutions. The law could establish timeframes, stipulate specific criteria, and request supporting documents canvassing social, historical, economic, cultural, scientific and environmental questions. Evidence supports the inclusion of a broad hierarchy of decision-making criteria to mitigate the threat of political influence and inconsistent prioritisation across decision-makers.²⁹⁸ Notably, however, a degree of flexibility may be necessary to account for distinctive situations. Where decision-makers do not have the capacity or resources to make informed decisions, the law may allow for expert consultation or an advisory board to be established. A balance of decision-making criteria drawn from Western science and traditional knowledge, could advance more equitable framing of challenges and pursuit of solutions.²⁹⁹

The principles of good governance embrace the concepts of accountability and justice. It is suggested within the literature that the compliance with management rules may be positively correlated with the level of respect given to the governance authority and decision-makers.³⁰⁰ Legal frameworks may stipulate mechanisms and procedures to foster accountability, such as fair elections to decision-making bodies, external monitoring, and access to information.³⁰¹ Where decisions are made by multiple authorities, the statutory provisions may identify a lead body as well as procedures for communication and reporting to promote accountability. Legal frameworks can also stipulate clear mandates, term limits, and potential composition of decision-making bodies. The provision of specified timeframes for actions as well as measures to be taken for inaction and the associated recourse aligns with best practices.³⁰² Legal frameworks could describe the procedures to request reasons and appeal certain decisions taken. Noting the risk of elite capture or a bias by a few individuals, the law may also make provisions for transparent decision-making processes and ensure IPLCs and marginalised populations are given equitable opportunities to participate.³⁰³

²⁹⁶ Lausche *Integrated planning* (2019) 87.

²⁹⁷ Ruano-Chamorro, et al. "Advancing procedural justice in conservation" (2022) *Conserv Lett* 4.

²⁹⁸ Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 120-121.

²⁹⁹ Ruano-Chamorro, et al. "Advancing procedural justice " (2022) *Conserv Lett* 2.

³⁰⁰ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 104.

³⁰¹ Ruano-Chamorro, et al. "Advancing procedural justice " (2022) *Conserv Lett* 4.

³⁰² Schreckenberg, et al. "Unpacking equity for protected area conservation" (2016) *PARKS* 16.

³⁰³ Ruano-Chamorro, et al. "Advancing procedural justice " (2022) *Conserv Lett* 5.

3.3.5.3 Identification of the management authority

The management authority is defined as “the organisation or entity responsible for the ongoing management of a site”.³⁰⁴ Although it may be the same entity, the management authority also may be separate from the governance authority, owners, or customary custodians. As with protected areas, this may be government agencies, non-governmental organisations, private individuals and corporations, IPLC, or a blend of these identified through co-management agreements.³⁰⁵ Importantly, management should be allocated to the individuals or institutions with the authority and mandate to undertake the necessary activities.³⁰⁶ To encourage legitimacy, the law could recognise the composition of the management authority, by position, qualification, or other criteria for appointment, as well as who has the power to appoint them and the length of the term. It may also be necessary to identify the processes and procedures to remove a management authority for mismanagement against the objectives of the OECM.³⁰⁷

Co-management agreements represent a tool to formally recognise collaborative³⁰⁸ or joint³⁰⁹ management by identifying the parties and how they will implement management decisions. Legal frameworks may create obligatory provisions that trigger agreements to be developed where more than one management authority is recognised.³¹⁰ These may be employed when multiple tenure or resource use rights are represented under the umbrella of an OECM, including different rights and obligations within communally held lands. Co-management agreements may also be particularly useful in the case of an OECM where conservation is the secondary or ancillary objective, as management may require specific skills and knowledge outside of the expertise of the management authority for the primary objective. Importantly, co-management agreements complement the more substantive agreements that seek to secure the long-term commitment to conservation objectives. As the management authority may change while the overall management of an OECM continues, it is desirable for the co-management agreements to be attached to other legal agreements giving recognition to the area.³¹¹

While co-management agreements should be “tailored” to the specific context as negotiated under the principle of FPIC, the legal frameworks giving effect to OECMs may prescribe the contents to ensure clarity and consistency.³¹² Generally, a co-management agreement should identify the rights, roles, and responsibilities of each party.³¹³ It may establish the

³⁰⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) viii.

³⁰⁵ Dudley *Guidelines for Protected Area Management Categories* (2013) 26; Borrini-Feyerabend, et al. *Sharing power: A global guide to collaborative management of natural resources* (2013) 234.

³⁰⁶ Martin, et al. *Framework for assessing and improving law for sustainability* (2016) 12.

³⁰⁷ Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal* 46.

³⁰⁸ Defined as the “decision making authority and responsibility rest with one agency but the agency is required – by law or policy – to inform or consult other stakeholders”. Dudley *Guidelines for Protected Area Management Categories* (2013) 26.

³⁰⁹ Defined when “various actors sit on a management body with decision-making authority and responsibility”. Dudley *Guidelines for Applying Protected Area Management Categories* 1-86 26.

³¹⁰ Over the past decades co-management agreements have become a common statutory tool within protected area legal frameworks. Lausche *Guidelines for Protected Area Legislation* (2011) 132.

³¹¹ Ibid. 101.

³¹² For a comprehensive guide and case studies see Borrini-Feyerabend, et al. *A global guide to collaborative management* (2013); Lausche *Guidelines for Protected Area Legislation* (2011) 132-134.

³¹³ Lausche *Guidelines for Protected Area Legislation* (2011) 101.

overall objective of the OECM and include the relevant management plan. The agreement could explicitly define and identify the area as well as any zoning where appropriate. It may also include references to tenure, resource use, and access rights, including those recognised under customary law. The agreement may address the sharing of benefits and burdens associated with the OECM, agreed-upon procedures for public participation, monitoring and enforcement, and dispute resolution. The agreement may be time-bound, stating the procedures to renew, amend, or revoke.³¹⁴ There may be merit in aligning the duration of co-management agreements with the timeframe for review of the management plan.³¹⁵ Parties to the agreement should have the legal powers and authority to enter into agreements. Notably, this can be challenging for communal lands. The law may require the formation of an incorporated body or provide other culturally appropriate means of justification and validation for communally held areas. To have full legal effect, the legal framework for OECMs may require the co-management agreement to have final approval from the entity responsible for the national protected areas estate, such as a Minister or other high-level authority mandated with collective oversight of domestic OECMs.³¹⁶

Co-management agreements can afford the opportunity to utilise and build upon each party's strengths. However, depending on the specific context, examples from protected areas have shown that shared management can also result in an imbalanced shift of power³¹⁷ with IPLCs serving only a consultative function.³¹⁸ As OECMs seek to foster inclusivity of a variety of management authorities, legal frameworks must foster fair and equitable cooperation to reduce concerns that formal recognition could negatively impact the access and rights of local stakeholders.³¹⁹ Importantly, the law may explicitly provide for co-management agreements to be developed under custom and employ cultural processes for mediation where appropriate.³²⁰ Agreements should be developed to ensure all parties clearly understand and are able to enforce the contents to manage the threat of power imbalances.³²¹ Where co-management agreements are employed, the law may stipulate additional stages and processes of public participation and the development of a co-management board with equitable representation by the parties to support the management objectives.

3.3.5.4 Management regime

The management regime of an OECM should reflect the management objectives by employing specific actions and prohibitions to protect the identified values of the area. Legal frameworks may provide an opportunity to define the rules, restrictions, powers, enforcement mechanisms, decision-making criteria, and remedies for the management regime. The

³¹⁴ Ibid. 133.

³¹⁵ As OECMs are expected to provide sustained long-term conservation, such provisions should seek to foster continuity. It may be beneficial to emphasise that this is for review and renewed consent.

³¹⁶ Lausche *Guidelines for Protected Area Legislation* (2011) 126.

³¹⁷ Borrini-Feyerabend, et al. *Governance of Protected Areas* (2013) 52.

³¹⁸ Kothari, et al. "Conservation as if people also mattered" (2013) *Conserv Soc* 3.

³¹⁹ Dudley, et al. "Essential role of OECMs in achieving conservation targets" (2018) *Global Ecology and Conservation* 5.

³²⁰ Guidance is offered for customary agreements in Borrini-Feyerabend, et al. *A global guide to collaborative management* (2013) 236-243.

³²¹ Lausche *Guidelines for Protected Area Legislation* (2011) 134.

legal frameworks may also allow for transparent pathways to adapt the management regime to social and environmental changes and align with new scientific information.

Contemporary area-based conservation strategies draw attention to the role OECMs could play in protecting an interconnected network of biodiversity integrated into the broader landscape.³²² This may require well-defined management planning that balances conservation and sustainable development objectives.³²³ While preferably a statutory requirement, the undertaking of management planning and implementation may, under some jurisdictions, be simply a voluntary best practice. When mandated by law, management plans serve as a binding document that hold authorities accountable.³²⁴ Legal frameworks may prescribe the contents of the management plan, as well as the process for preparation, public participation, approval, and revision. Although the management plan may draw from the broader domestic policy environment, as a site-level tool it should be designed to address local considerations and values for achieving the objectives of the OECM through specific interventions.³²⁵

The management plan serves as the primary source of guidance for activities aimed at advancing the management objective. The plan may specify prohibited and regulated activities, as well as those requiring written permissions or allowed under specific rules. Legal frameworks may give effect to these provisions through an approved management plan or may employ subsidiary legislation to extend the rules consistently across a network of OECMs.³²⁶ Legal frameworks may specify who has the power to approve permissions and enforce regulations. While a high-level authority may foster consistency and legitimacy, the right to self-determination of IPLC may be supporting by decentralising certain powers or providing for public participation.

To have full legal effect, the management plan may be approved by a high-level authority, such as a Minister or other authority mandated with the collective oversight of OECMs.³²⁷ The legal frameworks for OECMs could clearly identify the criteria for approvals. This may include documentation of lower-level approvals, such as local governments and other entities that may be impacted, as well as evidence of following procedures for public participation and FPIC.³²⁸ The law may make provisions for interim protections pending final approval to support the employment of the precautionary principle.³²⁹ Notably, the literature cautions against the risk of overly complicated requirements becoming barriers to pursuing recognition as an OECM.³³⁰ Legal frameworks may seek to balance provisions for inclusivity with those to support sufficient rigour to give statutory effect to the management regime.

³²² Jonas, et al. *Guidance on OECMs* (2024) 51.

³²³ Management planning has been endorsed by the CBD, WHC, Ramsar Convention, and several regional conventions.

³²⁴ Thomas & Middleton *Guidelines for management planning* (2003).

³²⁵ Lausche *Integrated planning* (2019) 85.

³²⁶ Lausche *Guidelines for Protected Area Legislation* (2011) 163.

³²⁷ *Ibid.*

³²⁸ *Ibid.* 166.

³²⁹ *Ibid.* 165.

³³⁰ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law* 24.

The management authority should have the capacity to implement, monitor, prevent, enforce, and sanction as empowered by the law. OECMs lacking formal legal status may be challenged to enforce customary laws upon external individuals who do not recognise the local customs, thus negatively impacting effectiveness and the ability to sustain outcomes.³³¹ The legal frameworks can broaden the jurisdiction of customary law by enabling rules to be gazetted and legally enforceable regardless of standing within the community.³³² The enforcement mechanisms may clearly state that any person found in breach of a by-law established under its remit may face penalties.

Conflicting legal mandates, ambiguous legal provisions, and overlap of management objectives can negatively impact the effectiveness and ability to sustain long-term outcomes of the OECM.³³³ The legal frameworks may foster certainty by defining the relationship between OECMs and other mechanisms found in other resource frameworks that grant rights and access to authorities with vastly different objectives.³³⁴ The management regime may oblige a combination of tools that could include zoning and spatial tools, regulations, and permissions.³³⁵ The licensing and permitting of regulated activities may describe specific timeframes, confer various use rights, and carry conditions. The law could also provide for the decision-making criteria, any prerequisites, and the sanction for non-compliance.³³⁶ These permissions may incorporate management rules of an OECM, as adopted under legal frameworks or custom, to facilitate enforcement. The management regime may explicitly integrate laws from the top down to address potential conflict and overlap.

3.3.5.5 Equity

Equity, often defined as “fairness”,³³⁷ is increasingly linked to the concepts of environmental justice.³³⁸ Although the perceptions and understanding of equity vary across cultural and societal contexts,³³⁹ it may be understood through the

³³¹ Techera “Enhancing legal frameworks in Pacific” (2015) *Pacific Conservation Biology* 94.

³³² Ibid.

³³³ Jonas, et al. *Guidance on OECMs* (2024) 43.

³³⁴ Stolton, et al. *Futures of PPAs* (2014) 9; Jonas, et al. *An Analysis of law interrelating with ICCAs* (2012); Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 176.

³³⁵ Day, et al. “Marine protected area management” in Worboys, et al. (eds) *Protected Area Governance and Management* (2015) 629. Estradivari, et al. “Marine conservation beyond MPAs in Indonesia” (2022) *Mar Policy* 8-9; Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal* 47.

³³⁶ Paterson “Scoping the Potential Influence of Law on Terrestrial OECMs” (2023) *Law, Environment and Development Journal* 47.

³³⁷ *SBSTTA Protected and conserved areas governance in the Convention on Biological Diversity: A review of key concepts, experiences, and sources of guidance* (2018) 2; Franks, et al. *Understanding and assessing equity in protected area conservation* (2018) 10; Franks, et al. *Advancing equitable governance in area-based conservation* (2024) 9-10.

³³⁸ The literature also draws attention to the parallels with social justice noting that the concept of equity may be framed in relation to governance, while social justice tends to be used in relation to rights-based approached. Franks, et al. *Understanding and assessing equity in protected area conservation* (2018) 10. Franks, et al. *Advancing equitable governance in area-based conservation* (2024) 9-10.

³³⁹ Schreckenber, et al. “Unpacking equity” (2016) *PARKS* 12; Zafra-Calvo, et al. “Progress toward equitably managed protected areas in Aichi target 11: a global survey” (2019) *BioScience* 191.

three dimensions of recognition, procedural, and distribution.³⁴⁰ These dimensions are positively correlated³⁴¹ thus the collective inclusion within the legal frameworks would be advantageous to support and strengthen OECMs.

Recognition equity acknowledges and respects the distinctive views, values, priorities, and customs of various stakeholders and rightsholders as shaped by their cultural practices, institutions, and traditional knowledge.³⁴² Legal frameworks may oblige the inclusion of these diverse perspectives, as held by IPLCs and other stakeholders, into management plans, spatial plans, zoning, monitoring, and reporting mechanisms. It may also identify the types of individuals and institutions to include in decision-making structures, as well as those to engage in consultative roles. Co-management agreements may assist to identify and address disparities in capacity, influence, and resources available to foster fairness and equity when undertaking various functions.³⁴³ OECMs could provide an opportunity to recognise a diversity of worldviews and environmental stewardship through the recognition and inclusion of a variety of institutions and mechanisms to govern and manage.

Distributional equity refers to the fair allocation of both benefits and burdens,³⁴⁴ amongst stakeholders and rightsholders, spanning the international, national, and local levels as appropriate.³⁴⁵ Distributional equity may also account for the intergenerational aspects of equity to encourage the fair distribution of benefits and costs to both current and future actors. Legal frameworks could mandate the use of benefit-sharing agreements to address the risk of the elite capture of benefits and other threats that may comprise the longevity of the OECM.³⁴⁶ These agreements should define the terms associated with equity, which may reflect the contribution to conservation efforts, actual costs incurred, rights of stakeholders, interests of poor and marginalised groups or individuals, or the equal distribution shared amongst actors.³⁴⁷ To foster distributional equity, the legal frameworks for OECMs could compel the identification of various actors and the extent to which they participate in governance and management when considering recognition of a potential OECM.³⁴⁸

³⁴⁰ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B); Schreckenberg, et al. "Unpacking equity" (2016) *PARKS* 14-17; Booker & Franks *Governance Assessment for Protected and Conserved Areas (GAPA)* (2019) 12; Zafra-Calvo, et al. "Progress toward equitably managed protected areas" (2019) *BioScience* 192.

³⁴¹ Zafra-Calvo, et al. "Progress toward equitably managed protected areas" (2019) *BioScience* 194.

³⁴² CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B)(9); Zafra-Calvo, et al. "Progress toward equitably managed protected areas" (2019) *BioScience* 191-192; Schreckenberg, et al. "Unpacking equity" (2016) *PARKS* 14-15.

³⁴³ Franks, et al. *Understanding and assessing equity in protected area conservation* (2018) 11.

³⁴⁴ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B)(9); Zafra-Calvo, et al. "Progress toward equitably managed protected areas" (2019) *BioScience* 191-192; Schreckenberg, et al. "Unpacking equity" (2016) *PARKS* 17.

³⁴⁵ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B)(9); Zafra-Calvo, et al. "Progress toward equitably managed protected areas" (2019) *BioScience* 191-192; Schreckenberg, et al. "Unpacking equity" (2016) *PARKS* 17.

³⁴⁶ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 142; Wynberg "One step forward, two steps back?: Implementing access and benefit-sharing legislation in South Africa" in McManis&Ong (eds) *Routledge Handbook of Biodiversity and the Law* (2017) 212.

³⁴⁷ Franks, et al. *Understanding and assessing equity in protected area conservation* (2018) 11.

³⁴⁸ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 15.

Procedural equity is described as the inclusiveness, transparency, and accountability relevant to how decisions are taken and by whom.³⁴⁹ This includes access to justice and clear mechanisms for conflict resolution.³⁵⁰ The principles of public participation and FPIC are important components of procedural equity as they relate to decision-making functions. The law can provide opportunities for full participation by all relevant stakeholders and rightsholders in the institutions and mechanisms for governance and management.³⁵¹ The state may publish subsidiary legislation and guidelines that outline transparent procedures, including those for access to information and conflict resolution. It is noted within the literature that an important component of procedural equity is to qualify various actions with specified timeframes and measures for accountability.³⁵²

Legal frameworks employed to recognise, regulate, and report OECMs should seek to encourage equity, especially as experienced by vulnerable and marginalised populations, by giving effect to the following dimensions of recognition, procedure, and distribution.³⁵³ Notably, OECMs should demonstrate “positive progress” towards equitable governance and management as a universal measure does not exist.³⁵⁴ The concepts associated with equity are central to good governance and are entwined with the other aspects examined within this chapter to create the enabling environment.³⁵⁵

3.3.5.6 Integration for holistic management

In line with international guidance, states should seek to manage a network of protected areas and OECMs that endeavour to support and strengthen connectivity and integration across landscapes and seascapes.³⁵⁶ This could be facilitated through the alignment of the management plans for OECMs with relevant sectoral and spatial plans. The legal frameworks can mandate the integration of an OECM’s management plan into land-use plans, watershed management plans, marine and coastal area management plans, integrated development plans, and other spatial and sectoral plans. The law may also support the alignment of planning timelines as well as provide for existing plans to be reviewed and updated to reflect newly developed management plans. As OECMs should seek to holistically conserve nature, not individual components of the ecosystem,³⁵⁷ integration and alignment may mitigate duplication and overlap with other environmentally related planning frameworks. Notably, the management plan may also reflect the contents of other plans that were used to inform its development

³⁴⁹ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex II(B)(9); Zafra-Calvo, et al. “Progress toward equitably managed protected areas” (2019) *BioScience* 191-192; Schreckenberg, et al. “Unpacking equity” (2016) *PARKS* 16-17.

³⁵⁰ Zafra-Calvo, et al. “Progress toward equitably managed protected areas” (2019) *BioScience* 191-192; Schreckenberg, et al. “Unpacking equity” (2016) *PARKS* 16-17.

³⁵¹ See section 3.3.5 of this text.

³⁵² See section 3.3.5.5 of this text. Schreckenberg, et al. “Unpacking equity” (2016) *PARKS*.

³⁵³ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 15-16.

³⁵⁴ *Ibid.*

³⁵⁵ The enabling conditions may include policy and legal frameworks, the balance of power amongst actors, a connection to human rights, the elimination of poverty and socio-economic equality. Franks, et al. *Advancing equitable governance* (2024). 17.

³⁵⁶ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex 1 I 3; Jonas, et al. *Guidance on OECMs* (2024) 45.

³⁵⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 6.

The identification and development of conflict resolution procedures for any potential threats and challenges could lead to improved outcomes. This could include specific provisions relating to the management of the vertical dimension.³⁵⁸ For example, the benthic and pelagic areas of a potential marine OECM may be expected to be holistically managed;³⁵⁹ however, the management objectives, authority, and regime may be reflective of the specific attributes. Co-management agreements could be used to formalise cooperation³⁶⁰ with the roles, responsibilities, and mechanisms for coordination integrated into the respective planning frameworks. There also may be merit to establishing mechanisms or institutions, with a clear mandate and powers, to serve as an overarching authority to manage conflicts and overlap.³⁶¹ Sectoral legislation may explicitly identify the management plans for all area-based conservation as part of decision-making criteria. The management plan could also trigger certain conditions attached to the permits or licenses of overlapping and adjacent resource user rights. These conditions should align with the contents of the management plan but may include the use of buffer areas, zoning, and requirements to set aside certain areas of land from development.

The state may have an existing central authority or statutory body mandated to oversee domestic planning. While it is recommended for the protected area authority to facilitate management planning, given the need for technical knowledge and consistency, the law could explicitly require planning authorities to be included in consultation, monitoring, and reporting obligations. The specific mechanisms for coordination, including the identification of the lead authority, can be detailed in the law.³⁶²

3.3.6 Ensuring the area achieves positive and sustained long-term outcomes

The OECM definition establishes the two-part qualifier³⁶³ that governance and management should achieve both positive and sustained long-term outcomes.³⁶⁴ Within the literature “positive” is interpreted as being synonymous with “effective”, as explicitly reflected within term of an OECM.³⁶⁵ Although the international community agrees that the monitoring of effectiveness should be central to an OECM,³⁶⁶ there is no clear method for measurement.³⁶⁷ However, given the paradigm shift discussed in Chapter 2, there could be an opportunity to think more holistically about how to define effective OECMs.

³⁵⁸ However, vertical zoning is discouraged. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 9.

³⁵⁹ Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth*.

³⁶⁰ See section 3.3.5.3 of this text.

³⁶¹ Techera “Mangrove ecosystems and services” (2020) *University of Queensland Law Journal* 495-496; Lemieux, et al. “The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation ” (2019) *Mar Policy* 321.

³⁶² Lausche *Integrated planning* (2019) 104.

³⁶³ Although the site-level tool divides this into two separate criteria (criterion 6 and 7), this thesis will address them collectively to mitigate the repetition of monitoring and reporting mechanisms.

³⁶⁴ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) para 2.

³⁶⁵ The international guidance seemingly interchanges the word “positive” with “effective”. As the literature primarily references effectiveness, this shall be adopted throughout this thesis. Ibid. Annex III(B); IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 5-6.

³⁶⁶ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III C(1)(f); Alves-Pinto, et al. “Opportunities and challenges of OECMs” (2021) *Perspectives in Ecology and Conservation* 118; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 13.

³⁶⁷ Maini, et al. “Value and limits of OECMs for marine conservation” (2023) *Mar Policy* 5; Cook “Progress developing the concept of OECMs” (2024) *Conservation biology* 13; Jonas, et al. *Guidance on OECMs* (2024) 51-52.

The second part of the definition is clarified within the OECM guidance that "sustained" is relevant to the governance and management of the site, whereas "long-term" should be interpreted with regards to biodiversity outcomes.³⁶⁸ Although the guidance for OECMs proposes using legal frameworks, formal agreements, and customary law to support the "probability" of achieving long-term conservation outcomes,³⁶⁹ it does not establish clear indicators for assessing the terms of long-term. As the KMGBF sets a general target for area-based conservation, it is asserted that both protected areas and OECMs should be held to a comparable standard of permanence.³⁷⁰ The PPA guidance acknowledges the difficulty of quantifying and defining long-term, but recommends for management activities to cover a minimum period of 25 years and ideally demonstrate the intention to extend for perpetuity.³⁷¹ Legal frameworks can help codify long-term outcomes through the employment of "multi-generational time frames" that compel decision-makers to consider both the present and future activities that may impact longevity of conservation objectives.³⁷²

Monitoring and reporting are fundamental to assessing effectiveness and progress towards objectives. Including relevant tools and activities support informed decision-making and adaptive management to nurture long-term conservation outcomes.³⁷³ This section first seeks to identify the role of law to support monitoring efforts by identifying conservation values and indicators of effectiveness. It will then turn to the reporting of outcomes as an essential mechanism to foster good governance, adaptable management, and accurate progress towards international obligation.³⁷⁴

3.3.6.1 What to monitor

The CBD urges states to monitor and report on the progress towards meeting international obligations.³⁷⁵ The CBD's KMGBF is complemented by a monitoring framework that establishes a set of indicators.³⁷⁶ The "headline indicator" relevant to this thesis seeks to monitor the coverage of protected areas and OECMs. This is further qualified with

³⁶⁸ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III(B).

³⁶⁹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 9.

³⁷⁰ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 181. Paterson "OECMs, biodiversity stewardship and statutory intervention" (2023) *Potchefstroom Electronic Law Journal* 12-13.

³⁷¹ Fitzsimons, et al. "Clarifying 'long-term' for protected areas and other effective area-based conservation measures (OECMs): Why only 25 years of 'intent' does not qualify" (2024) *PARKS* 90; Mitchell, et al. *Guidelines for PPAs* (2018) 33. The IUCN's guidance to promote long-term conservation of privately protected areas may also be of relevance to OECMs Stolton, et al. *Futures of PPAs* (2014).

³⁷² Lausche *Guidelines for Protected Area Legislation* (2011) 17.

³⁷³ Gombos, et al. *Designing Effective Locally Managed Areas in Tropical Marine Environments: A Facilitator's Guide to Help Sustain Community Benefits Through Management of Fisheries, Ecosystems, and Climate Change* (2013) 98; Spoelder, et al. "Planning" in Worboys, et al. (eds) *Protected Area Governance and Management* (2015) 390; Day, et al. "Marine protected area management" in *Protected Area Governance and Management* (2015) 643.

³⁷⁴ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 1.

³⁷⁵ CBD Article 26 obliges parties to report on the measures taken and their effectiveness in achieving the collective objectives of the Convention.

³⁷⁶ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022).

"component indicators"³⁷⁷ and "complementary indicators"³⁷⁸ to facilitate monitoring.³⁷⁹ States are encouraged to review and adopt the relevant indicators for domestic use to facilitate national planning, including within the national biodiversity strategies and action plans³⁸⁰ and reporting on commitments to the CBD.³⁸¹

Notably, an OECM has the intrinsic responsibility to demonstrate effectiveness. Monitoring efforts may be refined at the site level to encompass the elements contributing to the effective long-term commitment to conservation objectives. Although there is no single measure for assessing the effectiveness of an OECM, some have interpreted this as monitoring of the quality of conservation values associated with the site and progress towards management objectives. The international guidance has shifted away from traditional monitoring of individual species to measuring the broader impacts,³⁸² thus aligning with the ecosystem approach. Legal frameworks can guide the governance and management authorities to establish a clear and consistent monitoring program that reflects international and domestic obligations as well as the site-level management regime. This could balance prescriptive provisions with the flexibility to accommodate diverse OECM management objectives. The literature underscores the challenges associated with site-level monitoring, noting that many protected areas face similar hurdles.³⁸³

Compliance may serve as another key indicator of effective and sustained long-term conservation outcomes.³⁸⁴ Monitoring activities could include the review of compliance with various permissions and conditions associated with permits, licenses, EIAs and other agreements that may impact the OECM. To monitor compliance, policies, procedures, permits, licenses, conditions attached to an EIA, and other permissions must be legally enforceable either through statutory legal frameworks or customary laws. The specific circumstances of the state, as well as the area within and surrounding an OECM, will inform programs for monitoring compliance.

Recognising that conservation objectives are not achieved in a vacuum, the socio-economic and political factors can influence the effectiveness and long-term outcomes of an OECM. Although the direct monitoring of such activities may be outside the mandate of the authorities associated with OECMs, the state may have existing systems for inter-departmental cooperation and coordination for the distribution of information. Legal frameworks can describe mechanisms for cooperation and access to information to facilitate holistic monitoring.

³⁷⁷ These include Protected Area Connectedness Index (PARC-Connectedness), Red List of Ecosystems, Connectivity Indicator (in development), the number of protected areas that have completed a site-level assessment of governance and equity (SAGE), and the Species Protection Index.

³⁷⁸ These are the most numerous, including the number of countries implementing national legislation, policies or other measures regarding FPIC related to conservation; proportion of terrestrial, freshwater and marine ecological regions which are conserved by protected areas or OECMs; extent of indigenous peoples and local communities' lands that have some form of recognition; percentage of biosphere reserves that have a positive conservation outcome and effective management; coverage of protected areas and OECMs and traditional territories (by governance type); amongst others.

³⁷⁹ CBD COP 15 *Decision 15/5: Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022) para 13.

³⁸⁰ CBD COP 15 *Decision 15/6: Mechanism for planning, monitoring, reporting and review* (2022) para 8.

³⁸¹ *Ibid.* para 13.

³⁸² Lausche, et al. *Legal Aspects of Connectivity Conservation* (2013) 28.

³⁸³ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology*.

³⁸⁴ Bergseth & Day "Compliance – The 'Achilles heel' of protected areas" (2023) *Mar Policy*.

3.3.6.2 How to monitor

The IUCN recently published a framework for monitoring biodiversity in protected areas and OECMs.³⁸⁵ This describes monitoring through four phases: preparatory, conceptual, implementation, and re-evaluation.³⁸⁶ Legal frameworks can compel timeframes, processes, and mandates for implementing monitoring tools to be developed within a monitoring plan with performance indicators to facilitate adaptive management. While monitoring efforts could employ an array of methods and tools to collect qualitative and quantitative data,³⁸⁷ it is recommended to keep monitoring data simple and relevant.³⁸⁸ Data collection should be robust yet streamlined to optimise resources by drawing upon a collection of skills and knowledge from a range of stakeholders and rightsholders, including management authorities, owners, government agencies, NGOs, technical experts, and various partnerships.³⁸⁹

Management effectiveness assessments are considered a valuable tool to foster informed decision-making to advance effective area-based conservation, both at the site level and across the entire network of protected areas and OECMs.³⁹⁰ The OECM screening tool endorses the employment of protected area management effectiveness (PAME) tools³⁹¹ as an indication of the quality of management and the extent to which values and objectives are being supported.³⁹² Numerous PAME tools have been developed over the years.³⁹³ These may be tailored to fit the domestic context to reflect the specific management objectives, culture, and challenges.³⁹⁴ Clear guidance is essential to assist local communities in using tools. The legal frameworks may seek to address the question of who determines the indicators of effectiveness and how monitoring accounts for various worldviews.³⁹⁵ A lingering challenge noted with the use of PAME tools is that these may fall short of monitoring the actual effectiveness of protection resulting from the area-based conservation measures.³⁹⁶ The IUCN Green List of Protected and Conserved Areas Standard³⁹⁷ could provide a holistic framework that can be employed to fill this gap.³⁹⁸

³⁸⁵ For a detailed description of these phases see Dalton, et al. *A framework for monitoring biodiversity* (2024).

³⁸⁶ Ibid.

³⁸⁷ Day, et al. "Marine protected area management" in *Protected Area Governance and Management* (2015) 643; Coad, et al. "Measuring impact of protected area management interventions" (2015) *Philosophical Transactions of the Royal Society B: Biological Sciences* 9.

³⁸⁸ Dalton, et al. *A framework for monitoring biodiversity* (2024) 44.

³⁸⁹ Maini, et al. "Value and limits of OECMs for marine conservation" (2023) *Mar Policy* 4-5.

³⁹⁰ Dudley *Guidelines for Protected Area Management Categories* (2013) 78. Hockings, et al. *Evaluating Effectiveness* (2006); Hockings, et al. "Protected area management effectiveness" in *Protected Area Governance and Management* (2015).

³⁹¹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 13.

³⁹² Hockings, et al. *Evaluating Effectiveness* (2006) 1.

³⁹³ For experience and lessons learned from using various PAME tools in the Pacific region see: SPREP *A comparative analysis of protected area management effectiveness evaluation tools for the Pacific Islands Region* (2023). Coad, et al. "Progress towards management effectiveness targets" (2013) *PARKS* 13.

³⁹⁴ Dudley *Guidelines for Protected Area Management Categories* (2013) 78.

³⁹⁵ Axford, et al. "What constitutes success in Pacific Island community conserved areas?" (2008) *Ecology and Society*; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*.

³⁹⁶ Alves-Pinto, et al. "Opportunities and challenges of OECMs" (2021) *Perspectives in Ecology and Conservation* 118; Geldmann, et al. "Essential indicators for measuring site-based conservation effectiveness in the post-2020 global biodiversity framework" (2021) *Conserv Lett* 3.

³⁹⁷ IUCN & WCPA *Green List of Protected and Conserved Areas* (2016).

³⁹⁸ Geldmann, et al. "Essential indicators for measuring site-based conservation effectiveness" (2021) *Conserv Lett* 7; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 13; Jonas, et al. *Guidance on OECMs* (2024) 63-64.

Monitoring compliance with various permits, licenses, permissions, and generally the rules of the OECM could also provide information to assess effectiveness. Subsidiary legislation could establish thresholds based on the best available science to account for environmental changes.³⁹⁹ Given the broad array of objectives of OECMs, this could include monitoring water quality, forest cover, sustainable resource use, or the presence of invasive species. If the stated thresholds are exceeded, the law could provide for the appropriate process to remedy. The state may have existing structures to undertake monitoring, such as through rangers, technicians, or scientists, whose mandates could be updated to monitor and report on the conditions of an OECM. Importantly, the time periods for monitoring and review do not need to be the same as the duration of permissions or agreements; rather, it should serve as a means for adaptive management.

Measurable targets and indicators, including the associated timeframes for realisation, may provide an indication of the effectiveness of the management plan and progress of actions taken in pursuit of the management objective.⁴⁰⁰ The timeframes for assessing effectiveness may acknowledge that successful conservation can be slow.⁴⁰¹ Intermediate monitoring of three to five years may align with reporting obligations or review of management plans,⁴⁰² as well as support adaptive management to nurture objectives. General indicators could be described in subsidiary legislation to provide flexibility to account for changes in conservation science and best practice.

Governance, equity, and socio-economic factors may also influence effective long-term biodiversity conservation. Several tools have been developed that may be applied to facilitate site-level assessments of OECMs. These include the social assessment for protected and conserved areas (SAPA), governance assessment for protected and conserved areas (GAPA), and site-level assessment of governance and equity (SAGE).⁴⁰³ Moreover, the sole use of management effectiveness tools could be perceived as continuing to advance the Western paradigm of conservation, neglecting the opportunity to recognise a broader and more diverse conservation paradigm. The legal frameworks may seek to address the question of who determines the indicators of effectiveness and how monitoring accounts for various worldviews. It may be important to acknowledge that the various worldviews of stakeholders and rightsholders may shape expectations for monitoring progress towards the objectives of the OECM.⁴⁰⁴ Depending upon the available resources, external assessors could be engaged to collaborate with the site-level management and governance authorities to facilitate consistent application across the entire domestic protected area network.⁴⁰⁵

³⁹⁹ Spoelder, et al. "Planning" in *Protected Area Governance and Management* (2015) 391.

⁴⁰⁰ Lausche *Guidelines for Protected Area Legislation* (2011) 25; Jonas, et al. *Guidance on OECMs* (2024) 73.

⁴⁰¹ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 261; Bergseth & Day "Compliance" (2023) *Mar Policy*.

⁴⁰² SPREP *A comparative analysis of PAME tools for the Pacific* (2023) 17.

⁴⁰³ Franks & Pinto *SAPA, SAGE or GAPA? Tools for assessing the social impacts, governance, and equity of conservation* (2021); Echeverri, et al. "Application of site-level assessment of governance and equity (SAGE) methodology to a candidate OECM: Andakí Municipal Natural Park, Caquetá, Colombia" (2021) *PARKS*; Jonas, et al. *Guidance on OECMs* (2024) 63-64.

⁴⁰⁴ Axford, et al. "What constitutes success in Pacific conserved areas?" (2008) *Ecology and Society*; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*.

⁴⁰⁵ Jonas, et al. *Guidance on OECMs* (2024) 64.

3.3.6.3 Reporting

Reporting may be a key mechanism for keeping state and non-state actors, landowners, and other stakeholder informed.⁴⁰⁶ The outcomes from undertaking monitoring activities could be shared with the management and governance authorities for accountability, transparency, and to promote adaptive management.⁴⁰⁷ Rigorous reporting requirements can hold the management authority accountable for achieving objectives⁴⁰⁸ thus fostering long-term outcomes. Importantly, the requirement of reporting may generally be interpreted as the communication of monitoring outcomes. The actual form of communication could adopt the most appropriate medium for the intended audience.⁴⁰⁹

It may also be beneficial that this information is reported to the state to assist with development of policies and laws and inform international reporting.⁴¹⁰ The state may align monitoring activities, including the form and timeline, with the expectation for international obligations and reporting.⁴¹¹ The international guidance provides for reporting OECMs to the World Database on OECMs (WD-OECM).⁴¹² OECMs may be reported separately from protected areas⁴¹³ but collectively provide a picture of progress towards the same KMGBF target.⁴¹⁴ As parties to the CBD are expected to submit national reports in 2026 and 2029,⁴¹⁵ the state may align time frames and assign clear mandates for monitoring and developing reports. It is argued within the literature that although all conservation efforts may be notable, those for inclusion within monitoring and reporting against the global targets should be accompanied by a degree of legal rigour that ensures sustained long-term outcomes for biodiversity.⁴¹⁶ To facilitate the equitable expansions of area-based conservation, states could benefit from monitoring and reporting on the legal status, frameworks, and rights supported through the recognition and regulation of OECMs.

3.3.6.4 Outcomes of monitoring and reporting

Monitoring and reporting may positively contribute to mitigating the threat of degradation across the network of protected areas and OECMs.⁴¹⁷ However, they are not immune to threats⁴¹⁸ that may result in “delisting” as a consequence of their inability to meet the prescribed criteria.⁴¹⁹ This could result in the equivalent of protected area downgrading, downsizing

⁴⁰⁶ Dalton, et al. *A framework for monitoring biodiversity* (2024) 36.

⁴⁰⁷ Jonas, et al. *Guidance on OECMs* (2024) 73.

⁴⁰⁸ Dalton, et al. *A framework for monitoring biodiversity* (2024) 68.

⁴⁰⁹ Ibid. 36.

⁴¹⁰ SPREP *A comparative analysis of PAME tools for the Pacific* (2023) 19. Leverington, et al. *Management effectiveness evaluations* (2010) 6.

⁴¹¹ A table of relevant expectations is in Dalton, et al. *A framework for monitoring biodiversity* (2024) 42.

⁴¹² IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 20-21.

⁴¹³ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 4; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 20.

⁴¹⁴ Importantly, OECMs must be reported to the WD-OECM in order to be counted in assessing progress toward obligations under the KMGBF. Jonas, et al. *Guidance on OECMs* (2024) 60.

⁴¹⁵ CBD COP 15 *Decision 15/6: Mechanism for planning, monitoring, reporting and review* (2022) 1(b).

⁴¹⁶ Fitzsimons, et al. “Clarifying ‘long-term’ ” (2024) *PARKS* 92.

⁴¹⁷ Jonas & McKinnon *Framing the Issues: Discussion Paper 1 of the Task Force on Other Effective Area-Based Conservation Measures* 1-22.

⁴¹⁸ Threats may stem from weak governance and mismanagement or from the effects of climate change and natural disasters that may significantly alter the area.

⁴¹⁹ *Paterson OECM Legal Review - South Africa* (2024) 48; Jonas, et al. *Guidance on OECMs* (2024) 26.

and de-gazettement (PADDD)⁴²⁰ events which are associated with undesirable environmental consequences.⁴²¹ The legal frameworks could provide for OECMs that do not continue to meet the criteria of an OECM to be given a probationary period, through written warning, after which time the status of the site may be reviewed. This may be a holistic exercise that engages various state and non-state actors, owners, stakeholders, rights holders and customary custodians. Notably, the delisting of an OECM should be at least as rigorous as the process for recognition, including a process for public participation,⁴²² to encourage long-term security. The law may draw on the principle of good governance to ensure the governance and management authorities are held accountable for achieving conservation objectives.

It may also be advantageous for the law to recognise positive outcomes that are observed through monitoring and reporting. This may be linked to various incentives that promote effective long-term area-based conservation.⁴²³ The protected area discourse has employed a number of tools that may be adapted for OECMs, including incentives associated with economic incentives,⁴²⁴ technical assistance,⁴²⁵ and pathways to become protected areas.⁴²⁶ There may also be opportunities to align with incentives garnered under other sectors, such as climate change's REDD+ programs.⁴²⁷ Incentives may reflect the domestic context to appropriately motivate and reward the governance and management authority for achieving objectives.⁴²⁸ Although the extent of incentives is outside the scope of this thesis, the law can promote coordination and harmonise area-based conservation with fiscal legal frameworks.⁴²⁹ Legal frameworks may include safeguards and provisions for benefit-sharing agreements to manage the threat of abuse and ensure the benefits are equitably shared.⁴³⁰

3.4 IMPLICATIONS AND OUTLOOK FOR OECMS

The first part of this chapter sought to establish the potential role of law and the sources of law that may enable and regulate OECMs. Understanding the influence of law provides the foundation to develop the theoretical legal framework for integrating OECMs into domestic legal frameworks. As state's review, amend, and develop legal frameworks they may

⁴²⁰ Including the OECM equivalent.

⁴²¹ Mascia, et al. "Protected area downgrading, downsizing, and degazettement (PADDD) in Africa, Asia, and Latin America and the Caribbean, 1900–2010" (2014) *Biol Conserv*; Golden Kroner, et al. "The uncertain future of protected lands and waters" (2019) *Science (American Association for the Advancement of Science)*.

⁴²² Lausche *Guidelines for Protected Area Legislation* (2011) 152.

⁴²³ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 13.

⁴²⁴ Examples include subsidies, reduction of property taxes and other tax deductions. Mitchell, et al. "PPA or OECM?" (2018) *PARKS* 55-56; Smith, et al. "Reforms required to the Australian tax system to improve biodiversity conservation on private land" (2016) *Environmental and Planning Law Journal*; Lausche *Guidelines for Protected Area Legislation* (2011) 102-103.

⁴²⁵ Lausche *Guidelines for Protected Area Legislation* (2011) 205.

⁴²⁶ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 194.

⁴²⁷ Lausche *Guidelines for Protected Area Legislation* (2011) 38.

⁴²⁸ Waithaka & Njoroge "OECMs in Safeguarding Space for Nature" (2018) *PARKS* 105.

⁴²⁹ Lausche *Guidelines for Protected Area Legislation* (2011) 205.

⁴³⁰ *Ibid.* 98.

be cognisant of the law creating both benefits and constraints for recognising, regulating, and reporting OECMs.⁴³¹ Opportunities to enhance certainty, clarity, consistency, credibility, and security may be emphasised while provisions that are excessively restrictive, rigid, fragmented, inconsistent, or centralised may be used cautiously.⁴³² Given the diversity of potential OECMs and domestic circumstances, a prescriptive site-level assessment tool could fail to recognise local nuances.⁴³³ The legal mechanisms to recognise OECMs must be flexible yet robust enough to assess and monitor a commitment to long-term effective *in situ* area-based biodiversity conservation. The theoretical legal framework developed within this chapter has sought to balance a threat of greenwashing with that of over-regulation to encourage an equitable and representative protected and conserved area network.

Although domestic legal frameworks are diverse and grounded within national norms, they share the broader international policy and legal environment.⁴³⁴ The global guidance for OECMs establishes “good practices” for recognising, regulating, and reporting OECMs that may be adapted and applied to a local context. The theoretical legal framework developed within this chapter provides for the potential role of law to support and strengthen the recognition, regulation, and reporting of OECMs through consideration of the eight criteria for OECMs. This will provide the architecture to critically review PNG’s existing legal frameworks (Chapter 5) to identify opportunities and reforms for strengthening and supporting OECMs (Chapter 6). The theoretical legal framework has sought to provide for legal provisions that enable OECMs, including the identification of triggers for procedures and development of agreements, support given to FPIC, provision of clear definitions, establishment of institutions, recognition and credibility given to various measures, promotion of good governance, facilitation of effective management, and links to incentives for long-term security, as well as provisions that may be used to regulate OECMs such as the prescription of management objectives, activities, prohibitions, access rights, incentives and compliance mechanisms, timeframes, monitoring, and reporting.⁴³⁵

⁴³¹ Jonas, et al. *Guidance on OECMs* (2024) 25-26, 74-75; Paterson “OECMs, biodiversity stewardship and statutory intervention” (2023) *Potchefstroom Electronic Law Journal*.

⁴³² Jonas, et al. *Guidance on OECMs* (2024) 25; Paterson *OECM Legal Review - South Africa* (2024) 8-9.

⁴³³ Cook “Progress developing the concept of OECMs” (2024) *Conservation biology* 3.

⁴³⁴ Benidickson & Paterson “Biodiversity, Protected Areas and Law” in *Biodiversity and Law* (2017).

⁴³⁵ Jonas, et al. *Guidance on OECMs* (2024) 25-26; Paterson *OECM Legal Review - South Africa* (2024) 7-8.

Chapter 4 The Domestic Legal Framework Governing Area-Based Approaches to Biodiversity Conservation in PNG

Upon gaining independence in 1975, PNG established a legal system based upon English common law but with a constitutional mandate to develop its own underlying law.¹ This post-colonial period sought to formally recognise and integrate custom as a source of law, reflecting the unique cultural and legal identity of the new state.² The Constitution of the Independent State of Papua New Guinea³ (the Constitution) offers guidance for developing an “Indigenous jurisprudence”⁴ shaped by custom, common law, the underlying law, judicial precedent, and a selection of pre-independence laws.⁵ Today, PNG’s contemporary legal environment embodies a system of deep legal pluralism characterised by the co-existence of legal authority under both the state and custom.⁶

Many of the priorities expressed within PNG’s domestic legal frameworks reflect its international commitments. PNG is a party to a number of international conventions that influence its domestic policies and laws relating to the environment and conservation. This includes the CBD, CITES, Ramsar, World Heritage Convention, UNCCD, UNCLOS, UNFCCC and the Paris Agreement. PNG is a non-party to the CMS but has signed the MOUs related to Dugongs, Pacific Islands Cetaceans, and Indian Ocean and South-East Asia Marine Turtles,⁷ thereby committing to cooperate in the respective conservation and management plans for these species. Recognising the importance of regional cooperation, PNG is a party to several key agreements, including the Noumea Convention, the SPREP Treaty, the Torres Strait Treaty, and a member of the CTI.⁸ Despite observations of the negative impacts on the environment and Indigenous land rights resulting from the extractive industries,⁹ PNG has not ratified the ILO Convention 169 or UNDRIP. This could be attributed to a perception that PNG’s domestic legal environment adequately represents the rights of IPLCs.¹⁰

This chapter seeks to provide a broad overview of PNG’s legal frameworks with potential relevance for recognising, regulating, and reporting OECMs.¹¹ This legal foundation will underpin the critical review (Chapter 5) and proposed reforms (Chapter 6) to support and strengthen *in-situ* conservation in PNG. This chapter will first examine the legal architecture

¹ The underlying law is comprised of customary law and common law as described in the *Constitution of the Independent State of Papua New Guinea* (1975) Schedule 2; Care & Zorn “Legislating pluralism: Melanesian customary law” (2001) *The Journal of Legal Pluralism and Unofficial Law* 60.

² Care & Zorn “Legislating pluralism: Melanesian customary law” (2001) *The Journal of Legal Pluralism and Unofficial Law* 73-75.

³ *Constitution of the Independent State of Papua New Guinea* (1975).

⁴ *Ibid.* Section 21(1).

⁵ *Ibid.* Schedule 2.

⁶ Corrin “Administrative law and customary law in Papua New Guinea” (2018) *Oxford University Commonwealth Law Journal* 125.

⁷ CMS *Profile for PNG* (accessed January 2025).

⁸ PNG has signed the Convention on the Conservation of Nature in the South Pacific (Apia Convention), however it has never been ratified or acceded.

⁹ Cultural Survival and American Indian Law Clinic of the University of Colorado *Observations on the State of Indigenous Human Rights in Papua New Guinea* (2020).

¹⁰ Filer, et al. “The FPIC Principle Meets Land Struggles” (2020) *Land* 11.

¹¹ The Acts referenced within this thesis are inclusive of relevant amendments and reflect the most current form of the legislation.

established by the Constitution. Given the prominence of legal pluralism, the chapter shall also explore the sources of law giving recognition and status to custom. After establishing the legal foundations, the chapter will survey the legal frameworks specific to environmental conservation. It will then establish the legal regime associated with land use and planning mechanisms, as these policies and laws provide the enabling conditions for all area-based conservation. Finally, the chapter will review other natural resource and climate change policies and laws with potential relevance to the domestic application of OECMs.

A brief screening exercise to identify potential OECMs in PNG concludes the chapter. Potential OECMs will be screened for their status as a protected area and identification of management objectives. Notably, this is not an exhaustive list but may serve as a starting point for recognising OECMs drawn from the current legal frameworks. As PNG is an island nation, there likely is further potential to explore OECMs in the marine context. However, as this thesis is delimited to terrestrial, coastal, and near-shore marine areas, the potential OECMs contained within marine policy and legal frameworks will not be explored in depth.

4.1 OVERARCHING LEGAL FRAMEWORK OF PAPUA NEW GUINEA

Since independence in 1975, a system of decentralisation has been advocated in PNG to address the limited capacity of the central government to effectively implement and enforce legal frameworks given geographical and resource constraints.¹² Within PNG, five decision-making levels (including the national, provincial, district, local level governments (LLGs), and community level)¹³ are subject to the national Constitution.¹⁴ The primary legislation that establishes the system of decentralisation is the Organic Law on Provincial Governments and Local Level Governments (OLPGLLG).¹⁵ This legal framework establishes and delegates power to 22 provincial-level governments¹⁶ and over 300 LLGs. Together, the Constitution and Organic Laws encompass the overarching legal framework of PNG.

PNG is among the least urbanised states on the planet.¹⁷ For those living in remote rural areas, customary law often strongly influences everyday life.¹⁸ Customary laws in PNG are uniquely positioned to be both part of the underlying law and hold authority outside the statutory legal system.¹⁹ In developing the primary legal framework, the drafters of the

¹² GoPNG *Medium Term Development Plan IV (2023-2027)* 200.

¹³ Importantly the community level is not a standardised entity but rather may vary to encompass an assortment of sub-clans, clans, villages, and wards. Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud* 602.

¹⁴ *Constitution of the Independent State of Papua New Guinea* (1975) Section 187D(182). *The Organic Law on Provincial Governments and Local-level Governments* (1995) Sections 1, 5(2), and 138. *Local-level Governments Administration Act* (No. 33 of 1997). 38(31); *Provincial Governments Administration Act* (No. 7 of 1997). 16(11).

¹⁵ *The Organic Law on Provincial Governments and Local-level Governments* (1995).

¹⁶ Including twenty provinces, the National Capital District, and the Autonomous Region of Bougainville.

¹⁷ Population data is based on estimates derived from the 2000 census as later data is generally regarded as being inaccurate.

Bourke & Allen "Estimating the population of Papua New Guinea in 2020" (2021) *Development Policy Centre Discussion Paper* 9.

¹⁸ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 98.

¹⁹ Corrin "Administrative law and customary law in PNG" (2018) *Oxford University Commonwealth Law Journal* 133.

Constitution layered common law upon a pre-existing customary law.²⁰ Thus, while the Constitution is vested as the supreme law, it may also be essential to consider the legal frameworks that recognise and give authority to customary law.

Importantly, the overarching legal framework of PNG has been canvassed and critiqued in the literature.²¹ It is not within the limits of this thesis to provide a comprehensive review. However, this section will seek to briefly survey elements of the Constitution, Organic Law, and the legal frameworks giving recognition to customary law that may prove relevant for recognising, regulating, and reporting OECMs.

4.1.1 Constitution of the Independent State of Papua New Guinea (1975)

The Constitution, complemented by the Organic Laws,²² prevails as the Supreme Law of PNG to which all other laws and actions taken by the legislature, executive, or judiciary are subject.²³ Adopted in 1975,²⁴ the Constitution sought to reflect the values and organisation of the newly independent state. The Constitution is noteworthy as it enables the recognition of OECMs by providing the directive for certain rights, bestowing responsibilities and duties upon state and non-state actors, establishing the structure of government, and recognising custom.

4.1.1.1 Constitutional rights, responsibilities, and duties

The preamble of the Constitution establishes the non-justiciable²⁵ National Goals and Directive Principles (NGDPs), which serve as its foundation and guide for all domestic legal frameworks.²⁶ All state actors have a Constitutional duty to apply and give effect to the NGDPs.²⁷ The NGDPs broadly aim to encourage integral human development,²⁸ equality and participation,²⁹ national sovereignty and self-reliance,³⁰ and the conservation of natural resources and environment³¹ while being grounded in “Papua New Guinean ways”.³² The fourth goal is directly relevant to OECMs.

²⁰ Ibid. 124.

²¹ For further reading: Corrin “Developing the Underlying Law in PNG” (2014) *The Journal of Legal Pluralism and Unofficial Law*; Corrin “Administrative law and customary law in PNG” (2018) *Oxford University Commonwealth Law Journal*; May *Policy making implementation: studies from Papua New Guinea* (2009); Muroa “The Extent of Constitutional Protection of Land Rights in Papua New Guinea” (1998) *MLJ*; Goldring “Legalism Rampant: The Heritage of Imposed Law and the Constitution of Papua New Guinea” (1979) *Verfassung und Recht in Übersee/Law and Politics in Africa, Asia and Latin America*; May *State and Society in Papua New Guinea: The First Twenty-Five Years* (2004).

²² The Constitution provides for specific matters to be developed as an Organic Law made by Parliament that can only be altered by another Organic Law or Constitutional amendment. *Constitution of the Independent State of Papua New Guinea* (1975) Section 12.

²³ Section 11(1).

²⁴ Amendments are listed in Appendix 1 of the Constitution.

²⁵ Section 25.

²⁶ Preamble.

²⁷ Section 25.

²⁸ Goal 1, Preamble.

²⁹ Goal 2, Preamble.

³⁰ Goal 3, Preamble.

³¹ Goal 4, Preamble.

³² Goal 5, Preamble.

We declare our fourth goal to be for Papua New Guinea's natural resources and environment to be conserved and used for the collective benefit of us all, and be replenished for the benefit of future generations.³³

This NGDP extends the environmental responsibilities through the principle of intergenerational equity and promotes sustainable development through the wise use of natural resources. Notably, however, the term "wise use" is not defined, thus left to potentially varying interpretations. This NGDP is further qualified with the duty to provide biodiversity with adequate protection,³⁴ which could give constitutional recognition to OECMs.

The Constitution confers a number of rights and freedoms, including the fundamental rights to life³⁵ and the protection of the law,³⁶ as well as qualified rights, such as the protection from unjust deprivation of property³⁷ and freedom of information,³⁸ amongst others.³⁹ While it does not explicitly contain substantive environmental rights, the judiciary has broadly interpreted the fundamental right to life⁴⁰ to rely on a "safe and clean environment".⁴¹ Although the Constitution protects property from unjust deprivation,⁴² this is not absolute as property may be required for public purposes, or deemed necessary for other reasonable justifications,⁴³ and with just compensation.⁴⁴ The state's acquisition of land has been qualified as being an absolute necessity rather than that of desirability, given the constitutional right aimed to protect Indigenous lands.⁴⁵ The Constitution qualifies that all consultation should "in principle" be "meaningful and allow for a genuine interchange and consideration of views".⁴⁶ Although this gives constitutional support to the principle of FPIC, the interpretation of "meaningful" is not defined.⁴⁷ As these rights and freedoms are legally protected and enforceable,⁴⁸ they will inform the recognition of OECMs.

³³ Goal 4, Preamble.

³⁴ Goal 4(3), Preamble.

³⁵ Section 35.

³⁶ Section 37.

³⁷ Section 53.

³⁸ Section 51. Although this right may be regulated or restricted through legislation, PNG has not enacted a framework relevant to the freedom of information. The National Right to Information Policy has been developed to inform future legislation. *GoPNG National Right to Information Policy 2020-2030*.

³⁹ Sections 38-56.

⁴⁰ Section 35.

⁴¹ *Morua v China Harbour Engineering Co (PNG) Ltd* [2020] (PGNC) 16 para 56.

⁴² Section 53.

⁴³ Section 53(1)(a).

⁴⁴ Section 53(2).

⁴⁵ *Muroa* "Constitutional Protection of Land Rights in PNG" (1998) *MLJ* 1-2.

⁴⁶ Section 255.

⁴⁷ The challenges of meaningful consultation and its social translation between different worldviews are explored throughout *West Conservation is Our Government* (2006).

⁴⁸ Section 57.

4.1.1.2 Government structure

The Constitution establishes the national, provincial, and local-level governments. At the national level, it asserts a structure comprised of the National Parliament,⁴⁹ National Executive,⁵⁰ and National Judicial System.⁵¹ While the Constitution also establishes the lower levels of government,⁵² it imposes a duty to provide for their powers and functions within an Organic Law.⁵³ This includes the ability to create legislative powers that are subject to the Constitution and Organic Law.⁵⁴ The division of law-making powers may enable the recognition of OECMs through sub-national legislation.

In addition to the levels of government, the Autonomous Region of Bougainville is granted the right to self-govern as a Constitutional provision⁵⁵ per the Bougainville Peace Agreement.⁵⁶ This includes the endorsement of the Bougainville Constitution,⁵⁷ structures of government,⁵⁸ and identifies the division of powers between the National and Bougainville governments.⁵⁹ Although the Bougainville Constitution and legislation form part of the laws of PNG, this thesis shall exclude legal frameworks specific to Bougainville as their application may be limited.⁶⁰

4.1.1.3 Recognition of custom

The Constitution recognises custom provided it does not conflict with the Constitution, statutory laws, or is “repugnant to the general principles of humanity”.⁶¹ It further qualifies that custom shall form part of the underlying law of PNG,⁶² and courts may be established specifically to hear matters of custom and employ customary procedures.⁶³ Compared with other Pacific states, the definition of custom is notable as it acknowledges that it is neither stagnant nor homogenous.⁶⁴

[C]ustom means the customs and usages of indigenous inhabitants of the country existing in relation to the matter in question at the time when and the place in relation to which the matter arises, regardless of whether or not the custom or usage has existed from time immemorial.⁶⁵

⁴⁹ The powers and membership of parliament are described in Division 2.

⁵⁰ Including the Head of State and National Executive Council. Division 4 confers the appointment and powers of the National Executive.

⁵¹ Comprising of the Supreme Court, National Court, and other courts including village courts that hear matters related to custom and customary procedure. Sections 99, 155, and 172.

⁵² Section 187A.

⁵³ Section 187C. See section 4.1.2 of this text.

⁵⁴ Section 187D.

⁵⁵ Section Part XIV. *Bougainville Peace Agreement*. (30 August 2001) Section 4.

⁵⁶ The Bougainville Peace Agreement was signed on 30 August 2001 at Arawa by the Government of PNG and representatives of the Bougainville people. National Gazette No. G 146 of 16 November 2001.

⁵⁷ Section 280 and 285.

⁵⁸ Section 282.

⁵⁹ Section 300.

⁶⁰ Bougainville's non-binding 2019 referendum overwhelmingly favoured independence which may suggest a lingering divide.

⁶¹ Schedule 2.1.1 (2).

⁶² Schedule 2.1.1 (1).

⁶³ Section 172(2).

⁶⁴ Corrin “Developing the Underlying Law in PNG” (2014) *The Journal of Legal Pluralism and Unofficial Law* 156.

⁶⁵ Schedule 1.2.2 (1).

In furtherance of the recognition of custom, the Fifth NGDP calls for development through “the use of Papua New Guinean forms of social, political and economic organisation”.⁶⁶ This may highlight the importance of OECMs to employ local procedures for participation, consultation, and consensus⁶⁷ that recognise the traditional communities⁶⁸ and ways of life.⁶⁹

4.1.2 Organic Law on Provincial Governments and Local-level Governments (1995)

The Organic Law on Provincial Governments and Local-level Governments⁷⁰ (OLPGLLG) gives effect to Part VIA of the Constitution.⁷¹ Since before independence, and up until the present, PNG has implemented various policies and reforms attempting to institute a system of decentralisation.⁷² The OLPGLLG sought to shift powers, giving the LLG greater capacity to engage in bottom-up planning and law-making.⁷³ It establishes a hierarchy of laws where, in the event of inconsistencies, the legislation adopted by the national government will prevail over laws made by the provincial or local-level governments.⁷⁴ The OLPGLLG is relevant to this thesis as it provides for a system of decentralisation that empowers the local and provincial governments to participate in planning, budgeting, policy and law-making activities. Additionally, in implementing the duties and responsibilities of the OLPGLLG, the authorities shall comply with the fourth NGDP to conserve natural resources and the environment.⁷⁵

The OLPGLLG establishes a provincial government in each province⁷⁶ and provides the procedures for the Head of State to proclaim local-level governments.⁷⁷ It creates the administrative system for both the local and provincial governments, encompassing the offices of the provincial and district administrators, support services, the extension of national departments and agencies as required, and district development authority.⁷⁸ The provincial administrator serves as the provincial government’s chief executive officer.⁷⁹ Similarly, the district administrator is the chief executive officer of the LLGs within the district.⁸⁰ Amongst their various responsibilities, both are tasked with policy formulation, planning, and implementation of policies and plans as required by the OLPGLLG.⁸¹ While the OLPGLLG sought to provide reforms for the composition and administration under a decentralised structure, in reality, it has been suggested there was little

⁶⁶ Section 5.

⁶⁷ Section 5(1).

⁶⁸ Section 5(4).

⁶⁹ Section 5(3).

⁷⁰ *The Organic Law on Provincial Governments and Local-level Governments* (1995).

⁷¹ *Constitution of the Independent State of Papua New Guinea* (1975). See section 4.1.1 of this text.

⁷² May “Policy making on decentralization” in May (ed) *Policy making implementation: studies from Papua New Guinea* (2009) 203-206.

⁷³ Ibid. 215-218; Kwa *Biodiversity Law and Policy in PNG* (2004) 85.

⁷⁴ Section 41(6).

⁷⁵ Section 1(2).

⁷⁶ Section 10.

⁷⁷ Section 27.

⁷⁸ Section 72.

⁷⁹ Section 74(1).

⁸⁰ Section 74(2).

⁸¹ Section 74(1)(g) and 74(2)(f).

difference.⁸² Nevertheless, a thorough analysis of this is beyond the scope of this thesis. The provisions governing the division of power that give the local and provincial governments the ability to make and enforce laws⁸³ may foster an opportunity to recognise, regulate, and report OECMs.

Under the OLPGLLG, the provincial government is granted powers to make laws regarding community, urban and rural development; small-scale fishing and fisheries;⁸⁴ agriculture; land and land development; forestry and agro-forestry; renewable and non-renewable natural resources;⁸⁵ parks, reserves, gardens, scenic and scientific centres; amongst others.⁸⁶ The provincial government may also establish village courts to hear civil and criminal cases.⁸⁷ The LLG is empowered to make laws on such matters as the provision of water supply; hygiene and sanitation; improvements to villages, towns, cities and communities; dispute settlements; town, city, village and community planning; local environment; the protection of traditional and sacred sites; village communities; as well as the establishment of fines for the violation of its laws.⁸⁸ Those powers not specified by the OLPGLLG remain the responsibility of the National Government.⁸⁹ There are several examples across the country of the OLPGLLG being used to address gaps in the national legal frameworks and give legal recognition to locally protected and conserved areas governed by custom.⁹⁰

The provincial government and LLGs are generally given autonomy to implement their powers.⁹¹ However, the lower levels of government may be subject to other laws and powers when required by the provincial⁹² or national interests.⁹³ The national government may adopt legislation on matters within the provincial or local competencies, provided that consultation has taken place between the concerned authorities.⁹⁴ Local and provincial laws do not take effect until either approved by the appropriate Minister⁹⁵ or, if no decision is made, after 60 days from the date the law was served.⁹⁶

The OLPGLLG establishes the Joint Provincial Planning and Budget Priorities Committee (JPPBPC) and the District Development Authority,⁹⁷ which play a key function in local planning and budgeting.⁹⁸ The JPPBPC is responsible for

⁸² For a historical review of decentralization in PNG, including an examination of this Act and its impact, see: May "Policy making on decentralization" in *Policy making implementation* (2009); Thomason & Kase "Policy making in Health" in May (ed) *Policy making implementation: studies from Papua New Guinea* (2009).

⁸³ Section 40.

⁸⁴ Excluding large-scale fishing and marine ventures declared by the Head of State. Section 42(2)

⁸⁵ Excluding large-scale forestry, mining and petroleum declared by the Head of State. Section 42(2)

⁸⁶ Section 42(1).

⁸⁷ Section 47(1).

⁸⁸ Section 44(1).

⁸⁹ Section 40(1)(b) and 41(1).

⁹⁰ Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 3-7; Kwa *Biodiversity Law and Policy in PNG* (2004) 86.

⁹¹ Section 40(1)(d).

⁹² Section 40(1)(e).

⁹³ Section 40(1)(d).

⁹⁴ Section 41(3).

⁹⁵ Section 141(4)

⁹⁶ Section 141(5)

⁹⁷ The functions and powers of the District Development Authorities are described within the *District Development Authority Act* (No. 40 of 2014).

⁹⁸ Section 25(3). An LLG may also have ward development committees which feed up into the district and provincial levels. The powers of these committees are provided for in the *Local-level Governments Administration Act* (No. 33 of 1997). As any act by the

formulating⁹⁹ and reviewing¹⁰⁰ a provincial five-year development plan and budget estimates for “consideration” by the national government¹⁰¹ and “presentation” to the provincial assembly.¹⁰² However, it has been suggested within the literature that this bottom-up planning has not necessarily aligned with national priorities, creating inconsistencies and inefficiencies.¹⁰³ The OGPGLLG allows Parliament to equitably allocate funding to the local and provincial governments for service delivery¹⁰⁴ and development needs.¹⁰⁵ It also enables future legislation to provide additional financial allocations to fund other activities outside of assigned responsibilities,¹⁰⁶ development projects,¹⁰⁷ and “payments that are provided for in agreements relating to the development of natural resources”.¹⁰⁸ Support grants may be partly distributed to the JPPBPC¹⁰⁹ and Joint District Planning and Budget Priorities Committee (JDPBPC),¹¹⁰ and partly to the Member¹¹¹ for use as per the guidelines.¹¹² This could contribute to the enabling environment of OECMs with alignment and integration into planning and budget frameworks.

4.1.3 Underlying Law Act (2000)

The Underlying Law Act¹¹³ became law nearly 25 years after Parliament was called upon to provide for its development under the Constitution.¹¹⁴ Prior to its adoption, the English common law system prevailed.¹¹⁵ This Act seeks to support the development of a post-colonial era jurisprudence¹¹⁶ by providing the courts with guidance on the order of application, with priority given to written laws followed by the underlying law, customary law, and common law.¹¹⁷ The Act is particularly relevant for recognising OECMs governed by custom as it provides clarity regarding its application and elevates the status of customary law.¹¹⁸

ward development committee is non-binding unless approved by the local-level government, it may be considered more advisory with decision making powers held by the local-level government.

⁹⁹ Section 25(3)(d).

¹⁰⁰ Section 25(3)(e).

¹⁰¹ Section 25(3)(a).

¹⁰² Section 25(3)(c).

¹⁰³ May “Policy making on decentralization” in *Policy making implementation* (2009) 217; GoPNG *Medium Term Development Plan III* (2018-2022) 4.

¹⁰⁴ Section 82C.

¹⁰⁵ Section 82J.

¹⁰⁶ Section 82G.

¹⁰⁷ Section 82I(1)(b).

¹⁰⁸ Section 82I(1)(a). The OLPGLLG defines natural resources to include “minerals, petroleum, gas, marine products, water, timber (including forest products), fauna, flora and any other product determined by law to be a natural resource”. Section 98(1).

¹⁰⁹ Section 95B(1)(a).

¹¹⁰ Section 95A(1)(a).

¹¹¹ Section 95A(1)(b) and Section 95B(1)(b).

¹¹² Section 95A(7)(a) and Section 95B(5)(a).

¹¹³ *Underlying Law Act* (No. 13 of 2000).

¹¹⁴ *Constitution of the Independent State of Papua New Guinea* (1975). Section 20(1).

¹¹⁵ Corrin “Developing the Underlying Law in PNG” (2014) *The Journal of Legal Pluralism and Unofficial Law* 155-156. Section 6 and 7 of the Act clarify that customary law takes precedence over common law.

¹¹⁶ *Ibid.*

¹¹⁷ Section 6 and 7(1)-7(4).

¹¹⁸ For a comprehensive analysis of the Act see: Corrin “Developing the Underlying Law in PNG” (2014) *The Journal of Legal Pluralism and Unofficial Law*.

Although the Act does not explicitly provide a definition, it states that the underlying law shall be comprised of customary law and the common law of England in force prior to PNG's independence.¹¹⁹ It is further specified that a principle or rule of customary law or common law, assuming it is consistent with a written law, the NGDP, or the basic rights of the Constitution, becomes part of the underlying law.¹²⁰ It has been suggested within the literature that the underlying law may be interpreted as the principles or rules drawn from customary law or common law as determined by the courts to be law.¹²¹

The definition of customary law provided by the Act mirrors that of custom as defined by the Constitution,¹²² thus emphasising its dynamic nature across time and place.¹²³ The Act addresses the challenges in identifying customary law by providing a court with the authority to broadly consider cases, written materials, statements from local and provincial authorities, evidence and opinions from a knowledgeable person, and other information it deems relevant.¹²⁴ The application of customary law shall be determined by belonging to a specific community. The Act specifies that the criteria for determining membership within a community may include adherence to a particular way of life, or the person may be generally accepted by the respective community.¹²⁵ A change in either of these circumstances may result in the termination of membership.¹²⁶ When communities operate under different customary laws, a court may consider the intended custom governing the subject matter, and if none is identified, the court may apply the most appropriate custom, having regard to the place and nature of the act or event and place of residence of the parties.¹²⁷

4.1.4 Customs Recognition Act (1963)

The Customs Recognition Act¹²⁸ was established pre-independence as a guide for all courts to aid in determining and recognising custom in both criminal¹²⁹ and civil cases.¹³⁰ Concerning civil cases, custom may be applied to the ownership or rights associated with customary land, water, reef or seabed, hunting, gathering, and the crossing of animals through boundaries.¹³¹ Although many provisions have been explicitly repealed, some question within the literature whether the Act, at least with regard to civil matters, has been implicitly replaced by the Underlying Law Act given notable

¹¹⁹ Section 3(1).

¹²⁰ Section 4(5).

¹²¹ Corrin "Developing the Underlying Law in PNG" (2014) *The Journal of Legal Pluralism and Unofficial Law* 156.

¹²² See section 4.1.1.3 of this text.

¹²³ Section 1(1).

¹²⁴ Section 16.

¹²⁵ Section 1(2)(a).

¹²⁶ Section 1(2)(b).

¹²⁷ Section 17.

¹²⁸ *Customs Recognition Act 1963 (Chapter 19)*.

¹²⁹ Section 4.

¹³⁰ Section 5.

¹³¹ Section 5.

inconsistencies.¹³² Nevertheless, the courts have not yet contemplated this, and the Act is considered valid. This Act may be applicable to OECMs governed by customary laws.

To prove custom, the Act provides the court with the prerogative to rely upon books, reports, statements provided by the LLG Council, opinions, or any other evidence as per the court's discretion.¹³³ Should there be a conflict of custom, the courts may consult the evidence as to which shall prevail given the specific circumstances.¹³⁴ The court also has the power to apply the imperative of underlying law.¹³⁵

4.2 LEGAL FRAMEWORKS RELEVANT TO THE ENVIRONMENT AND CONSERVATION

At the national level, the CEPA Act defines environmental conservation law to include the Conservation Areas Act, Fauna Act, Environment Act, International Trade (Fauna and Flora) Act, the Crocodile Trade (Protection) Act, and any other law relevant to conservation that becomes the responsibility of CEPA.¹³⁶ These legal frameworks may be considered complementary rather than conflicting and overlapping.¹³⁷ The Environment Act creates the overarching regulatory mechanisms for environmental impact assessments, permits, management, and plans, while the other laws narrow to specific conservation objectives. As the International Trade (Fauna and Flora) Act and the Crocodile Trade (Protection) Act do not contain provisions relevant to area-based conservation, they fall outside the remit of this thesis.

The Policy on Protected Areas was announced at the end of 2014 to guide the advancement of a more inclusive and effective national protected area network.¹³⁸ In 2024, PNG's Parliament approved a new Protected Areas Act, which repeals the Fauna Act and Conservation Areas Act.¹³⁹ The existing protected areas remain and may be assessed as per the transitional provisions of the new Act.¹⁴⁰ References to the Fauna Act and Conservation Areas Act within this thesis seek to provide context for current area-based conservation and draw lessons learned as may be applicable for the recognition, regulation, and reporting of OECMs.

¹³² Corrin "Developing the Underlying Law in PNG" (2014) *The Journal of Legal Pluralism and Unofficial Law* 162-164. Examples of inconsistencies include the provisions where customary law is considered a question of fact in section 2(1) of this Act but a question of law under the Underlying Law Act section 16(1).

¹³³ Section 2.

¹³⁴ Section 7(1).

¹³⁵ Section 7(2).

¹³⁶ This has not yet been amended to reflect the enactment of the Protected Areas Act. Section 2(1).

¹³⁷ *Kwa Biodiversity Law and Policy in PNG* (2004) 73 and 79.

¹³⁸ *GoPNG PNG Protected Areas Policy* (2014).

¹³⁹ The new Act states that these are repealed "in whole or in part" but does not provide further clarity regarding specific provisions. *Protected Areas Act (No. 9 of 2024)*. Section 80.

¹⁴⁰ *Ibid.* Section 30(3) and 47.

4.2.1 Environment Act (2000)

The Environment Act¹⁴¹ was established to give effect to the NGDPs as enshrined within the Constitution, regulate environmental impacts, provide protections, and manage the national water supply.¹⁴² It is supported by subsidiary legislation including the Environment (Prescribed Activities) Regulations (2002),¹⁴³ Environment (Permits) Regulations (2002),¹⁴⁴ Environment (Fees and Charges) Regulations (2002),¹⁴⁵ Environment (Council's Procedure) Regulations (2002),¹⁴⁶ and Environment (Water Quality Criteria) Regulations (2002).¹⁴⁷ The Act sets out several objectives¹⁴⁸ along with strategies to facilitate their achievement.¹⁴⁹ This includes environmental protection through mechanisms such as attaching conditions to environmental permits and environmental management programmes, as well as environmental improvement plans, for activities identified as Level 2 or Level 3.¹⁵⁰ Those undertaking activities regarded as "matters of national importance" may be required to undertake an environmental impact assessment (EIA) with opportunities for public consultation and input.¹⁵¹ In instances of significant or unavoidable environmental harm, an environmental offset may be required.¹⁵²

The Act defines the "environment" to include:

- (a) ecosystems and their constituent parts including people and communities and including human-made or modified structures and areas; and
- (b) all-natural and physical resources; and
- (c) amenity values; and
- (d) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community.¹⁵³

All state actors are compelled to consider environmental policies when issuing approvals relating to the environment.¹⁵⁴ This may be broadly interpreted when considering the above definition of the environment and may provide implicit recognition to OECMs as the qualities contribute to the biological diversity of an area.

¹⁴¹ *Environment Act (No. 64 of 2000)*. The Act did not come into force until January 2004.

¹⁴² Preamble.

¹⁴³ *Environment (Prescribed Activities) Regulations (No. 30 of 2002)*.

¹⁴⁴ *Environment (Permits) Regulations (No. 27 of 2002)*.

¹⁴⁵ *Environment (Fees and Charges) Regulations (No. 31 of 2002)*.

¹⁴⁶ *Environment (Council's Procedure) Regulations (No. 29 of 2002)*.

¹⁴⁷ *Environment (Water Quality Criteria) Regulations (No. 28 of 2002)*.

¹⁴⁸ Section 4.

¹⁴⁹ Section 6.

¹⁵⁰ Section 6(2)(c).

¹⁵¹ Section 6(2)(d).

¹⁵² Section 6(2)(f).

¹⁵³ Section 2.

¹⁵⁴ Section 36.

The Act outlines the administrative functions and powers of the Minister,¹⁵⁵ Managing Director of CEPA,¹⁵⁶ and Environment Council.¹⁵⁷ CEPA's Managing Director serves as a key decision-maker for administering the Act.¹⁵⁸ However, the Minister shall give approvals for activities involving matters of national importance.¹⁵⁹ The Managing Director may delegate powers to a Provincial Environmental Committee¹⁶⁰ or Provincial Administrator.¹⁶¹ When implementing their functions and powers, these individuals are obliged to acknowledge traditional social structures, sources of clean water and subsistence food, protection of biodiversity and habitat, sustainable economic development, and landowner roles in decision-making.¹⁶² The latter may prove significant to OECMs as it gives legal recognition to the importance of landowner engagement and governance.

The Environment (Prescribed Activities) Regulations identify activities according to three levels. Level 1 activities are anything other than those described as a Level 2 or Level 3 activity. Although the Act provides that these may be prescribed within the Regulations, currently the Regulations only provide for Level 2 and Level 3 activities.¹⁶³ To varying degrees, Level 2¹⁶⁴ and Level 3¹⁶⁵ activities may pose potential environmental harm or negatively impact on matters of national importance. The listed Level 2 activities are primarily directed towards specific development activities and may have limited direct relevance to OECMs.¹⁶⁶ An environmental permit application submitted to the Director for a proposed Level 3 activity requires an EIA,¹⁶⁷ with final approval from the Minister.¹⁶⁸ The listed Level 3 activity with potential relevance to OECMs is one that:

May result in a significant risk of serious or material environmental harm within Wildlife Management Areas, Conservation Areas, National Parks and Protected Areas or any area declared to be protected under the provisions of an International Treaty to which Papua New Guinea is a party and which has been ratified by the Parliament of the Independent State of Papua New Guinea.¹⁶⁹

The Operational Procedures¹⁷⁰ provide the content, timeframes, and procedures for developing an Environmental Impact Statement (EIS)¹⁷¹ that will inform the Managing Director's decision to require an EIA. All Level 3 activities must undertake

¹⁵⁵ Section 14.

¹⁵⁶ Section 16.

¹⁵⁷ Section 19.

¹⁵⁸ Section 16.

¹⁵⁹ Section 14(b) and 59.

¹⁶⁰ Section 16(2)(b).

¹⁶¹ Section 16(2)(c).

¹⁶² Section 5.

¹⁶³ Section 42

¹⁶⁴ An activity which "may result in material environmental harm; or may have a negative impact on a matter of national importance". Section 42 (3).

¹⁶⁵ An activity which "may result in serious environmental harm; or may have a significant negative impact on a matter of national importance". Section 42 (2).

¹⁶⁶ No Level 2 activity directly correlates with area-based conservation.

¹⁶⁷ Section 50(1)(a) and Section 62(1).

¹⁶⁸ Upon recommendation from the Council. Section 50(3), 58 and Section 59.

¹⁶⁹ *Environment (Prescribed Activities) Regulations (No. 30 of 2002)*. Schedule 2, Level 3, Activity 14.4.

¹⁷⁰ *GoPNG Operational Manual (Environment Act 2000)* (2004).

¹⁷¹ Section 53(2).

a process of notification, referral, and consultation; however, this may be at the discretion of the Managing Director for Level 2 activities.¹⁷² An EIS may be made available¹⁷³ to the public for a period of review.¹⁷⁴ The Act imposes a general environmental duty to “prevent or minimise” potential harm to the environment.¹⁷⁵ The person responsible for environmental harm may be charged with an offence, with the Act prescribing the maximum fines applicable to the degree of harm.¹⁷⁶ This could foster the protection of an OECM’s values.

The Act also provides for the management of national water resources, including surface, underground and coastal waters. Although the Act vests the right to “use, flow, and control” water to the state,¹⁷⁷ it explicitly qualifies this by protecting the customary rights to use water.¹⁷⁸ Although landowners adjacent to a watercourse or lake are given use of water, excluding commercial uses, the maximum quantity and period of use may be delimited by written notice.¹⁷⁹ The right to other uses by various actors can be granted under a permit.¹⁸⁰ Permit holders may be required to pay compensation for environmental harm to landowners, occupiers and any person with customary rights.¹⁸¹ The provisions of a permit may be amended or suspended for the protection of water resources during times of drought.¹⁸²

4.2.2 Conservation and Environment Protection Authority Act (2014)

The Conservation and Environment Protection Authority Act¹⁸³ (CEPA Act) establishes the Conservation and Environment Protection Authority (CEPA) as a statutory body,¹⁸⁴ with the Managing Director serving as the chief executive officer¹⁸⁵ responsible to the Minister for implementing government policies and directions.¹⁸⁶ The Act broadly outlines CEPA’s functions, such as coordinating affairs with provincial and LLGs to foster, manage, and monitor conservation initiatives,¹⁸⁷ as well as promoting¹⁸⁸ and advising¹⁸⁹ on environmental policies and laws throughout the country. CEPA must comply with priorities and directions given by the Minister and those established by any environmental law.¹⁹⁰ Additionally, the Act grants CEPA the mandate to approve and issue environmental permits as per the Environment Act.¹⁹¹ CEPA generally

¹⁷² Section 64(2)(a).

¹⁷³ With opportunities for the exclusion of confidential information. Section 55(5).

¹⁷⁴ Section 55.

¹⁷⁵ Section 7.

¹⁷⁶ Sections 11 – 13.

¹⁷⁷ Section 79(1).

¹⁷⁸ Section 79(2).

¹⁷⁹ Section 81.

¹⁸⁰ Section 82.

¹⁸¹ Section 87.

¹⁸² Section 95.

¹⁸³ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*.

¹⁸⁴ Section 7(1).

¹⁸⁵ Section 23(1)(a).

¹⁸⁶ Section 23(1)(d).

¹⁸⁷ Section 8(b).

¹⁸⁸ Section 8(e).

¹⁸⁹ Section 8(f).

¹⁹⁰ Section 6.

¹⁹¹ Section 8(d). See section 4.2.1 of this text.

has the mandate to undertake all things necessary for conservation and environmental protection, which could naturally extend to OECMs.¹⁹²

The Act provides for certain reserved lands¹⁹³ to be granted to CEPA for control and management¹⁹⁴ as national parks, botanical or zoological gardens, reserves or sanctuaries, or any other purpose as per any other environmental conservation law for the protection of flora and fauna.¹⁹⁵ Such reserved lands are given a “special purposes lease” for a period of 99 years¹⁹⁶ registered to CEPA.¹⁹⁷ The provision of reserved lands was previously regulated under the National Parks Act (Chapter 157), which has been repealed by the CEPA Act.¹⁹⁸ However, the transitional provisions hold that the regulations and “all forms and instruments made, issued or approved” under the National Parks Act continue to be in force, provided they are not inconsistent with the CEPA Act.¹⁹⁹ Several protected areas, including national parks, provincial parks, reserves, and memorial parks, were gazetted under the repealed National Parks Act²⁰⁰ and were expected to transition to a new protected area type under the Protected Areas Act.²⁰¹ However, the new legislation lacks transitional provisions for provincial parks, reserves, and memorial parks.²⁰² Recognition as an OECM could fill the gap.

4.2.3 Protected Areas Act (2024)

The Protected Areas Act was established to manage PNG’s protected areas network and facilitate alignment with the Protected Area Policy.²⁰³ Several notable inclusions that may be relevant to this thesis, include changes in protected area categories²⁰⁴ and guidance for decision-makers to determine FPIC.²⁰⁵ Protected areas are separated into national and regional protected areas.²⁰⁶ CEPA is granted exclusive control over national protected areas²⁰⁷ but may transfer powers with consent of the NEC.²⁰⁸ This may include National Parks, National Heritage sites, National Maritime Sanctuaries, and

¹⁹² Section 8(a).

¹⁹³ As per Section 49 of the Land Act 1996 these apply to government lands or those subject to state lease.

¹⁹⁴ The details may be prescribed within regulations. Section 48(2).

¹⁹⁵ Section 39(1).

¹⁹⁶ This is change from the National Parks Act [repealed] which granted these reserved lands a lease not exceeding 50 years with the possibility of renewal.

¹⁹⁷ Section 39(2).

¹⁹⁸ Section 50(1).

¹⁹⁹ Section 50(2).

²⁰⁰ There are inconsistencies in the reporting as to the number of protected areas gazetted under the repealed National Parks Act and have transitioned under the provisions of this Act. However, all sources indicate that it has not been an extensively used source of designation. Leverington, et al. *Transitions for Papua New Guinea’s existing protected areas, PNG Protected Area Management Guideline (No. PA3 version 1)* (2019) 5-6; GoPNG PNG Protected Areas Policy (2014) 74-75. GoPNG Discussion paper: *A protected area policy for a national protected area system for Papua New Guinea* (2011) 9.

²⁰¹ Protected Areas Act (No. 9 of 2024). Section 30(3).

²⁰² These have been referenced in the guidance document. Leverington, et al. *Transitions for PNG’s existing protected areas* (2019) 5-6.

²⁰³ PNG National Executive Council decision 385/2014. GoPNG PNG Protected Areas Policy (2014).

²⁰⁴ Section 22(1).

²⁰⁵ Section 11.

²⁰⁶ GoPNG PNG Protected Areas Policy (2014) 66; Protected Areas Act (No. 9 of 2024). Section 22.

²⁰⁷ Section 10(1)(a).

²⁰⁸ Section 10(3).

Special Management Areas (SMAs).²⁰⁹ Regional protected areas may consist of community conservation areas (CCA), LMMAs, locally managed conservation areas (LMCA), and PPAs.²¹⁰ Provincial governments, local-level governments, a corporation, customary landowners, ILG, or an individual may manage regional protected area types.²¹¹ The Act also grants protection to areas that may or may not be recognised within one of these formal protected area categories, including protected areas established by a provincial government,²¹² LLG,²¹³ *traditional sacred sites*,²¹⁴ as well as areas set aside for conservation as required by an environmental permit granted under the Environment Act.²¹⁵ The Act also affords guidance for the overlap of protected areas and biodiversity offsets²¹⁶

The National Conservation Council (NCC) is established²¹⁷ to advise the Minister on conservation policies, the development of legal instruments and the endorsement proposals for national protected areas.²¹⁸ The Managing Director may consult with the NCC to establish the assessment criteria for protected areas.²¹⁹ Several guidance documents have been developed to complement the legislation²²⁰ including the 2019 Guide to Protected Area Types²²¹ that is explicitly referenced within the Act.²²² Under the Act, CEPA's Managing Director has the authority to approve proposals for protected areas.²²³ CEPA may consult with the Provincial Governments to establish four "Regional Hubs" ²²⁴ to assess regional protected area proposals.²²⁵ These are intended to be governed by provincial laws and published within a provincial gazette.²²⁶ The Act establishes the Biodiversity and Climate Fund²²⁷ and Small Grants Program²²⁸ to support

²⁰⁹ Section 22(1)(a). Leverington *A guide to protected area types in Papua New Guinea. Protected Area Management Guideline (No. PA9 version 1)* (2019) iv-v.

²¹⁰ Section 22(1)(b).

²¹¹ Section 28(2).

²¹² Section 26(1).

²¹³ Section 27

²¹⁴ Section 8.

²¹⁵ Section 19(2)(b).

²¹⁶ Section 25.

²¹⁷ Section 14(1).

²¹⁸ Section 18.

²¹⁹ Section 48. A proposal form is contained within Schedule 3.

²²⁰ Leverington, et al. *Establishing new protected areas in Papua New Guinea, PNG Protected Area Management Guideline (No. PA2 version 1)* (2019); Leverington *A guide to protected area types in PNG* (2019); Wolnicki, et al. *Sharing governance in PNG's protected areas, a guide to the governance arrangements in the PNG Protected Areas Bill (No. IG2 version 1)* (2019); Leverington, et al. *Working with protected area management committees in PNG, PNG Protected Area Management Guideline (No. MC1 version 1)* (2019); Wolnicki, et al. *Protected Area Governance: Review of the role of Provincial Government in protected area management. PNG Protected Area Management Guideline (No. PG1 version 1)* (2019); Leverington, et al. *Transitions for PNG's existing protected areas* (2019).

²²¹ Leverington *A guide to protected area types in PNG* (2019).

²²² Section 49(1).

²²³ Section 20(2).

²²⁴ Section 26(2).

²²⁵ Section 26(2).

²²⁶ Section 26(3).

²²⁷ Section 59.

²²⁸ Section 60.

protected areas. The Livelihoods Committee has the function of facilitating funding²²⁹ and coordinating benefit sharing agreements to support sustainable livelihoods within PNG's protected areas.²³⁰

Importantly, the criterion of an OECM explicitly states that OECMs and protected areas must be mutually exclusive. However, the Protected Areas Act could provide an opportunity to foster clarity and consistency across a network of protected areas and OECMs.

4.2.4 Fauna (Protection and Control) Act (1966)

The Fauna (Protection and Control) Act²³¹ (repealed) pre-dates PNG's independence, with its original intent being to regulate hunting practices.²³² The Act was amended several times to "remove the elements of colonial paternalism" and give greater recognition to the aspects of custom acknowledged within the Constitution.²³³ The Act made provisions for the protection, control, harvest, and destruction of fauna²³⁴ by declaring the protected species as property of the state²³⁵ and vested to the Managing Director of CEPA as the Conservator of Fauna.²³⁶ Importantly, protection under the Act was accorded to fauna only and did not explicitly include habitats and biodiversity generally. The Act afforded a weak level of protection as it did not preclude the possibility of a mining tenement, forestry permit, or forest management agreement being issued or concluded with respect to the resources within the boundaries of protected areas.²³⁷

This Act has been repealed by the Protected Areas Act.²³⁸ However, as the most extensively used legislation to create protected areas in PNG²³⁹ it may provide insights for recognising OECMs. The Act provided for three types of protected areas: sanctuaries,²⁴⁰ protected areas "in relation to a species or class of animals",²⁴¹ and Wildlife Management Areas (WMA).²⁴² The new Protected Areas Act has repealed all provisions relevant to Sanctuaries and Protected Areas under this Act. However, as the new Act lacks transitional provisions for these protected area types, their future status is uncertain.²⁴³

²²⁹ Section 35.

²³⁰ Section 36.

²³¹ *Fauna (Protection and Control) Act 1966 (Chapter 154)*.

²³² Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud* 609.

²³³ *Ibid*.

²³⁴ Preamble.

²³⁵ Section 7.

²³⁶ Section 4.

²³⁷ *GoPNG PNG protected area policy discussion paper* (2011) 11; *Kwa Biodiversity Law and Policy in PNG* (2004) 99; Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud* 609-610.

²³⁸ Preamble and section 80.

²³⁹ Leverington, et al. *Transitions for PNG's existing protected areas* (2019) 5-6.

²⁴⁰ Section 11.

²⁴¹ Section 13.

²⁴² Section 15.

²⁴³ This may be because Schedule 2 of the Protected Areas Act does not identify any areas gazetted under these protected area types. However, this does not align with the data provided by UNDP & CEPA *PNG Biodiversity* (accessed September 2024).

WMAs are the most numerous protected area type and collectively cover the greatest area in PNG.²⁴⁴ Although the Act was perceived as innovative²⁴⁵ as it allowed for consultation with local landowners and local-level government,²⁴⁶ the process and procedures for consultation were not defined nor required. A failure to consult with the local landowners and the LLG did not nullify the Minister's declaration of a WMA.²⁴⁷ Despite explicit provisions for FPIC, local landowners were expected to assume management roles through a management committee²⁴⁸ and develop a management plan. Powers were granted to local rangers to monitor²⁴⁹ and undertake enforcement in the protected areas established by the Act.²⁵⁰ The lack of powers for the state to engage in management, enforcement, and prevention of exploitation of resources may have contributed to the limited long-term success of many WMAs.²⁵¹ Future legal frameworks for OECMs may learn from the experience of implementing the Fauna Act.

4.2.5 Conservation Areas Act (1978)

The Conservation Areas Act²⁵² (repealed) was established shortly after independence to broadly provide for and manage the conservation of sites and areas of biological, topographical, geological, historical, scientific, or social importance.²⁵³ Although the Act existed for over four decades, it had only been successfully used twice. The YUS Conservation Area was gazetted in 2009²⁵⁴ and the Managalas Conservation Area in 2017.²⁵⁵ This Act has been repealed by the Protected Areas Act.²⁵⁶ The new legislation provides for the gazetted Conservation Areas to transition to CCAs.²⁵⁷ Nevertheless, the provisions of this Act may provide lessons learned for recognising, regulating, and reporting OECMs.

The process to recognise a conservation area could be initiated by the Minister, a person, group, or authority.²⁵⁸ However, the Minister had full discretion to progress the recommendation to the National Executive Council.²⁵⁹ While a conservation area may have been declared on customary land, the Act did not adequately address the principle of FPIC, giving the ultimate decision-making authority to the government.

²⁴⁴ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 24.

²⁴⁵ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law* 4; Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 18.

²⁴⁶ Section 15.

²⁴⁷ Section 15.

²⁴⁸ Section 16.

²⁴⁹ Section 23.

²⁵⁰ Section 22.

²⁵¹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 16; GoPNG PNG protected area policy discussion paper (2011) 74.

²⁵² *Conservation Areas Act 1978* (Chapter 362).

²⁵³ Preamble.

²⁵⁴ PNG National Gazette No. G5, 9 January 2009.

²⁵⁵ PNG National Gazette No. G232, 22 March 2017. This protected area is missing from Schedule 2 that describes existing protected areas. *Protected Areas Act* (No. 9 of 2024).

²⁵⁶ Preamble and section 80.

²⁵⁷ *Protected Areas Act* (No. 9 of 2024).. Section 30(3)(e).

²⁵⁸ Section 12.

²⁵⁹ Section 16.

The Act prescribed the creation of site-level Conservation Area Management Committees (CAMCs). The CAMCs were tasked with preparing and implementing area management plans, developing rules and overseeing monitoring activities.²⁶⁰ These CAMCs were intended to represent the landowners, provincial government, and LLG of the respective conservation area.²⁶¹ While the Act provided for shared governance arrangements, decisions were ultimately subject to the approval of the Minister.²⁶²

Once an area was recommended as a conservation area, the Minister was given considerable power regarding the permission for future development within it. Although the landowners or resource users generally could only use the land as per the management plan,²⁶³ the Minister could grant permission for development through an application process.²⁶⁴ While some considered this a robust arrangement for promoting long-term conservation,²⁶⁵ others question the constitutionality of the state assuming this degree of power over land subject to private or communal property rights without compensation.²⁶⁶ This seemingly flexible arrangement could have allowed for unwanted development as there were no options for administrative appeal.

4.3 LEGAL FRAMEWORKS RELEVANT TO LAND, LAND-USE AND PLANNING

Land throughout the Pacific is scarce²⁶⁷ and may require proper planning mechanisms to balance the needs of people and the environment. In PNG, it is widely acknowledged that legal frameworks must adequately account for and recognise customary tenure as the majority of land is held outside of government control.²⁶⁸ The overarching land, land-use, and planning legislation that creates the enabling environment for OECMs includes the Planning and Monitoring Responsibility Act,²⁶⁹ Physical Planning Act,²⁷⁰ Lands Act,²⁷¹ and Maritime Zones Act.²⁷² These provide the mechanisms to integrate OECMs into the broader policy environment. The Planning and Monitoring Responsibility Act and Physical Planning Act establish the linkages between the national planning framework and budget allocations. The Lands Act and Maritime Zones Act create the regulatory frameworks for the terrestrial and marine environments.

²⁶⁰ Section 26.

²⁶¹ Section 25(3).

²⁶² Section 27(2).

²⁶³ Section 31(1)(a).

²⁶⁴ Section 32.

²⁶⁵ Beehler & Kirkman *Lessons Learned from the Field* (2013) 18; Dabek & Wells "Creating the first conservation area in PNG" in *Tree kangaroos* (2021) 139.

²⁶⁶ GoPNG *PNG protected area policy discussion paper* (2011) 10.

²⁶⁷ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law* 12.

²⁶⁸ Ibid. ; Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv* 103.

²⁶⁹ *Planning and Monitoring Responsibility Act* (No. 1 of 2016).

²⁷⁰ *Physical Planning Act* (No. 32 of 1989).

²⁷¹ *Land Act* (No. 45 of 1996).

²⁷² *Maritime Zone Act* (No. 47 of 2015).

A discussion on land would perhaps be incomplete without acknowledging the role and influence of the Land Groups Incorporated Act,²⁷³ Land Registration Act,²⁷⁴ and Land Dispute Settlement Act.²⁷⁵ Collectively, these acts seek to facilitate the mobilisation of land and resolve land ownership disputes. In PNG, land is a central component of identity, community membership, and livelihood.²⁷⁶ Given the geography and dependency upon locally available natural resources,²⁷⁷ these frameworks will enable and support the regulation of OECMs. The array of legal frameworks relevant to land, land-use, and planning could contribute to challenges for providing a coherent approach for recognising, regulating, and reporting OECMs.

4.3.1 Planning and Monitoring Responsibility Act (2016)

The Planning and Monitoring Responsibility Act²⁷⁸ seeks to establish PNG's national development frameworks, link annual budgets with plans, and foster compliance by imposing duties and responsibilities upon state actors.²⁷⁹ The Act establishes the order of planning frameworks²⁸⁰ and directs all state entities to ensure their respective plans comply and are consistent with those developed under this framework.²⁸¹ The national planning framework is formatted to be “cascading” from the Constitution down to the National Strategy for Responsible Sustainable Development (StaRS),²⁸² Vision 2050,²⁸³ Medium-Term Development Plan (MTDP), sector plans,²⁸⁴ annual budgets for MTDP implementation and finally any other documents.²⁸⁵ The national department responsible for planning and monitoring is given the duty to broadly consult state actors in developing and reviewing these frameworks.²⁸⁶

The StaRS seeks to foster a long-term direction for growth, equity, and sustainability for present and future generations.²⁸⁷ Vision 2050 establishes the strategic direction for PNG from 2010-2050 built upon the “seven pillars” of human capital development, gender, youth and people empowerment; wealth creation; institutional development and service delivery; security and international relations; environment sustainability and climate change; spiritual, cultural and community development; and strategic planning, integration and control.²⁸⁸ The MTDP is a five-year plan outlining the priorities of the national government.²⁸⁹ The current plan covers the period from 2023-2027 to which sector, provincial, and district

²⁷³ *Land Groups Incorporation Act 1974 (Chapter 147)*.

²⁷⁴ *Land Registration Act 1981 (Chapter 191)*.

²⁷⁵ *Land Disputes Settlement Act 1975 (Chapter 45)*.

²⁷⁶ Yala “Rethinking customary land issues in Papua New Guinea” (2019).

²⁷⁷ vanNimwegen, et al. *Conserving our sea of islands* (2022) 167.

²⁷⁸ *Planning and Monitoring Responsibility Act (No. 1 of 2016)*.

²⁷⁹ Preamble.

²⁸⁰ Section 4(2).

²⁸¹ Section 8(1)(a).

²⁸² *GoPNG National Strategy for Responsible Sustainable Development for Papua New Guinea (StaRS)*.

²⁸³ *GoPNG Papua New Guinea Vision 2050*.

²⁸⁴ This Act only provides the for the hierarchal position of sector plans. These plans may be mandated and described within the correlating legislation.

²⁸⁵ Section 4.

²⁸⁶ Section 3(2).

²⁸⁷ *GoPNG PNG StaRS* 15.

²⁸⁸ *GoPNG Papua New Guinea Vision 2050* 3.

²⁸⁹ Section 1(1).

development plans align.²⁹⁰ These require approval of the NEC prior to taking effect.²⁹¹ All state bodies are required to align plans under their mandates.²⁹² The inclusion of OECMs within the planning framework may facilitate their recognition as a national priority that could compel consideration by decision-makers and potentially provide access to government funding.

4.3.2 Physical Planning Act (1989)

The overall objective of the Physical Planning Act²⁹³ and Regulations²⁹⁴ is to regulate planning at both the national and provincial levels²⁹⁵ with all land throughout the state subject to the provisions of the Act.²⁹⁶ Although the Act generally defines a physical planning area as an urban area,²⁹⁷ it does allow for the national or a provincial Minister to declare other areas as physical planning areas.²⁹⁸ Planning matters that are deemed to be in the national interest or overlap with two or more provinces are the responsibility of the national government, while all others fall within the mandate of the provincial government.²⁹⁹

The Act establishes the National Physical Planning Board³⁰⁰ and Provincial Physical Planning Boards,³⁰¹ which are tasked with granting planning permissions. A provincial board may appoint and delegate powers to a local physical planning board.³⁰² CEPA serves as a member of the national board to advocate for environmental and conservation interests.³⁰³ Although the provincial boards do not have explicit representation for this sector,³⁰⁴ the Act does give some notable recognition to *in-situ* conservation. All decision-makers are obliged to have regard to a number of factors, including the provisions of the Environment Act and Conservation Areas Act, environmental impacts and potential means for protection, social and economic considerations, and any representations made by a public authority or general public, amongst others.³⁰⁵ Perhaps also relevant to this thesis is the power of the board to order the preservation of trees within a physical planning area.³⁰⁶

²⁹⁰ *GoPNG MTDP IV (2023-2027)* 3-7.

²⁹¹ Section 3(3).

²⁹² Section 8(1)(a).

²⁹³ *Physical Planning Act (No. 32 of 1989)*.

²⁹⁴ *Physical Planning Regulations (No. 6 of 1990)*.

²⁹⁵ Preamble.

²⁹⁶ Section 2(2).

²⁹⁷ Section 3.

²⁹⁸ Section 67-68.

²⁹⁹ Section 4(1).

³⁰⁰ Section 9.

³⁰¹ Section 20.

³⁰² Section 29.

³⁰³ Section 9(d).

³⁰⁴ Section 20.

³⁰⁵ Section 5.

³⁰⁶ Section 82. Except as permitted by the Forestry Act. Section 82(4).

The Minister, either national³⁰⁷ or provincial,³⁰⁸ may order a development plan to be prepared for any area within PNG.³⁰⁹ These may encompass provincial,³¹⁰ urban,³¹¹ local,³¹² or subject development plans.³¹³ The plans may contain written documents, maps, existing land uses, and proposed zoning.³¹⁴ Development is defined as “the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land”.³¹⁵ However, it does not include land use for agriculture or forestry.³¹⁶ A development plan may recommend that land be reserved from future leases as per the Lands Act.³¹⁷ The respective physical planning boards may approve development plans³¹⁸ after a period for comment by potentially affected state and non-state actors.³¹⁹ The inclusion of OECMs within the plans may foster alignment and integration across sectors.

The National Sustainable Land Use Policy (NSLUP) was introduced by the Department of Lands and Physical Planning to improve land use planning in PNG through the Physical Planning Act.³²⁰ This policy broadly defines three zones which include development promotion, conservation, and rural sustainability areas.³²¹ The latter two zones may be the most relevant for recognising and regulating OECMs. Notably, however, these zones are merely suggestive, with undefined boundaries, and may be further refined through the lower-level development planning process.³²² The land-use planning instruments may be strengthened as the NSLUP calls for these to be legal instruments.³²³ The undertaking of land-use plans at various levels, including the ward, LLG, district, and provincial levels, should seek to foster FPIC and employ participatory approaches.³²⁴ Community input is encouraged to define and identify various land-use areas, including those for conservation.³²⁵ It is suggested that the NSLUP be reviewed and updated at a minimum within a ten-year timeframe.³²⁶

4.3.3 Lands Act (1996)

When established, the Lands Act³²⁷ sought to consolidate and amend legislation relating to land³²⁸ through a new comprehensive regulatory framework. The Act confers all land, other than customary land, to be state property and subject

³⁰⁷ Section 50.

³⁰⁸ Section 51.

³⁰⁹ Section 44.

³¹⁰ This spans the whole of a province, integrating various aspects of sustainable development. Section 46.

³¹¹ Section 47.

³¹² This plan is more narrowly focused and may provide greater detail. Section 48.

³¹³ Section 49.

³¹⁴ The requirements and procedures for the development plans are contained in the *Physical Planning Regulations (No. 6 of 1990)*.

³¹⁵ Section 3.

³¹⁶ Section 3.

³¹⁷ Section 56(2).

³¹⁸ Section 55.

³¹⁹ Section 59.

³²⁰ *GoPNG National Sustainable Land Use Policy of Papua New Guinea (2022-2023)* 1.

³²¹ *Ibid.* 11-13 and 16-19.

³²² *Ibid.* 9-10.

³²³ *Ibid.* 25.

³²⁴ *Ibid.* 26.

³²⁵ *Ibid.*

³²⁶ *Ibid.* 29.

³²⁷ *Land Act (No. 45 of 1996)*.

³²⁸ Preamble.

to estates, rights titles or interests under the law.³²⁹ It also provides a mechanism for the acquisition, either compulsory or through agreement, of land by the Minister on behalf of the state³³⁰ and includes the potential for compensation.³³¹ An acquisition may be in the form of an easement, right, power, privilege, or other interest.³³² The Act provides for several lease types, their terms, and conditions, including limits on duration not to exceed 99 years.³³³ In connection with several other pieces of legislation discussed within this chapter, the Act gives the Minister powers to reserve land³³⁴ from future lease.³³⁵ Such land may be given a special purposes lease and registered to the state.³³⁶

Customary land is defined as “land that is owned or possessed by an automatic citizen or community of automatic citizens by virtue of rights of a proprietary or possessory kind that belong to that citizen or community and arise from and are regulated by custom”.³³⁷ The Act confirms customary land, including any rights, may not be sold, leased or disposed of to anyone other than citizens of PNG and, in doing so, must comply with custom.³³⁸ Customary land mobilisation in PNG has faced challenges over the years.³³⁹ A caveat in the Act allows the Minister to acquire and lease customary land on behalf of the customary landowners.³⁴⁰ For example, the special agricultural and business leases (SABL), through the state’s lease-lease back scheme,³⁴¹ provide a mechanism to engage customary landowners in economic activities and provide evidence of title to the land. However, the use and approval of SABLs have been contested,³⁴² with a Commission of Inquiry (COI) being launched in 2011.³⁴³ The COI found that the legal framework contained “loop holes, inadequacies or permissive ambiguities that are being used to abuse... and hijack land use.”³⁴⁴ The COI further found that the Act lacked procedural guidelines for land acquisition and did not provide adequate protection for customary landowners.³⁴⁵ Despite the COI’s recommendations to repeal the relative provisions, they remain. However, the Government stopped issuing SABLs. This may serve as a lesson for needing robust legal frameworks for customary lands.

³²⁹ Section 4.

³³⁰ Section 7.

³³¹ Part IV.

³³² Section 8(1).

³³³ Such as agricultural leases, section 87-88; pastoral leases, section 89-91; business and residence leases, section 92-95; mission leases, section 96-98; special purposes leases, section 100-101; SABL, section 102.

³³⁴ Including government land or land that is subject to state lease.

³³⁵ Section 49.

³³⁶ Section 52.

³³⁷ Section 2(1).

³³⁸ Section 132.

³³⁹ For a historical review and critique of the legal frameworks related to customary land and mobilisation see: Filer “Two steps forward, two steps back: The mobilisation of customary land in Papua New Guinea” (2019) *Development Policy Centre Discussion Paper*. Chand “Registration and release of customary-land for private enterprise: Lessons from Papua New Guinea” (2017) *Land Use Policy*.

³⁴⁰ Section 10(2).

³⁴¹ Section 4.

³⁴² The Cairns Declaration was a catalyst which called for a moratorium on SABLs due to the negative impact on biodiversity as a result of forest clearing activities.

³⁴³ Numapo “Commission of inquiry into the special agricultural and business lease (SABL) - Final Report” (2013).

³⁴⁴ Ibid. 4.

³⁴⁵ Ibid. 255.

4.3.4 Land Groups Incorporation Act (1974)

The Land Groups Incorporation Act³⁴⁶ was established to support local people and groups to “hold, manage and deal” with their customary lands.³⁴⁷ The Act seeks to facilitate this goal through economic participation, certainty of title, dispute settlement mechanisms, and recognition of certain landowning customary groups as legal corporations.³⁴⁸ An incorporated lands group (ILG) recognised under the Act is deemed a corporation with the associated status, powers, and duties.³⁴⁹ Given the prevalence of communally-held customary land throughout PNG, the contemporary legal frameworks have adopted the establishment of an ILG as a precondition to facilitate consent for entering into various agreements. Where OECMs may be recognised under existing legislation, landowners may be encouraged to first establish an ILG.

The Act establishes the requirements for an ILG application, including the group’s constitution, membership list, and external boundaries of communal lands, amongst other information required by the Registrar.³⁵⁰ The group’s constitution is expected to provide further details such as the group’s name, qualification for membership, relevant customs, and dispute settlement.³⁵¹ The Registrar for ILGs is an appointed position made by the Minister with notice given in the national gazette.³⁵² Where the Registrar deems the characteristics of the group as “temporary, evanescent or doubtful of a corporate nature”, they may refuse the application.³⁵³ Copies of all applications, certificates, comments received during the notice period, and other relevant information are to be maintained by the Registrar.³⁵⁴ A misrepresentation to the Registrar is deemed an offence with the associated penalty of 200 Kina or imprisonment of less than six months.³⁵⁵

4.3.5 Land Disputes Settlement Act (1975)

Customary land disputes, including the location of boundaries,³⁵⁶ may be settled as per the provisions of the Land Disputes Settlement Act.³⁵⁷ This Act may prove important as the criteria of OECMs require the demarcation of boundaries. The dispute mediation process outlined in the Act is expected to employ locally appropriate principles and customs to promote self-determination.³⁵⁸ Land mediators may be appointed by a provincial land disputes committee, in consultation with the respective LLG and village court, and include village magistrates or other individuals.³⁵⁹

³⁴⁶ *Land Groups Incorporation Act 1974 (Chapter 147)*. .

³⁴⁷ Preamble

³⁴⁸ Section 1.

³⁴⁹ Sections 11-13.

³⁵⁰ Section 5(2).

³⁵¹ Section 8(1).

³⁵² Section 3.

³⁵³ Section 5(4).

³⁵⁴ Section 7.

³⁵⁵ Section 29.

³⁵⁶ Section 3(1).

³⁵⁷ *Land Disputes Settlement Act 1975 (Chapter 45)*.

³⁵⁸ Section 1.

³⁵⁹ Section 11.

The process of mediation seeks to foster “peace and harmony” through “just and amicable” dispute settlements.³⁶⁰ The outcome of land mediation includes a record of agreement that is clearly understood and publicly acknowledged by all parties.³⁶¹ An endorsement by the Local Land Court binds the agreement upon the relevant parties.³⁶² Where land disputes are referred to a Local Land Court under the appropriate jurisdiction,³⁶³ the court is empowered to consider the role of custom³⁶⁴ and apply the relevant customs when making orders.³⁶⁵

4.3.6 Maritime Zones Act (2015)

The Marine Zone Act³⁶⁶ serves as the primary legal framework for ocean governance and gives effect to UNCLOS.³⁶⁷ This Act contains provisions for the protection of the marine environment³⁶⁸ and underwater cultural heritage.³⁶⁹ It identifies and provides for the jurisdiction of internal waters,³⁷⁰ archipelagic waters,³⁷¹ the territorial sea,³⁷² coastal waters,³⁷³ the contiguous zone,³⁷⁴ the continental shelf,³⁷⁵ and the exclusive economic zone (EEZ).³⁷⁶ The Act grants the sovereign right to the state to conserve and manage natural resources within the EEZ, including the waters, seabed, and subsoil.³⁷⁷

The Minister for Environment and Conservation may consult with the Minister for Fisheries to declare different types of marine protected areas over the waters of PNG,³⁷⁸ including the underlying seabed, the associated land and wetlands.³⁷⁹ The protected area may be designated as a fishing reserve, marine park, marine reserve, or a particularly sensitive sea area.³⁸⁰ The Act, however, not only fails to define these types of protected areas but also does not offer guidance regarding tenure or user rights within them. The Act empowers the Ministers to collectively consult to implement prohibitions and attach conditions to certain activities undertaken within the protected areas declared under the Act.³⁸¹

³⁶⁰ Section 15(1).

³⁶¹ Section 18(1).

³⁶² Section 20(b).

³⁶³ Section 31-32.

³⁶⁴ Section 39(3).

³⁶⁵ Section 39(2).

³⁶⁶ *Maritime Zone Act (No. 47 of 2015)*.

³⁶⁷ Preamble.

³⁶⁸ Sections 39-44.

³⁶⁹ Sections 49-50 and in accordance with the Convention on the Protection of the Underwater Cultural Heritage contained in Schedule 7 of the Act.

³⁷⁰ Part II.

³⁷¹ Part III.

³⁷² Part IV.

³⁷³ Part V.

³⁷⁴ Part VII.

³⁷⁵ Part IX.

³⁷⁶ Part VIII.

³⁷⁷ Section 28(1)(a)(i).

³⁷⁸ Defined as the “internal waters, the archipelagic waters, the territorial sea, the contiguous zone, the exclusive economic zone and the water superjacent to the continental shelf”. Section 2(1).

³⁷⁹ Section 40(1).

³⁸⁰ Section 40(2).

³⁸¹ Section 40(3).

Protected areas established by a local or provincial government are subject to this Act.³⁸² Although the Protected Areas Act gives effect to this Act,³⁸³ the protected area types referenced within this Act are not explicit.³⁸⁴ Within the scope of this thesis, this Act may be relevant for LMMAs and wetland areas, such as Ramsar sites, that may be potential OECMs.

4.4 LEGAL FRAMEWORKS RELEVANT TO NATURAL RESOURCES

While the natural resource policy and laws of PNG primarily focus on exploitation, certain provisions could potentially recognise, regulate, and report OECMs. The key legal frameworks with possible application to OECMs include the Forestry Act,³⁸⁵ Fisheries Management Act,³⁸⁶ and Mining Act.³⁸⁷ The latter two laws entrust the associated natural resources to the state, while the Forestry Act contains provisions for landowners to maintain their ownership rights over the land, with only the resource rights to the timber being transferred to a permit holder. These laws may highlight opportunities for OECMs where conservation is a primary, secondary, or ancillary objective.

4.4.1 Forestry Act (1991)

The Forestry Act³⁸⁸ was established to regulate PNG's national forests through wise use and development.³⁸⁹ It is complemented by the Forestry Regulations,³⁹⁰ National Forest Policy,³⁹¹ National Forest Plan,³⁹² PNG Logging Code of Conduct,³⁹³ and National Forest Development Guidelines.³⁹⁴ As over 70% of the landmass of PNG contains some kind of forested landscape,³⁹⁵ the Act has potentially broad application for potential OECMs.

The Act establishes the PNG Forest Authority (PNGFA)³⁹⁶ to manage, develop, and protect domestic forest resources.³⁹⁷ Forests are classified³⁹⁸ as production forests, protection forests, reserve forests, salvage forests, and land suitable for

³⁸² *Protected Areas Act (No. 9 of 2024)*. Section 26-27.

³⁸³ *Ibid.* Section 4(1)(c).

³⁸⁴ The Protected Areas Act references LMMAs and marine protected areas but does not explicitly include the protected area types recognised by the MZA. *Ibid.* Section 22(1)(b).

³⁸⁵ *Forestry Act (No. 30 of 1991)*.

³⁸⁶ *Fisheries Management Act (No. 48 of 1998)*.

³⁸⁷ *Mining Act (No. 20 of 1992)*.

³⁸⁸ *Forestry Act (No. 30 of 1991)*.

³⁸⁹ Preamble.

³⁹⁰ *Forestry Regulations (No. 3 of 1998)*.

³⁹¹ *GoPNG National Forest Policy (1991)*.

³⁹² The first National Forest Plan was finalised in 1996. According to the literature there have been subsequent efforts to update the plan. However, it remains under review. This thesis has drawn context from *GoPNG National Forest Plan (draft) (2010)*; *PNGFA Papua New Guinea's 2019 Voluntary Country Report to the United Nations Forum on Forest (2019)* 7-8.

³⁹³ *GoPNG Papua New Guinea Logging Code of Practice (1996)*. Revised in 2021.

³⁹⁴ *GoPNG National Forestry Development Guidelines (2009)*.

³⁹⁵ Bryan & Shearman (eds) *The State of the Forests of Papua New Guinea 2014: Measuring Change Over the Period 2002-2014 (2015)* 13.

³⁹⁶ Section 1.

³⁹⁷ Section 6.

³⁹⁸ Land is also classified to identify areas which is unsuitable to logging such as areas with significant slope, high altitude, tower karst, mangroves, and inundation. *GoPNG National Forest Plan (draft) (2010)* Appendix 3.

reforestation.³⁹⁹ Relevant to this thesis, protection forests are categorised by location, topographic constraints, and ecological, cultural or environmental factors.⁴⁰⁰ Reserve forests are those awaiting a classification decision but may include areas suitable for protection.⁴⁰¹ While the protection forests and reserve forests are provided within the National Forest Policy and National Forest Plan, they are not explicitly mentioned in the Act.

The Act contains several tools for managing forests, including the National Forest Plan,⁴⁰² Provincial Forest Plans,⁴⁰³ development option study or feasibility study,⁴⁰⁴ EIAs,⁴⁰⁵ project statements by permit holders,⁴⁰⁶ five-year working plans,⁴⁰⁷ and annual logging plans.⁴⁰⁸ Each province is responsible for developing a Provincial Forest Plan⁴⁰⁹ which is incorporated into the National Forest Plan⁴¹⁰ upon approval by the Minister.⁴¹¹ The National Forest Plan is prepared by the PNGFA⁴¹² and referred to the NEC for approval.⁴¹³ These plans may account for both forest development activities as well as conservation and protection. Additionally, several of the Key Standards identified in the Logging Code of Practice, by which timber permit holders must comply, seek to limit environmental degradation.⁴¹⁴ This includes establishing minimum buffer zones for bodies of water, village areas, cultural sites, reserves, and conservation areas.⁴¹⁵ All applications for a timber permit must submit an environmental plan approved by CEPA as per the Environment Act 2000⁴¹⁶ for approval by the Minister.⁴¹⁷ The Protected Areas Act asserts that a timber permit will not be issued unless at least 10% of the harvestable area is set aside for conservation and administered by CEPA as a protected area.⁴¹⁸

As the majority of forests exist on customary land, the Act accords a procedural right to customary landowners to be recognised in all transactions.⁴¹⁹ The Act explicitly provides that the transfer of timber rights under a forest management agreement will not affect the right of customary ownership of the land.⁴²⁰ For a forest management agreement to take effect, consent must be given by the customary landowners.⁴²¹ The primary mechanism for gaining consent may be

³⁹⁹ Ibid. 5; GoPNG *National Forest Policy* (1991) 5.

⁴⁰⁰ GoPNG *National Forest Plan (draft)* (2010) 5-6; GoPNG *National Forest Policy* (1991) 5.

⁴⁰¹ GoPNG *National Forest Plan (draft)* (2010) 5-6; GoPNG *National Forest Policy* (1991) 5.

⁴⁰² Section 47. GoPNG *National Forest Plan (draft)* (2010).

⁴⁰³ Section 49.

⁴⁰⁴ Section 62.

⁴⁰⁵ Section 77.

⁴⁰⁶ Section 100.

⁴⁰⁷ Section 101.

⁴⁰⁸ Section 102.

⁴⁰⁹ Section 49(1).

⁴¹⁰ Section 47(2)(c)(iv).

⁴¹¹ Section 49(6).

⁴¹² Section 7(1)(b).

⁴¹³ Section 47(4).

⁴¹⁴ GoPNG *PNG Logging Code of Practice* (1996).

⁴¹⁵ Ibid. Key Standard Number 2.

⁴¹⁶ Section 77(2)(c)(iii).

⁴¹⁷ Section 73(1).

⁴¹⁸ *Protected Areas Act (No. 9 of 2024)*. Section 19(2) and 19(3).

⁴¹⁹ Section 46.

⁴²⁰ Section 56.

⁴²¹ Section 57.

through an ILG.⁴²² Alternatively, the Act allows that consent may be recognised where 75% of adult members give written consent.⁴²³

4.4.2 Fisheries Management Act (1998)

The Fisheries Management Act⁴²⁴ and Regulations⁴²⁵ endeavour to foster long-term conservation, management, and sustainable use of marine living resources.⁴²⁶ It applies to all fishing activities except for personal consumption, sport, custom, or artisanal purposes.⁴²⁷ The resource and fishing rights of the customary owners are acknowledged under the Act.⁴²⁸ Fish is defined as “any water-dwelling aquatic or marine animal or plant, alive or dead, and includes their eggs, spawn, spat and juvenile stages, and any of their parts, but does not include any species of whale”.⁴²⁹ A fishery comprises of one or more fish stocks with the collective intent of conservation, development, or management.⁴³⁰

The Act establishes the National Fisheries Authority (NFA)⁴³¹ with the power to manage domestic fisheries, make recommendations regarding the granting of licenses, cooperate with various actors, develop and manage projects, collect data, make policy recommendations and establish procedures.⁴³² The Managing Director serves as the Chief Executive Officer,⁴³³ with a Board providing general control and guidance for the NFA.⁴³⁴ CEPA holds a statutory ex-officio position on the Board.⁴³⁵ The Minister, the Board, and the Managing Director are obliged to consider internationally accepted principles and best practices, such as those associated with transparency, accountability, sustainable use, and the best available science when exercising powers under the Act.⁴³⁶ The Act also mandates the conservation and management of fisheries and marine living resources for both current and future generations through the precautionary⁴³⁷ and ecosystem approach.⁴³⁸

The Act employs several tools to realise the sustainable management of fisheries, including fishery management plans,⁴³⁹ access agreements,⁴⁴⁰ fisheries management agreements,⁴⁴¹ licences,⁴⁴² and the power to make a wide range of

⁴²² Section 57(1).

⁴²³ Section 57(2)(b).

⁴²⁴ *Fisheries Management Act (No. 48 of 1998)*.

⁴²⁵ *Fisheries Management Regulations (No. 2 of 2000)*.

⁴²⁶ Section 25(1).

⁴²⁷ Section 3(2).

⁴²⁸ Section 26.

⁴²⁹ Section 2(1).

⁴³⁰ Section 2(1).

⁴³¹ Section 5(1).

⁴³² Section 6.

⁴³³ Section 16(1)(a).

⁴³⁴ Section 7(1).

⁴³⁵ Section 8(1)(c).

⁴³⁶ Section 25(2).

⁴³⁷ Section 25(3).

⁴³⁸ Section 25(4).

⁴³⁹ Section 28.

⁴⁴⁰ Section 33.

⁴⁴¹ Section 37.

⁴⁴² Part IV.

regulations.⁴⁴³ A fisheries management plan should clearly identify the management objectives, characteristics of the fishery, potential adverse impacts from fishing activities, and any relevant customary rights or practices.⁴⁴⁴ The provisions of a fishery management plan are given the same status as the conditions attached to a licence.⁴⁴⁵ The Managing Director may recommend that the Board gives notice in the National Gazette for specific prohibitions concerning conservation.⁴⁴⁶ This may be broadly or narrowly interpreted with regard to the timeframe, applicable areas, and fish or classes of fish.⁴⁴⁷ This Act may be relevant for managing and regulating the vertical dimension of OECMs.

4.4.3 Mining Act (1992)

The Mining Act⁴⁴⁸ provides the regulatory framework for the mining of minerals.⁴⁴⁹ The Act vests all minerals as property of the state.⁴⁵⁰ It further qualifies that the exploration, mining, and the granting of tenements are permissible on all land within the state.⁴⁵¹ As defined by the Act, land encompasses the terrestrial surface area and water, as well as the foreshore, the offshore seabed of the territorial sea, and the bed of rivers, streams, estuaries, lakes, and swamps.⁴⁵² Acknowledging that accessing minerals may impede upon landowners' rights,⁴⁵³ the Act provides recognition to those who may be potentially affected by the granting of a special mining lease to be heard through a development forum generally before the granting of any approvals.⁴⁵⁴ This provision encompasses consultation only and does not necessitate the need for consent. While the Minister is given this statutory obligation, there is a degree of discretion as to whom may be invited to represent the views of the applicant and the landowners to whom the application relates, as well as representatives from the national and provincial government.⁴⁵⁵ Notably, the responsibility to assemble a development forum extends only to a special mining lease that follows an exploration licence.⁴⁵⁶ There is no consultation process for an exploration licence.

The Act provides for various types of licences and leases. However, bearing the scope of this thesis, the relevant provision is that which gives the Minister the power to give notice for land to be reserved from exploration and mining activities.⁴⁵⁷ A reservation may not be indefinite as it may be revoked or expire, thus allowing any applications under the Act to proceed. Additionally, land reserved under any other Act, such as the Lands Act,⁴⁵⁸ may be made available for exploration and mining with the consent of the responsible Minister.⁴⁵⁹ While this provision does not prevent exploration and mining within

⁴⁴³ Section 76.

⁴⁴⁴ Section 37(3).

⁴⁴⁵ Section 28(7).

⁴⁴⁶ Section 30(3).

⁴⁴⁷ Section 30(3).

⁴⁴⁸ *Mining Act (No. 20 of 1992)*.

⁴⁴⁹ Preamble.

⁴⁵⁰ Section 5(1).

⁴⁵¹ Section 6.

⁴⁵² Section 2.

⁴⁵³ *Kwa Biodiversity Law and Policy in PNG* (2004) 97.

⁴⁵⁴ Section 3(1).

⁴⁵⁵ Section 3.

⁴⁵⁶ Section 33(1).

⁴⁵⁷ Section 7(1).

⁴⁵⁸ See section 4.3.3 of this text.

⁴⁵⁹ Section 8(1).

some protected and conserved areas, it is qualified as necessitating high-level approval by the Minister. The Act does not mention or extend this provision to protected areas and other potential OECMs.

4.4.4 National Water Supply and Sanitation Act (2016)

The National Water Supply Act grants powers to the Water Papua New Guinea Limited⁴⁶⁰ (Water PNG) to maintain any stream and water courses for the supply of water,⁴⁶¹ including the taking of water in, under, or on any land.⁴⁶² With Ministerial approval, the powers and functions of Water PNG may be delegated to a local authority or LLG.⁴⁶³ Importantly, Water PNG is obliged to supply water in the best interest of PNG people rather than for commercial advantage through the inclusion of the “community service obligation”.⁴⁶⁴ The company may have an easement for maintaining waterworks on, above or under land it does not own.⁴⁶⁵ Notably, the Act does not contain further provisions relevant to maintaining or conserving any areas under its remit.

4.5 LEGAL FRAMEWORK RELEVANT TO CLIMATE CHANGE

As an island state, PNG is particularly vulnerable to the adverse events associated with climate change. These events have implications for the outcomes of area-based conservation and biodiversity.⁴⁶⁶ The National Climate Compatible Development Management Policy⁴⁶⁷ emphasises the cross-cutting role of climate change in the plans, policies, and activities of various government bodies and sectors. Provincial Climate Change Committees are positioned to implement the national policy and strategy through on-the-ground activities and foster partnerships with non-state actors.⁴⁶⁸

The Climate Change (Management) Act⁴⁶⁹ was enacted to encourage and manage PNG’s mitigation and adaptation activities.⁴⁷⁰ This Act gives effect to PNG’s obligations and commitments under the UNFCCC and Paris Agreement.⁴⁷¹ The Act establishes the Climate Change and Development Authority (CCDA)⁴⁷² as a statutory body with a lengthy list of functions and powers, including the general formulation, coordination, implementation and management of national climate-related activities and reporting.⁴⁷³ The CCDA is tasked with ensuring equitable participation, as well as promoting

⁴⁶⁰ As a state-owned enterprise, the Kumul Consolidated Holdings Act 2002 applies. Section 5.

⁴⁶¹ Section 4(2)(d).

⁴⁶² Section 4(2)(f).

⁴⁶³ Section 7(1).

⁴⁶⁴ Section 33.

⁴⁶⁵ Section 51.

⁴⁶⁶ *GoPNG Papua New Guinea National Biodiversity Strategic Action Plan 2019-2024* 32-33.

⁴⁶⁷ *GoPNG National Climate Compatible Development Management Policy* (2014).

⁴⁶⁸ *Ibid.* 40.

⁴⁶⁹ *Climate Change (Management) Act* (No. 19 of 2015).

⁴⁷⁰ Section 10(a).

⁴⁷¹ Section 10(b) and is complemented by the *United Nations Paris Agreement (Implementation) Act 2016* (No. 4 of 2016).

⁴⁷² Section 8(1).

⁴⁷³ Section 11(1).

and enforcing the rights of local people and communities.⁴⁷⁴ The Minister may prescribe a list of regulated sectors⁴⁷⁵ that are required to implement emission mitigation actions⁴⁷⁶ and develop adaptation plans.⁴⁷⁷ The latter could have application to OECMs through activities such as community-based mangrove planting and protection of marine areas.⁴⁷⁸

The Managing Director is appointed by the NEC⁴⁷⁹ to serve as the chief executive officer of the CCDA.⁴⁸⁰ The Act also establishes the National Climate Change Board⁴⁸¹ to oversee climate change policies, provide guidance and monitor the functions of the CCDA.⁴⁸² The Managing Director of CEPA holds an ex-officio position on the Board.⁴⁸³ The powers of the Board may be delegated to the Managing Director.⁴⁸⁴

This Act represents PNG's first endeavour to explicitly adopt FPIC into legislation. FPIC is defined as "a consultative process to obtain the consent of potentially affected landholders by engaging in an open and informed dialogue with REDD+ and other climate change-related projects in areas occupied or owned or used by landholders".⁴⁸⁵ Consent is required for climate change-related projects and should be reflected in the project agreement.⁴⁸⁶ This written agreement should also document⁴⁸⁷ landowner rights and expected benefits, a description of the project, duration, a map of area boundaries, and other "climate compatible or green growth" options.⁴⁸⁸ The expectations for implementing FPIC are expounded upon in the OCCD's Guidelines on FPIC for REDD+ in Papua New Guinea.⁴⁸⁹

4.6 IDENTIFYING POTENTIAL OECMS IN PNG

This chapter has sought to highlight PNG's legal frameworks that are potentially relevant to OECMs. This section will draw upon the legal frameworks to identify potential OECMs. While this is not an exhaustive list, it may serve as a starting point to recognise, regulate, and report potential OECMs. This section serves as a scoping exercise that applies the first two screening criteria of the site-level tool for recognising OECMs to determine the status as a protected area and management objective. The potential OECMs that meet these first two criteria will be critically reviewed further in-depth (Chapter 5) against the theoretical legal framework (Chapter 3). Importantly, the assessment of any potential OECM will

⁴⁷⁴ Section 11(1)(r), Section 11(1)(s).

⁴⁷⁵ Section 53.

⁴⁷⁶ Section 64.

⁴⁷⁷ Section 73. *GoPNG National Adaptation Plan* (2023).

⁴⁷⁸ Section 74(1)(b).

⁴⁷⁹ Section 45(1).

⁴⁸⁰ Section 44(4)(a).

⁴⁸¹ Section 12.

⁴⁸² Section 13.

⁴⁸³ Section 16(2)(b)(vi).

⁴⁸⁴ Section 15(1).

⁴⁸⁵ Section 3.

⁴⁸⁶ Section 89.

⁴⁸⁷ In English, Tok Pisin, and local language upon request. Section 90(1)(a).

⁴⁸⁸ Section 90.

⁴⁸⁹ *GoPNG Guidelines on FPIC for REDD+ in Papua New Guinea* (2014).

require consent from the governing authority. The potential OECMs referenced within this section have applied a Western lens to draw from PNG's statutory laws. Given the diversity of local customs,⁴⁹⁰ nuanced mechanisms that result in area-based conservation may be under-explored.

4.6.1 Community and locally managed areas

Although prevalent throughout PNG, the extent and coverage of community and locally managed conservation areas may be underreported within PNG's protected area network.⁴⁹¹ Domestically locally managed marine areas (LMMAs), locally managed conservation areas (LMCAs), and community conservation areas (CCAs)⁴⁹² are often traditionally managed under local custom and may have various objectives related to conservation and sustainable use.⁴⁹³ Although there is limited data regarding LMCAs and CCAs, the literature documents fourteen LMMAs recognised under a LLG law, seventeen not officially recognised, and potentially more than 80 that have been proposed or have not yet been mapped.⁴⁹⁴ Generally, LMMAs, LMCAs, and CCAs have been excluded from the international protected area estate as conservation may not be the primary management objective.⁴⁹⁵ However, the IUCN guidance explicitly identifies LMMAs as potential OECMs.⁴⁹⁶

Some LMMAs, LMCAs, and CCAs have been afforded legal status through powers granted to local and provincial governments by the OLPGLLG or have been protected under a conservation deed established through PNG's law of contract.⁴⁹⁷ Although the domestic use of conservation deeds does not have a standardised duration, the period of five to seven years is common.⁴⁹⁸ A LMMA established through the powers granted by the OLPGLLG may be included within the protected area registry.⁴⁹⁹ It will be necessary to screen each area to assess its status as a protected area, as well as the duration of legal protection to ensure it meets the OECM criteria.

⁴⁹⁰ Although it is challenging to find a source to quantify the extent of local customs and customary laws, PNG's 840 distinct living indigenous language groups are often cited as a proxy to demonstrate the diversity. Eberhard *Ethnologue* (accessed June 2025).

⁴⁹¹ At the time of writing, PNG had identified six LMMAs on the WDPA. Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 29. vanNimwegen, et al. *Conserving our sea of islands* (2022) 240; GoPNG PNG's 6th National Report to the CBD (2019) 18; Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 81; GoPNG PNG NBSAP 2019-2024.

⁴⁹² Although, the legal frameworks lacks clear decision making criteria to distinguish these tools, the guidance documents recommend CCAs encompass larger areas consisting of multiple communities represented through a board to co-manage the area with CEPA. LMCAs and LMMAs will likely retain the tradition balance of conservation and sustainable use at the local-level. Leverington, et al. *Establishing new protected areas in PNG* (2019) 8.

⁴⁹³ Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 28.

⁴⁹⁴ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 56.

⁴⁹⁵ See Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS*. Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 28.

⁴⁹⁶ MacKinnon, et al. "Protected and conserved areas: Contributing to ambitious outcomes post-2020" (May 2021) *PARKS* 8-9; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 11; Jonas, et al. "New steps of change: Beyond protected areas to consider OECMs" (2014) *PARKS* 121; Diz, et al. "Mainstreaming marine biodiversity into the SDGs" (2018) *Mar Policy*.

⁴⁹⁷ Van Helden *Lessons learned in community based conservation in Papua New Guinea* (2005) 57.

⁴⁹⁸ *Ibid*.

⁴⁹⁹ *Protected Areas Act (No. 9 of 2024)*. Section 30(4).

The new Protected Areas Act extends regional protected area status to LMMAs, LMCAs, and CCAs.⁵⁰⁰ However, it may be idealistic to assume that all community and locally managed areas will seek protected area status. Where the governance authority pursues the transition into a protected area, these will not meet the criteria of an OECM. The NSLUP also references community conservation areas. While it does not provide an explicit definition, it may be inferred that these are driven by customary landowners at the local level.⁵⁰¹ As these areas may not be protected areas nor have conservation as a primary objective, they could be potential OECMs.

4.6.2 *Ples masalai*, sacred sites, and *tambu* areas

PNG's Constitution gives recognition to the "sacred, scenic, and historical qualities" of the environment in the Fourth NGDP.⁵⁰² *Ples masalai*,⁵⁰³ sacred sites, and *tambu* areas are owned, governed, and managed as per custom by the local landowners.⁵⁰⁴ These areas recognise the customary practice of prohibiting access or regulating certain activities.⁵⁰⁵ The definition of custom adopted by the Constitution recognises the fluidity of custom to change over time and across space.⁵⁰⁶ Noting the possibility of a change in circumstance, reporting on these areas has been conservative.⁵⁰⁷ Recognising such sites could ultimately strengthen the longevity and effectiveness of conservation efforts as they build upon the specific cultural and social norms found in custom.⁵⁰⁸ In addition to the protections provided through local customary law, the employment of the OLPGLLG may fortify legal provisions as it empowers local-level governments to make laws on the protection of traditional sacred sites⁵⁰⁹ and impose fines for violations.⁵¹⁰

Although the OECM guidance discourages small areas from being recognised,⁵¹¹ these sites could prove critical for fostering ecosystem connectivity. Drawing from the experience of gazetting protected areas in PNG, landowners may not simultaneously pledge land for inclusion in area-based conservation; rather, it can be a long process of gaining support and securing FPIC.⁵¹² Locally, these pledges may be considered *tambu* areas pending the legal designation of a larger area. Although each *tambu* area may vary in size, they may contribute to the overall objective of a larger site. Recognising *tambu* sites as OECMs could fill important gaps in the protected area network, or offer legal security, as part of a pathway to becoming a protected area. *Ples masalai*, sacred sites, and *tambu* areas within a protected area may be governed and managed as per the objectives of the protected area. These would not meet the criteria of an OECM as they fall within a

⁵⁰⁰ Section 22(1).

⁵⁰¹ GoPNG *National Sustainable Land Use Policy* (2022-2023) 42.

⁵⁰² *Constitution of the Independent State of Papua New Guinea* (1975) Preamble, Goal 4.

⁵⁰³ A *ples masalai* represents a spiritual place, while *tambu* areas are considered sacred or off-limits. Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 14.

⁵⁰⁴ Leverington *A guide to protected area types in PNG* (2019) 31.

⁵⁰⁵ Telesetsky "Graun bilong mipela na mipela no tromweim: The viability of international conservation easements to protect Papua New Guinea's declining biodiversity" (2001) *Georgetown International Environmental Law Review* 752.

⁵⁰⁶ *Constitution of the Independent State of Papua New Guinea* (1975). Schedule 1.2.2 (1).

⁵⁰⁷ GoPNG *PNG's 6th National Report to the CBD* (2019) 18-19.

⁵⁰⁸ Aini, et al. "Reimagining conservation practice: Indigenous self-determination and collaboration in Papua New Guinea" (2023) *Oryx* 352-353.

⁵⁰⁹ *The Organic Law on Provincial Governments and Local-level Governments* (1995). Section 44(1)(z).

⁵¹⁰ *Ibid.* Section 44(1)(ab).

⁵¹¹ Jonas, et al. *Guidance on OECMs* (2024) 43-46.

⁵¹² Dabek & Wells "Creating the first conservation area in PNG" in *Tree kangaroos* (2021) 142.

protected area. However, sites outside of a protected area could be recognised as an OECM where they meet the established criteria.

Where a *ples masalai*, sacred site, or *tambu* area is identified and demarcated by a ward committee or district development committee, it may be considered *prima facie* a protected area regardless of being registered as per the provisions of the Protected Areas Act.⁵¹³ Where *ples masalai*, sacred sites, or *tambu* areas do not meet the IUCN definition of a protected area nor have biodiversity conservation as the primary objective, these areas may not be reported as protected areas against international obligations. However, they may have beneficial outcomes for biodiversity and could be considered as OECMs with the consent of the governance authority. Areas that overlap with protected areas may not be recognised as an OECM.

4.6.3 Reserved lands

Several legal frameworks create synergies with the Land Act to recognise reserved lands.⁵¹⁴ The CEPA Act, Mining Act, and Defence Act⁵¹⁵ all include provisions that allow for land to be reserved from future leases as per the Land Act. Reserved lands may also be recommended through development plans prepared under the guidance of the Physical Planning Act.⁵¹⁶ Reserved lands are generally not protected areas. However, where they are controlled and managed by CEPA,⁵¹⁷ they could be considered a protected area and will not qualify as an OECM. It may be necessary to critically assess these areas as OECMs to reduce the risk of double counting.

The Oil and Gas Act does not explicitly reference the Land Act but does allow the Minister to declare “blocks” as reserved from tenement through notice in the National Gazette.⁵¹⁸ The provisions of the Oil and Gas Act, however, offer less guidance and potentially limited long-term protection as the declaration can be revoked which opens it to potential exploration at the Minister’s discretion.⁵¹⁹ Given the questionable security and longevity, areas reserved under the Oil and Gas Act may not qualify as a potential OECM.

Reserved lands are not required to have conservation as the primary objective; however, they may foster positive outcomes for biodiversity through the additional safeguard from development. Although the Land Act, as well as the associated resource legislation, do not define a specific objective for reserved land, the land placed under the care and control of CEPA is more descriptive as these are granted a special purpose lease for 99 years for the protection of flora and fauna.⁵²⁰ Reserved land is generally on government land or areas subject to state lease.⁵²¹ However, as the Land

⁵¹³ *Protected Areas Act (No. 9 of 2024)*. Section 8.

⁵¹⁴ *Land Act (No. 45 of 1996)*. Part V.

⁵¹⁵ The Defence Act identifies reserved lands as “defence areas” to be used and controlled for defence purposes. However, the Act does not provide further elaboration. Section 1.

⁵¹⁶ *Physical Planning Act (No. 32 of 1989)*. Section 56(2).

⁵¹⁷ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 39.

⁵¹⁸ *Oil and Gas Act (No. 49 of 1998)*.

⁵¹⁹ *Ibid.* Section 20.

⁵²⁰ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 39.

⁵²¹ *Land Act (No. 45 of 1996)*. Section 49.

Act also provides for the acquisition of customary land,⁵²² it is feasible that these areas could also be subject to reservation. Although Reserved lands could potentially satisfy the criteria of an OECM to be both geographically defined and of sufficient duration to support long-term conservation, CEPA may not have the resources or capacity to manage these areas independently.

4.6.4 Heritage sites

The Kuk Early Agricultural Site (Kuk site) currently represents PNG's only World Heritage site and is noted for its cultural value.⁵²³ However, since 2006, seven additional sites have been tentatively listed under the Convention.⁵²⁴ Currently, none of the listed and tentatively listed areas are represented in their entirety within PNG's progress toward the CBD's targets for area-based conservation. However, they may overlap with established or proposed protected areas.⁵²⁵ If these areas meet the criteria of an OECM, clearly distinguished areas of overlap may reduce the risk of overstating coverage.

Various legal frameworks have been used to provide protection, or at least partial protection, for PNG's heritage sites. This includes the mechanisms identified within the OLPGLLG and Fauna Act.⁵²⁶ The Kokoda Historical Track Reserve⁵²⁷ and Interim Protection Zone (IPZ) employs mechanisms for the legal protection of both cultural and natural heritage through the National Museum & Art Gallery Act and Environment Act.⁵²⁸ The former affords protection to the war relics of the area,⁵²⁹ while the latter provides the legal basis for the protection of biodiversity found throughout the IPZ.⁵³⁰ The Marine Zones Act also extends to protect underwater cultural heritage, including all relics of human existence with cultural, historical, or archaeological character. The remnants of World War II are scattered throughout PNG, including many remaining underwater. Nevertheless, these may not yet be afforded protection by the MZA as they would not be the condition of being underwater for at least 100 years.⁵³¹ Notably, with the enactment of the Protected Areas Act, heritage

⁵²² Ibid. Section 10.

⁵²³ The Kuk site is afforded protection under the OLPGLLG, as well as being demarcated, having a management plan and consent agreements, however, it would require assessment of its ability to deliver biodiversity outcomes and protect the associated values. Muke & Denham "Kuk Phase 8: Heritage Issues to 2008" in Golson, et al. (eds) *Ten thousand years of cultivation at Kuk Swamp in the highlands of Papua New Guinea (Terra Australis 46)* (2017) 467; Muke, et al. "Nominating and managing a World Heritage Site in the highlands of Papua New Guinea" (2007) *World Archaeology* 327 & 330.

⁵²⁴ These include the Kikori River Basin, Kokoda Track and Owen Stanley Ranges, Trans-Fly Complex, Milne Bay Seascape, the Sublime Karsts of PNG, Upper Sepik River Basin, and the Huon Terraces. World Heritage Convention *World Heritage List* (accessed October 2023).

⁵²⁵ Hitchcock & Gabriel *World Heritage Tentative Listed Sites in Papua New Guinea: Report on a review of the sites* (2015).

⁵²⁶ The literature suggests the Conservation Areas Act may have been the most useful legislation as it provided for the protection of both the environment and "national cultural inheritance" but was never employed for this purpose. Kwa *Biodiversity Law and Policy in PNG* (2004) 28.

⁵²⁷ Also known as the Kokoda Trail.

⁵²⁸ Although it has been identified as part of PNG's obligations under the CBD, the Kokoda Track has not been formally gazetted as a protected area. The area was proposed for protection in 1972, however, there is no evidence that it was formally gazetted. GoPNG *METT Assessment: Kokoda Track and IPZ* (accessed March 2024).

⁵²⁹ *National Museum and Art Gallery Act (No. 9 of 1992)*. Section 1(i).

⁵³⁰ *Environment Act (No. 64 of 2000)*. Sections 5(a), 5(c), and 5(e).

⁵³¹ *Maritime Zone Act (No. 47 of 2015)*. Section 49.

sites may be identified as protected areas⁵³² and therefore would not qualify as an OECM. Each site may be assessed to discern the qualifications of being considered an OECM.

4.6.5 Forest areas

As forest areas cover 71% of PNG,⁵³³ these could likely comprise a significant component of potential OECMs.⁵³⁴ Under the umbrella of forest areas,⁵³⁵ there are several tools found within the various legal frameworks that may be screened as potential OECMs, including those covered under a conservation deed,⁵³⁶ areas identified as REDD+ project sites under the Climate Change framework,⁵³⁷ and forest areas reserved from harvest and set aside for conservation.⁵³⁸ The literature notes that policy makers and law makers should be mindful not to overrepresent the extent of forest areas as potential OECMs as the mechanisms for managing forest resources could overlap.

The Protected Areas Act requires 10% of an area to be harvested under a timber permit to be set aside for conservation purposes.⁵³⁹ As this is to be administered by CEPA as a protected area it may not qualify as an OECM. The Act also calls for any forest clearance exceeding 1000 hectares to set aside a minimum of 10% of a total logging area as a biodiversity corridor.⁵⁴⁰ These set-aside areas could trigger an assessment as an OECM.

PNG's Climate Change framework also provides for the conservation of forest areas through the provisions relevant to REDD+. ⁵⁴¹ These areas should address emission reduction strategies through conservation and sustainable management of forest areas. It is noted within the literature that the project agreements under the Climate Change Act occupy a space between protected areas and commercial logging concessions.⁵⁴² REDD+ projects facilitated within a protected area will

⁵³² *Protected Areas Act (No. 9 of 2024)*. Section 22(1) and Section 27.

⁵³³ This encompasses areas of rainforest, mangrove, swamp forest and dry evergreen forests, but does not include gardens nor timber plantations. Bryan & Shearman (eds) *The State of the Forests* (2015) 9-15.

⁵³⁴ The primary focus of this thesis has been narrowed to terrestrial areas as the legal frameworks for marine areas are less developed and customary ownership is more constricted. However, as PNG is an island nation, there is a potential for the scope of OECMs to encompass a significant marine component as well.

⁵³⁵ The mechanisms for managing forest resources could overlap, therefore this section has generally applied the term forest areas. The legal distinction is noted as appropriate in the remainder of the chapter. Detailed examples of overlapping interests and permissions is described in Filer, et al. "The construction of voluntary forest carbon projects in Papua New Guinea" (2023) *Development Policy Centre Discussion Paper No. 105* 45-51.

⁵³⁶ Conservation deeds have been employed to provide legal protection for forest areas for a number of years. However, given the recent adoption under the Protected Areas Act, these should be screened carefully. *Ibid.* 47-48.

⁵³⁷ A moratorium was placed on new proposals for voluntary carbon projects in 2022 pending the development of a regulatory framework after a report exposed a number of irregularities, including the mechanisms for obtaining FPIC. These are explored in Filer, et al. 2023 *Development Policy Centre Discussion Paper No. 105*.

⁵³⁸ *Protected Areas Act (No. 9 of 2024)*. Section 19(1)(b).

⁵³⁹ *Ibid.* Section 19.

⁵⁴⁰ *Ibid.* Section 19(3)(b).

⁵⁴¹ A moratorium was placed on new proposals for voluntary carbon projects in 2022 pending the development of a regulatory framework after a report exposed a number of irregularities, including the mechanisms for obtaining FPIC. These are explored in Filer, et al. 2023 *Development Policy Centre Discussion Paper No. 105*.

⁵⁴² Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper 103* 9.

not meet the criteria of an OECM. Importantly, given the illegalities and corruption that has plagued the forestry sector and REDD+ projects, recognition of these areas as OECMs could open PNG to criticisms of greenwashing.⁵⁴³

4.6.6 Water resource areas

The Maritime Zones Act identifies and provides for the jurisdiction of internal waters, archipelagic waters, the territorial sea, coastal waters, the contiguous zone, the continental shelf, and the exclusive economic zone (EEZ). Noting the scope of this thesis, the discussion relevant to water resource areas will be narrowed to internal and coastal waters. The Minister for Environment and Conservation may consult with the Minister for Fisheries to declare different types of marine protected areas over the waters of PNG,⁵⁴⁴ including the associated land and wetlands.⁵⁴⁵ The protected area may be designated as a fishing reserve, marine park, marine reserve, or a particularly sensitive sea area.⁵⁴⁶ However, as the Act fails to define these types of protected areas, nor are they identified within the Protected Areas Act, it is unclear if they may qualify as an OECM. The OECM guidance cautions against the recognition of provisions that provide for seasonal or species-specific protections as this does not facilitate a holistic ecosystem approach.⁵⁴⁷

As a party to the Ramsar Convention, PNG has an obligation to promote the conservation of wetlands throughout the country, regardless of their listed status. Although wetlands may overlap with protected areas, they are generally not formally protected in PNG. Where an overlap does exist, these areas may not meet the OECM criteria.⁵⁴⁸ However, the lack of formal legal recognition provides a compelling case for the undertaking of site-level assessments across the broader scope of wetlands as they could qualify as an OECM.

Other water resources are provided for under a collection of laws. The Environment Act vests the right to use, flow, and control water in the state.⁵⁴⁹ However, it qualifies this by protecting the customary rights to use water.⁵⁵⁰ The right to other uses by various actors may be conferred under a permit⁵⁵¹ The National Water Supply Act grants powers to the Water Papua New Guinea Limited, a majority state-owned enterprise, to maintain on any land, stream and water courses for the supply of water.⁵⁵² Although Water PNG may have an easement on land that it does not own to maintain waterworks on, above or under,⁵⁵³ the Act does not explicitly mention conservation objectives. Collectively, these laws provide for the

⁵⁴³ The challenges facing the forestry sector are detailed in *ibid.* ; Filer, et al. "The construction of voluntary forest carbon projects in PNG" (2023) *Development Policy Centre Discussion Paper No. 105*.

⁵⁴⁴ Defined as the "internal waters, the archipelagic waters, the territorial sea, the contiguous zone, the exclusive economic zone and the water superjacent to the continental shelf". Section 2(1).

⁵⁴⁵ Section 40(1).

⁵⁴⁶ Section 40(2).

⁵⁴⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 10.

⁵⁴⁸ PNG currently has listed two wetlands of international importance: Lake Kutubu and the Tonda Wildlife Management Area. Both sites overlap with current protected areas, thus would not qualify as an OECM. Ramsar Convention *Annotated List of Wetlands of International Importance: Papua New Guinea* (accessed June 2025).

⁵⁴⁹ *Environment Act (No. 64 of 2000)*. Section 79(1).

⁵⁵⁰ *Ibid.* Section 79(2).

⁵⁵¹ *Ibid.* Section 82.

⁵⁵² *National Water Supply and Sanitation Act (No. 52 of 2016)*. Section 4(2)(d).

⁵⁵³ *Ibid.* Section 51.

use of water. However, they do not extend to encompass ownership. The complexities of ownership, resource use rights, and the protection of values may create obstacles for recognising these areas as OECMs.

4.6.7 Biodiversity offsets

Only relatively recently have biodiversity offsets⁵⁵⁴ been recognised within PNG's legal frameworks to address the adverse environmental impacts resulting from development activities.⁵⁵⁵ PNG defines an offset as a compensation payment for serious or material environmental harm that cannot be mitigated through alternative actions⁵⁵⁶ with payments directed into a Biodiversity Trust Fund.⁵⁵⁷ This definition could be viewed as buying approvals through the exchange of natural capital for financial capital.⁵⁵⁸ The nature of PNG's biodiversity offset scheme is outside of the remit of this thesis, except to the extent that these areas may be assessed against the OECM criteria.

The CEPA Managing Director may establish a Special Management Area (SMA) as a biodiversity offset for a duration of ten years.⁵⁵⁹ Where this provision is applied, the area may not qualify as an OECM as the Act affords SMAs with the status of a national protected area.⁵⁶⁰ Although it is submitted within the literature that biodiversity offsets may be assessed against the criteria of an OECM, given the domestic context and limited duration of offsets, it may be unlikely that these areas will meet the qualifications.⁵⁶¹

4.7 IMPLICATIONS AND OUTLOOK FOR OECMS

This chapter has sought to provide an overview of the relevant provisions that may contribute to the recognition, regulation, and reporting of OECMs in PNG. For nearly 50 years, PNG has sought to develop a unique "indigenous jurisprudence" that integrates custom, common law, the underlying law, judicial precedent, and certain laws that pre-date independence.⁵⁶² The result is an evolving system of deep legal pluralism recognising both state and customary laws. The legal frameworks presented in this chapter may contribute to both the enabling environment, as well as to the regulatory systems for potential OECMs in PNG. A review of the provisions of the constitution, in addition to the legal frameworks for environment and conservation, land, natural resources, and climate change, suggests that there could be an opportunity for OECMs to play a complementary role to protected areas. As biodiversity conservation may be the

⁵⁵⁴ The terms 'environmental offset' and 'biodiversity offset' are used interchangeably throughout PNG's policy and legal frameworks. This thesis has adopted biodiversity offset as it is used in the more contemporary Protected Areas Act. Conversely the Environment Act applies the term environmental offset.

⁵⁵⁵ *Environment Act (No. 64 of 2000)*. Section 6(2)(f).

⁵⁵⁶ *Ibid.* Section 2.

⁵⁵⁷ *Protected Areas Act (No. 9 of 2024)*. Section 58(1)(c).

⁵⁵⁸ Pope, et al. "When is an offset not an offset? A framework of necessary conditions for biodiversity offsets" (2021) *Environmental Management* 428.

⁵⁵⁹ *Protected Areas Act (No. 9 of 2024)*. Section 25(2).

⁵⁶⁰ *Ibid.* Section 22(1)(a)(iii).

⁵⁶¹ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 191; Paterson "OECMs, biodiversity stewardship and statutory intervention" (2023) *Potchefstroom Electronic Law Journal* 17-19.

⁵⁶² *Ibid.* Schedule 2.

primary, secondary, or ancillary objective of an OECM, it is recommended to extend the scope of legal frameworks to include the recognition, regulation, and reporting of OECMs.

The chapter concluded with a brief screening exercise of potential OECMs that reflects the guidance found in Step 1 of the IUCN site-level tool for identifying potential OECMs, namely the status as a protected area and management objectives. Many of PNG's community-led and customary conservation practices align with the principles of OECMs. Strengthening legal recognition for these areas could provide greater security for conservation initiatives while respecting local governance structures and traditional ecological knowledge. However, the transition of protected areas under the new Protected Areas Act and the evolving role of sub-national governance structures may influence the future status of potential OECMs. Ensuring that OECMs are effectively integrated into national planning and reporting frameworks will require the engagement of both state and non-state actors. The findings from this chapter provide a foundation for the critical review (Chapter 5) and the proposed legal reforms (Chapter 6) for the recognition, regulation, and reporting of OECMs to support and strengthen PNG's biodiversity conservation while fostering community-led and sustainable resource management.

Chapter 5 A Critical Review of the Legal Frameworks with Relevance to OECMs

PNG set an ambitious agenda to extend legal recognition and strengthen *in-situ* conservation by progressively adding 6,427,503 hectares¹ into the protected areas network by 2022.² The anticipated development of a Marine Protected Area Policy is hoped to complement this by guiding the establishment of at least one million hectares of marine protected areas.³ This extension of the protected areas network seeks to propel PNG towards the international community's collective targets for area-based conservation. However, with 2022 now firmly in the past, PNG's ambition has yet to be realised.⁴

Although the reasons for a lack of progress in expanding the network of protected areas and OECMs have not been explicitly addressed, existing literature has highlighted several challenges, including differences in Western and Indigenous world views,⁵ issues around tenure arrangements,⁶ external interests dominating decision-making,⁷ and the use of models which have dispossessed people of control over their natural resources, environmental sovereignty, and property rights.⁸ It also may be likely that the challenges generally found within PNG, such as capacity and resource constraints coupled with fragmented and weak governance, have hindered growth.⁹ PNG's failure to progress towards international commitments and domestic goals underscores the need to engage and recognise conservation efforts by a diversity of state and non-state actors to overcome challenges and achieve global targets.¹⁰

¹ For comparison the current coverage is just over 2.2 million hectares according to *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 55. Although this figure differs from that reported on the World Database of Protected Areas and in PNG's 6th National Report to the CBD, all are significantly below the proposed commitments. PNG's NBSAP 2019-2024.

² Achieving such an increase may have been especially challenging given the short timeframe for implementation *GoPNG PNG NBSAP 2019-2024* 16 and 62.

³ It is unclear if these marine protected areas are inclusive or overlap with any of the aforementioned proposed protected areas. Ibid. 62.

⁴ PNG's own biodiversity website indicates that there are 61 protected areas, with four being gazetted since 2010. This differs from other reporting sources as well as the WDPA which indicate only one additional area being gazetted in 2017. At the time of writing the official gazettes for the additional areas could not be found within the public domain. This also does not afford recognition to protected areas recognized under local or provincial laws.

⁵ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology*.

⁶ Ibid. ; *West Conservation is Our Government* (2006).

⁷ Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud*; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*; Beehler & Kirkman *Lessons Learned from the Field* (2013); Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017).

⁸ *West Conservation is Our Government* (2006); West & Kale "The Fate of Crater Mountain" in *Tropical Forests of Oceania* (2015).

⁹ See section 1.2.3 of this text.

¹⁰ Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS* 73-74.

Although the expansion of gazetted protected areas has waned over the decades since independence,¹¹ this does not imply a lack of conservation.¹² Community and locally managed areas have employed two alternative mechanisms for legal protection. First, the OLPGLLG empowers local and provincial governments to establish laws to recognise and regulate the environment.¹³ Second, some co-managed areas have developed conservation deeds using the law of contracts to establish protection.¹⁴ However, many of these areas are not formally represented within the current domestic protected areas network and are excluded from reporting on progress toward international commitments.¹⁵ The recognition of OECMs may provide an opportunity to formally acknowledge the conservation efforts and contributions of all state and non-state actors outside of traditional protected areas. This could progress PNG towards meeting international commitments and strengthen the entire network of protected areas and potential OECMs through equitable legal recognition.

This chapter will draw together the theory and legal frameworks presented in the previous chapters to critically review the domestic opportunities and needed reforms to recognise, regulate, and report on OECMs in PNG. The evolving discourse on OECMs as a tool for equitable and inclusive area-based conservation measures (Chapter 2) forms the foundation of this chapter. Aligning the theoretical legal framework¹⁶ (Chapter 3) with PNG's domestic legal frameworks (Chapter 4), this chapter surveys the legal opportunities and gaps for recognising, regulating, and reporting OECMs within the specific domestic context. Although no law in PNG explicitly provides for such statutory recognition, existing legislation may be amended to better represent pathways for the inclusion of OECMs. As both protected areas and OECMs, align to meet the same KMGBF targets, PNG's protected areas regime may be particularly valuable. However, as OECMs and protected areas must be mutually exclusive, this chapter will also draw from the laws generally associated with biodiversity, natural and cultural heritage, natural resources, coastal and inland waters, sustainable land use, and climate change, as well as from experience using non-statutory tools to provide a legal basis to give recognition to OECMs. Given the legally pluralistic system of PNG, there likely are various opportunities to recognise OECMs through customary law. Although it is beyond the scope of this thesis to undertake a thorough exploration of potential OECMs founded on customary law, it is notable that the OLPLLG serves as a mechanism to translate custom into local and provincial laws. The holistic inclusion of an array of laws may broaden the understanding of conservation and create a more inclusive network of protected areas and potential OECMs in PNG.

¹¹ The gazettal of new protected areas has seemingly stalled with four protected areas being gazette since 2015. This may impart be due to the changes to national legislation which has taken more than five years. *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 55-58, 65. Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 346.

¹² Van Helden *Lessons learned in community based conservation in PNG* (2005) 67.

¹³ For example, the Talasea Rural LLG enacted the Marine Environment Management Law 2004 provides for the protection and management of LMMAs.

¹⁴ Van Helden *Lessons learned in community based conservation in PNG* (2005) 57-58.

¹⁵ However, the new Protected Areas Act may provide legal recognition to these areas in the future.

¹⁶ As in Chapter 3 this will also combine several of the OECM criteria to underscore the collective relevance and mitigate repetition.

The aspiration and urgency of meeting international targets should not compromise the quality of conservation measures nor neglect to secure the consent of customary landowners.¹⁷ Ensuring robust legal frameworks, with an ability to coherently and equitably deal with the legal issues, could address the threat of misuse and greenwashing to support positive long-term conservation outcomes. Ultimately, the decision to recognise and report OECMs will rest with CEPA as they have the mandate for reporting to the international environmental and conservation conventions.

5.1 IDENTIFYING POTENTIAL OECMS

Although PNG's current legal frameworks do not explicitly account for OECMs, their inclusion in guidance documents relevant to protected areas may suggest conversations have been initiated within CEPA regarding their application in PNG. The guidance document for identifying protected area types provides for "other protected and conserved areas" that do not meet the criteria of a protected area under the domestic frameworks.¹⁸ The guidance elaborates that this may encompass areas established under local and provincial laws, forested areas set aside from logging, *ples masalai* and *tambu* areas, areas reserved under the Mining Act or Oil and Gas Act, and other areas identified for conservation by any other Act.¹⁹ Notably, these areas mirror those identified as potential OECMs in Chapter 4.²⁰ Although these areas may not meet the IUCN definition of a protected area, they may align with the international criteria of an OECM.²¹ Future direction may be further refined as the current lack of distinction between protected areas and OECMs creates space for ambiguity and misrepresentation.

Given the relatively recent development of guidance and policy direction for OECMs from the international community, it may be reasoned that the definition of an OECM has outpaced PNG's enactment of new protected area legislation, which was in process for many years. Thus, the domestic policies and laws may not reflect the most contemporary guidance for recognising OECMs. PNG's policy makers and law makers could revisit the definitions and management objectives for protected areas to explicitly include reference to OECMs and offer clarity for distinguishing the two area-based measures.

A site may first be screened as a protected area, and where such a designation is not appropriate or desirable, it may be screened against the OECM criteria.²² Although PNG's Protected Areas Act empowers CEPA's Managing Director to establish a protected areas proposal form to be prescribed with future regulations,²³ the expression of interest form

¹⁷ Within PNG 'customary landowner(s)' is commonly used both within the legal frameworks and informally. It has been adopted throughout this chapter as the domestically appropriate terminology akin to IPLCs. Filer, et al. "The FPIC Principle Meets Land Struggles" (2020) *Land* 11; GoPNG *PNG Protected Areas Policy* (2014) 58; Claudet, et al. "Avoiding misuse of OECMs in the blue economy" (2022) *One Earth*.

¹⁸ Leverington *A guide to protected area types in PNG* (2019) iv.

¹⁹ Ibid. 31.

²⁰ See section 4.6 of this text.

²¹ Leverington *A guide to protected area types in PNG* (2019) 31.

²² Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 178.

²³ *Protected Areas Act* (No. 9 of 2024). Section 49.

included within a schedule of the Act may serve an indicative function for future proposal forms.²⁴ Neither the Act nor the form provide guidance for who may make proposals nor establish the decision-making criteria by which to assess proposals. This process also fails to necessitate FPIC and only provides for the “indication” of government support. Although, these gaps are addressed in a guidance document for establishing new protected areas,²⁵ they have not been given legal credibility through inclusion in the Act. This provides learning opportunities for identifying future OECMs.

The legal frameworks could be strengthened with the explicit inclusion of OECMs, including a domestically appropriate definition and guidance for identifying the management objective. Reforms may seek to address issues associated with who may initiate a proposal for an OECM, what form may be appropriate, and by who and how should proposals be assessed.

5.2 SECURING CONSENT

Securing FPIC is vital for assessing and recognising a potential OECM.²⁶ While PNG is not a party to UNDRIP, the right to consultation and consent for undertaking activities that may affect a landowners' land, territories, or resources should be considered a best practice. History has provided evidence that the customary landowners of PNG have a significant influence on the outcomes of domestic conservation efforts.²⁷ The mechanisms for FPIC contained within this section are not explicitly for OECMs. However, they provide an opportunity to learn from experience and build a cohesive policy that may be replicated uniformly across sectors for interpreting and applying the elements of FPIC. As society is increasingly globalised, it will be advantageous for OECMs to have a clear and consistent measure of consent that can be understood by state, non-state, and international actors.

PNG's Constitution obliges all consultations to be "meaningful" and foster the "genuine interchange and consideration of views".²⁸ The Second NGDP extends an equal opportunity to every citizen to participate in and benefit from activities that may affect the individual's or community's interests.²⁹ Although these provisions provide the foundations for consent, the Constitution fails to explicitly necessitate FPIC. PNG's legislation generally aligns with the Constitutional mandate for meaningful consultation. However, few laws explicitly trigger the need to secure consent from customary landowners.

The Climate Change Act and Forestry Act have attempted to adopt relevant provisions for FPIC, however, these have been the focus of fraud, corruption, and misrepresentation.³⁰ The legislation allows for FPIC to be derived from an existing

²⁴ *Protected Areas Act (No. 9 of 2024)*. Schedule 3.

²⁵ Leverington, et al. *Establishing new protected areas in PNG* (2019).

²⁶ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 1-2.

²⁷ For a detailed account see: West *Conservation is Our Government* (2006); West & Kale “The Fate of Crater Mountain” in *Tropical Forests of Oceania* (2015).

²⁸ *Constitution of the Independent State of Papua New Guinea* (1975). Section 255.

²⁹ *Ibid*. Preamble

³⁰ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18.

ILG or other legal mechanism for registering a title to customary land.³¹ This places an onus on the landowners to maneuver through potentially burdensome procedures as a precondition to granting consent. Alternatively, FPIC may also be considered valid where a percentage of adult members residing within the area to be covered by the project grant permission. However, this is inconsistent across the laws, with 75% of adult residents giving written consent under the mechanisms for forestry³² and 85% for climate change activities.³³ The residential requirement may fail to provide equitable representation to future generations and landowners temporarily living elsewhere. It is noted within the literature that this may also negatively impact the social security provided by retaining customary land rights for retirement, as is common in PNG.³⁴

Given PNG's social constructs and the state's limited capacity, the benchmarks for consent may be both impossible to achieve and validate. The Forestry Act utilises a form to be completed by an agent from each clan and witnessed by a Village Court Magistrate or land mediator.³⁵ There is no reliable means to ensure this person represents 75% of adult residents. The 2021 amendment to the Climate Change Act further stipulates that the results of social mapping and landowner identification studies must accompany the mechanism for consent.³⁶ However, the law is silent on how this can be authenticated.³⁷ Notably, a moratorium was placed on new proposals for voluntary carbon projects in 2022 due to several irregularities, including those for obtaining and validating FPIC.³⁸ The challenges of FPIC have been linked to the state's fragmented and weak governance, which has resulted in the misrepresentation of ILGs and the inability to verify landowners and land claims.³⁹ These lessons may present a cautionary tale for defining the criteria of FPIC relevant for OECMs.

The Climate Change Act initially defined FPIC as a "consultative" process with "open and informed dialogue". In 2021, the definition was amended to establish FPIC as a "special right" to "give or withhold consent".⁴⁰ This change aligns with the discourse emanating from Human Rights.⁴¹ The Act explicitly obliges FPIC from all landowners⁴² with customary rights to own or use the land, sea, flora, and fauna⁴³ in developing project agreements.⁴⁴ The Act calls for the process of FPIC to be prescribed within the Regulations.⁴⁵ Although a working draft of the Guidelines on FPIC for REDD+ in Papua New

³¹ *Climate Change (Management) Act (No. 19 of 2015)*. Section 89(1). *Forestry Act (No. 30 of 1991)*. Section 57(51)(a).

³² *Forestry Act (No. 30 of 1991)*. Section 57(2)(b).

³³ *Climate Change (Management) Act (No. 19 of 2015)*. Section 89(2).

³⁴ Telesetsky "Graun bilong mipela" (2001) *Georgetown International Environmental Law Review* 750-751; Fingleton & ToLopa "Land registration among the Tolai people: waiting 50 years for titles" 69.

³⁵ *Forestry Regulations (No. 3 of 1998)*. Form 165.

³⁶ *Climate Change (Management) Act (No. 19 of 2015)*. Section 89(2).

³⁷ *Kwa Biodiversity Law and Policy in PNG* (2004) 96-97.

³⁸ Filer, et al. "The construction of voluntary forest carbon projects in PNG" (2023) *Development Policy Centre Discussion Paper No. 105* 81-88.

³⁹ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18.

⁴⁰ *Climate Change (Management) Act (No. 19 of 2015)*. Section 3.

⁴¹ See section 2.3.2 of this text.

⁴² Described as "land holder" in the Act. *Climate Change (Management) Act (No. 19 of 2015)*. Section 87.

⁴³ *Ibid.* Section 3.

⁴⁴ *Ibid.* 89.

⁴⁵ *Ibid.* Section 87.

Guinea is publicly available,⁴⁶ there was no evidence of the accompanying Regulations at the time of writing. The Act provides the statutory obligation to develop a project agreement in writing, using English, Tok Pisin, and the appropriate local language as requested by the customary landowners.⁴⁷ However, this assumes a level of literacy⁴⁸ and does not address proof of understanding.

The Fauna Act and Conservation Areas Act could not conclusively be interpreted as applying the principle of FPIC. The Protected Areas Act may have missed an opportunity to strengthen the provisions for FPIC for the protected area regime. While the new legislation contains guidance for deeming when FPIC is given,⁴⁹ it fails to address from whom, when, how, and by whom FPIC should be sought. Although generally lacking, the Protected Areas Act does build upon the provisions of the climate change regime, to provide for all parties to have sufficient information to make an informed and autonomous decision without external pressures and with the consent documented in simple language.⁵⁰ The Act also extends the right to legal advice before consenting.⁵¹ The Act neglect to provide remedies for where FPIC is not obtained.

Identifying legitimate customary landowners and decision-makers will continue to be challenging in PNG. As such, the state has tried several mechanisms to facilitate the process. Perhaps most notably, this includes the formation of ILGs. This provides a customary landowner group with recognition as a legal entity to collectively represent their wishes but does not provide an ILG with legal title.⁵² Several legal frameworks, including many of those referenced in this chapter, encourage landowners to establish an ILG to grant consent and facilitate the distribution of benefits as per any benefit-sharing agreements. The current version of the Incorporated Land Groups Act was amended to clarify and stipulate the provisions of evidence within an ILG. This includes the provision of a list of members with evidence of each person's birth certificate;⁵³ a sketch map or plan for the land to which the proposed ILG has ownership, including size, location, boundaries, and the represented village and clan names;⁵⁴ and the ILG's constitution which stipulates the terms for membership, amongst others.⁵⁵ However, as PNG lacks a sophisticated database capable of searching and comparing membership and landownership,⁵⁶ these inclusions may not add the desired clarity.

⁴⁶ GoPNG *Guidelines on FPIC for REDD+ in PNG* (2014).

⁴⁷ *Climate Change (Management) Act (No. 19 of 2015)*. Section 90(1)(a).

⁴⁸ Literacy rates vary significantly across PNG with some surveys suggesting actual levels of less than 15% in some provinces. Devette-Chee "Literacy: a growing concern in Papua New Guinea" (2021) *Spotlight: The National Research Institute*.

⁴⁹ *Protected Areas Act (No. 9 of 2024)*. Section 11.

⁵⁰ *Ibid.* Section 11.

⁵¹ *Ibid.* Section 11(g).

⁵² To obtain a legal title, an ILG may seek to register their land under the *Land Registration Act 1981 (Chapter 191)*. See section 5.5.1 of this text.

⁵³ *Land Groups Incorporation Act 1974 (Chapter 147)*. Schedule 1.

⁵⁴ *Ibid.* Schedule 2.

⁵⁵ *Ibid.* Schedule 3.

⁵⁶ For example many people born in a village may not have a birth certificate thus have the additional burden of obtaining one. It is also feasible that a person could obtain multiple birth certificates under different names. Another example is a village that does not appear on maps, or has a different local name.

Evidence within the literature suggests that the process facilitated under an ILG, including those associated with consent, has been prone to irregularities and abuse.⁵⁷ Moreover, the legal framework for establishing an ILG may be too complex and costly, especially for rural landowners, to produce the required documentation and evidence.⁵⁸ Although the process of gaining FPIC is essential for OECMs, the associated procedures of establishing an ILG should not create additional barriers for landowners and resource users. As PNG develops legal provisions for OECMs, policy makers and law makers may be cognisant of the unintended consequences of requiring the formation of an ILG before recognition of an OECM.

PNG's legal frameworks remain vague regarding who is responsible for obtaining consent and how consent will be validated. The law is also silent about the process for continued monitoring and withdrawal of consent. Limited capacity and resources for enforcement could threaten FPIC generally and as directly relevant to the recognition, regulation, and reporting of potential OECMs.⁵⁹ Further guidance is essential to manage the issues associated with fraud, corruption, and misrepresentation.

5.3 ENSURING THE AREA IS NOT A PROTECTED AREA

Before distilling the opportunities to afford legal recognition to OECMs, an examination of the foundational definitions and management objectives that distinguish area-based conservation in PNG will be beneficial as it permeates this chapter. Observing the first criterion of an OECM is that it may not be currently recognised or reported as a protected area, neither in its entirety nor as part of a protected area,⁶⁰ establishing the discrete nature of these tools will be critical for screening potential OECMs within the domestic context. Notably, an explicit reference to OECMs does not exist in PNG's current legal frameworks. In the absence of a domestic definition and guidance relating to the management objectives of OECMs, a reflection on the protected areas regime may assist in establishing the exclusionary criteria.

5.3.1 Definition of a protected area

A significant failure of the previous legislation for protected areas was the lack of a definition that extended beyond an association with a specific fauna⁶¹ or value.⁶² This not only left the application of protected area nomenclature open to

⁵⁷ For detailed examples of irregularities and abuse see: Filer, et al. "The construction of voluntary forest carbon projects in PNG" (2023) *Development Policy Centre Discussion Paper No. 105*; Filer "Two steps forward, two steps back" (2019) *Development Policy Centre Discussion Paper*.

⁵⁸ Filer "Two steps forward, two steps back" (2019) *Development Policy Centre Discussion Paper 78*.

⁵⁹ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18; Filer, et al. "The construction of voluntary forest carbon projects in PNG" (2023) *Development Policy Centre Discussion Paper No. 105* 110.

⁶⁰ CBD COP 14 *Decision 14/8: Protected Areas and Other Effective Area-Based Conservation Measures* (2018) Annex III (B).

⁶¹ The *Fauna Act* defined a protected area as an area declared by the Minister "in relation to a species or class of animals" but did not explicitly extend protection to habitat conservation or other forms of biodiversity. Section 1 read with section 13.

⁶² The *Conservation Areas Act* generally lacked a definition of a protected area but asserted a conservation area may be declared for areas with biological, topographical geological, historical, scientific, or social significance, or any other special value of the community. Section 12(1).

various interpretations and applications,⁶³ but the legislation failed to afford holistic multi-dimensional protection. Although the Protected Area Policy adopted the recognised IUCN definition of a protected area,⁶⁴ the Protected Areas Act has failed to include this definition. Instead, the Act defines protected areas with regard to their type.⁶⁵ Protected areas are divided into national protected areas and regional protected areas.⁶⁶ Sacred sites,⁶⁷ areas required to be set aside as a condition of an environment or timber permit,⁶⁸ and some biodiversity offsets⁶⁹ are also defined as protected areas.

The Protected Areas Act seemingly seeks to provide legal protection for a variety of domestic area-based measures and objectives. Including a broad scope of protected area types may reflect the lack of legal mechanisms for area-based conservation. However, just as some areas may not meet the IUCN definition of a protected area, by according to them the domestic status of a protected area, they may likewise fail to meet the first criterion of an OECM of not being a protected area. The lack of explicit inclusion of OECMs within the legal framework could perpetuate a missed opportunity to equitably afford international recognition to a range of area-based conservation efforts that have been organically developed within PNG's specific social and cultural context.

PNG's Department of Lands and Physical Planning also endorsed a definition for protected areas within the NSLUP. This broadly includes all areas with "biological, topographical, geological, historical, scientific or social significance or other special value for the present community or future generations" recognised under CEPA or any Physical Planning Board as a conservation area zone.⁷⁰ This definition has not been adopted into the legal frameworks, nor does the NSLUP offer further elaboration to assess its relevance against the criteria of an OECM.⁷¹ The inclusion of these protected areas lacking legal status within the NSLUP could risk the overstating of the protected area estate.⁷² However, there may be merit in identifying the areas under the NSLUP as conserved areas to clearly distinguish them from those recognised under protected area legislation. These areas may trigger assessment as OECMs.

The very broad definition of PNG's protected areas potentially hinders the distinction between protected areas and OECMs. Adopting clear definitions may facilitate the recognition of OECMs and encourage accurate reporting against international obligations.

⁶³ The terms protected area and conservation area are used throughout PNG to mean both legally gazette areas, community driven efforts, and sometimes project sites driven by external NGO partners. The literature provides the example of an increase of "MPAs" across the Pacific that may be an indicator of external programs rather than actual protected areas. Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 41. Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy*.

⁶⁴ *GoPNG PNG Protected Areas Policy* (2014) 4.

⁶⁵ *Protected Areas Act (No. 9 of 2024)*. Section 2 and 22(1).

⁶⁶ *Ibid.* Section 22(1)(b) and 26. The Act also recognised the LLG protected areas. Section 27.

⁶⁷ *Ibid.* Section 8.

⁶⁸ *Ibid.* Section 19(1).

⁶⁹ *Ibid.* Section 25.

⁷⁰ *GoPNG National Sustainable Land Use Policy* (2022-2023) 2.

⁷¹ The NSLUP broadly outlines the objectives and guiding principles of the policy. These generally align with the principles of sustainable development, FPIC, good governance, equity, and public participation. They also highlight the protection of customary land rights and the opportunities to align bottom-up planning. *Ibid.* 6-8.

⁷² Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy* 103.

5.3.2 Management objective

Across Melanesia, conservation is rarely the primary objective of a protected area.⁷³ It is observed within the literature that the establishment of protected areas may be driven by alternative motivations, such as the need for sustainable livelihoods and economic well-being;⁷⁴ access to aid, political power, or group status;⁷⁵ cultural or spiritual reasons;⁷⁶ or simply with the intent of maintaining an area for future generations.⁷⁷ Notably, many of these drivers do not align with Western conservation motivations that seek to protect the "aesthetic or evolutionary value".⁷⁸ Although the law in PNG does not provide a definitive interpretation of conservation, the worldviews that shaped its legal frameworks may not have deliberately distinguished between conservation and sustainable use. The Constitution's Fourth NGDP calls for the conservation and wise use of the environment and natural resources.⁷⁹ This alignment of conservation and wise use has likely shaped, and continues to inform, legal frameworks.

In 2014, the Protected Area Policy championed a new direction that sought to strengthen and enhance the domestic protected area network by including and recognising a variety of protected area types to be governed and managed by a diversity of actors.⁸⁰ Amongst other things, this policy championed the inclusion of sustainable livelihoods for communities *in* protected areas.⁸¹ This could suggest a similar alignment of conservation and wise use as reflected in the Constitution. However, the Protected Areas Act has not legislated provisions to foster clarity for the management objective of protected areas.

The international guidance for protected areas qualifies that the primary objective of conservation should extend to no less than 75% of the landscape.⁸² In PNG, although not explicitly included within the legal frameworks, it has been suggested that the primary objective of conservation should apply to 90% of a protected area,⁸³ with the areas outside of the primary objective being "exceptional zones".⁸⁴ The reasons for the disparity between the international and domestic guidance has not been expounded upon. The high threshold for conservation as a primary objective could present opportunities to recognise OECMs as a connectivity tool or in areas with conservation as a secondary or ancillary objective.

⁷³ Melick, et al. 2012 *Conserv Soc* 344-353; Govan & Jupiter 2013 *PARKS* 73-80; Jupiter 2017 *Pacific Conservation Biology* 139-145.

⁷⁴ Beehler & Kirkman *Lessons Learned* 1-22; West *Conservation is Our Government*; West & Kale "The Fate of Crater Mountain" in *Tropical Forests* 155-178; Govan & Jupiter 2013 *PARKS* 73-80; Keppel, et al. 2012 *Conserv Lett* 256-265.

⁷⁵ Bartlett, et al. 2010 *Mar Policy* 99-104; Jupiter 2017 *Pacific Conservation Biology* 139-145.

⁷⁶ Keppel, et al. 2012 *Conserv Lett* 256-265; Leverington, et al. *Assessment of Management Effectiveness fo Papua New Guinea's Protected Areas 2017*; Jupiter 2017 *Pacific Conservation Biology* 139-145.

⁷⁷ Leverington, et al. *Assessment of Management Effectiveness fo Papua New Guinea's Protected Areas 2017*.

⁷⁸ Keppel, et al. 2012 *Conserv Lett* 256-265.

⁷⁹ *Constitution of the Independent State of Papua New Guinea* (1975) Preamble.

⁸⁰ *GoPNG PNG Protected Areas Policy* (2014).

⁸¹ *Ibid.* Pillar Two, 44-47; *Protected Areas Act (No. 9 of 2024)*. Part III.

⁸² *Dudley Guidelines for Protected Area Management Categories* (2013) 35.

⁸³ Leverington *A guide to protected area types in PNG* (2019) 5.

⁸⁴ *Ibid.*

The Protected Areas Act classifies areas as national or regional protected areas. National protected areas may include national parks, national heritage areas, special management areas, and national maritime sanctuaries.⁸⁵ Regional protected areas may encompass community conservation areas, LMMAs, LMCAs, and private protected areas within terrestrial and marine areas.⁸⁶ Although the Act does not address the management objectives of these areas, this is further elaborated within the non-binding guidance that pre-dates the legislation.⁸⁷ The Managing Director is empowered to establish the assessment criteria for new protected areas based on this guidance.⁸⁸

Several regional protected areas may overlap with potential OECMs identified within this thesis. The idea of a *tambu* area is shared across the Pacific region as spatial or temporal closure based on spiritual or cultural beliefs.⁸⁹ Conservation may not be the primary management objective. Although these areas are predominantly protected under customary law, there are examples of local-level governments adopting resolutions or enacting laws to extend protection.⁹⁰ The Protected Areas Act grants a LLG the power to declare sacred sites as a protected area.⁹¹ As the Act does not afford further guidance, the blind inclusion of these areas as protected areas could distort the protected area estate. LMMAs and LMCAs are also a notable example of how it may be challenging to discern conservation and sustainable use objectives.⁹² Without clear qualifiers, the distinction between protected areas and OECMs could be ambiguous and lead to the discretionary application by the decision-makers.

The Protected Area Act could be strengthened by the statutory inclusion of management objectives for protected areas and OECMs. The lack of clarity regarding the interpretation of conservation and thresholds for the primary objective may risk misrepresentation of the protected area estate within international reporting.

5.4 SUPPORTING IMPORTANT BIODIVERSITY VALUES

Rich in biodiversity, the island of New Guinea provides space for an estimated 5% to 9% of the world's terrestrial biodiversity on less than 1% of the total land area.⁹³ However, with approximately a third of terrestrial species being

⁸⁵ *Protected Areas Act (No. 9 of 2024)*. Section 22(1)(a). However, the guidance documents include community conservation areas as national protected areas based on exchanges with CEPA. Leverington *A guide to protected area types in PNG* (2019) 7.

⁸⁶ *Protected Areas Act (No. 9 of 2024)*. Section 22(1)(b).

⁸⁷ Leverington *A guide to protected area types in PNG* (2019).

⁸⁸ *Protected Areas Act (No. 9 of 2024)*. Section 48.

⁸⁹ Caillaud, et al. "Tabus or not taboos" (2004) *How to use traditional environmental knowledge to support sustainable development of marine resources in Melanesia. SPC Traditional Marine Resource Management and Knowledge Information Bulletin*; Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy* 100.

⁹⁰ The Bwanabwana Rural LLG has formally recognised the "Gwala" or traditional prohibition as a method to protect and promote sustainable use. Bwanabwana Rural LLG Assembly Resolution NO 13/2023. An account of this *tambu* marine closure is provided in Mitchell "Gwala, a form of marine customary closure in the Bwanabwana area of Milne Bay Province, Papua New Guinea" (2023) *SPC Traditional Marine Resource Management and Knowledge Information Bulletin*.

⁹¹ *Protected Areas Act (No. 9 of 2024)*. Section 8.

⁹² Govan & Jupiter "Can IUCN management categories support Pacific approaches?" (2013) *PARKS* 75-77.

⁹³ Although this statistic is widely referenced within PNG, the source does not differentiate PNG from the broader island of New Guinea. Adams, et al. *Land-Sea Conservation Assessment for Papua New Guinea* 1-84 7.

endemic, the biodiversity found on the island faces a heightened threat of extinction.⁹⁴ PNG's extensive biodiversity and endemism may suggest a reasonable likelihood of important biodiversity values extending across the landscape.

Despite PNG's ecological richness, the existing protected area network poorly covers terrestrial and marine habitats. According to the WDPA, nationally only 3.69% of land and 0.14% of marine areas are under protected area coverage.⁹⁵ However, to meet current government objectives and international obligations, PNG's conservation assessment estimates that approximately 20%⁹⁶ of the land and sea area must be protected.⁹⁷ This disparity suggests that existing challenges may be hindering the advancement of the protected area estate. Although the inclusion of OECMs into legal frameworks likely will not automatically increase formal protection to meet national targets, it may foster greater representation and connectivity across the landscape to support important biodiversity values.

While the gaps in the protected area estate may fail to formally safeguard biodiversity values, communities continue to express strong values toward biodiversity protection.⁹⁸ This may be linked to deep connections between environmental, socio-economic, and cultural values.⁹⁹ The literature draws attention to the submission that conservation projects in PNG do not fail due to gaps in scientific and technical information. Instead, it may be attributed to the misalignment of social, cultural and political aspects.¹⁰⁰ OECMs may be a conducive means to promote and protect an array of values that extend across a landscape.

5.4.1 Identifying values

PNG's Constitution establishes the architecture to champion important biodiversity values. The Fourth NGDP enshrines a commitment to protect PNG's "valued birds, animals, fish, insects, plants and trees".¹⁰¹ It also recognises the wise use of natural resources and conservation of sacred and historical features.¹⁰² The holistic nature of the Fourth NGDP aligns with the potential of OECMs to identify and balance various values within a landscape. This NGDP is reiterated through a number of contemporary legal frameworks and has contributed to shaping the national identity, which continues to resonate with both state and non-state actors.¹⁰³

Although the domestic legal frameworks do not afford further elaboration to effectively distinguish which species may be considered valuable as directed by the NDGP, extensive research and mapping exercises have produced a body of

⁹⁴ Adams, et al. *Land-Sea Conservation Assessment for Papua New Guinea* 1-84 7.

⁹⁵ UNEP-WCMC *Protected Area Profile for Papua New Guinea from the World Database of Protected Areas, February 2020*. In their 6th Report to the CBD, the figures for protected area coverage sourced from the national government database differ slightly.

⁹⁶ Subsequent publication by the authors' has suggested that the scale of protection required likely would be impossible for PNG to fully implement in the short term. Accounting for the capacity and resources of the state, the revised target could require as much 33% of land and sea area to be protected. Adams, et al. "Scheduling incremental actions to build a comprehensive national protected area network for Papua New Guinea" (2021) *Conservation science and practice* 7.

⁹⁷ Adams, et al. *Land-Sea Conservation Assessment for Papua New Guinea* 1-84.

⁹⁸ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 49-51.

⁹⁹ Ibid.

¹⁰⁰ Bryan & Shearman (eds) *The State of the Forests* (2015) 83; West *Conservation is Our Government* (2006).

¹⁰¹ *Constitution of the Independent State of Papua New Guinea* (1975) Preamble, Goal 4.

¹⁰² Ibid.

¹⁰³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 49-51.

literature and non-binding reports identifying PNG's important biodiversity values and areas with international relevance.¹⁰⁴ This includes identifying and mapping PNG's key biodiversity areas,¹⁰⁵ specific habitats of restricted range and endemic species,¹⁰⁶ critical areas for marine and bird species,¹⁰⁷ and the natural and cultural values associated with PNG's World Heritage Tentatively Listed sites.¹⁰⁸ In 2017, CEPA produced the results of a conservation assessment to inform systematic conservation planning. This identifies national and provincial priority areas of interest.¹⁰⁹ The information contained in the report could be used to endorse and identify potential OECMs as it reflects the guidance provided for the OECM criteria for supporting important biodiversity values.

PNG's NBSAP recognises the need to align international conservation values with "ethnobiological prioritisation" to accurately capture the cultural and spiritual significance of certain species and habitats.¹¹⁰ PNG has sought to gather information on PAME by utilising the METT Assessment tool with protected and conserved areas.¹¹¹ The tool was modified specifically for the PNG context to identify and include information regarding the values of each site.¹¹² The results revealed a meaningful connection across environmental, cultural, and socio-economic values.¹¹³ The lessons learned from identifying values relevant to PNG's protected areas may also be appropriate for recognising OECMs.

The Protected Area Policy has incorporated the advice from reviews of the domestic protected area network as it encourages the integration of traditional and scientific knowledge to inform management decision-making.¹¹⁴ Drawing on the data collected as part of PNG's METT Assessment, identifying and including local values may prove advantageous for understanding motivations for area-based conservation and encourage continued support and compliance. Despite this policy direction, the Protected Areas Act fails to explicitly acknowledge traditional knowledge and values regarding biodiversity.

The values identified within policy and guidance documents may be used to inform the future direction for recognising and regulating OECMs. The law could be strengthened through binding provisions that necessitate the identification of values from various actors and stakeholders. This could include guidance for how to balance potentially conflicting values. It may also support the application of values to identify key areas for conservation and to inform the management objectives.

¹⁰⁴ Adams, et al. *Land-Sea Conservation Assessment* (2017).

¹⁰⁵ Key Biodiversity Areas Partnership *PNG's Key Biodiversity Areas* (accessed 2024).

¹⁰⁶ Adams, et al. *Land-Sea Conservation Assessment* (2017) Appendix 1, Table 1

¹⁰⁷ *GoPNG National Marine Conservation Assessment for Papua New Guinea* (2015) Appendix 2, Maps 3,4, 10-14.

¹⁰⁸ *Hitchcock & Gabriel World Heritage Tentative Listed Sites in PNG* (2015).

¹⁰⁹ Adams, et al. *Land-Sea Conservation Assessment* (2017).

¹¹⁰ *GoPNG PNG NBSAP 2019-2024* 28.

¹¹¹ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 53.

¹¹² Leverington, et al. *Methodology for assessment of protected area management effectiveness in Papua New Guinea's protected areas* (2017) 5-6.

¹¹³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 49-51.

¹¹⁴ *Ibid.* 155; *GoPNG PNG Protected Areas Policy* (2014) 15,20.

5.4.2 Protecting values

The explicit inclusion of the conservation of natural resources and the environment as one of PNG's Constitutional founding NGDPs fosters a high level of protection for the values that may support OECMs. As the Constitution imposes a duty upon all state actors to apply and give effect to the NGDPs,¹¹⁵ these values cascade down to inform domestic policy and law. The Environment Act is a key piece of legislation for protecting important biodiversity values as it creates the overarching regulatory mechanisms for environmental impact assessments, permits, management plans, and biodiversity offsets. The Act states that the environmental protections pursued under its remit may be informed by identifying the important values of the "community of Papua New Guinea" for protection. These may subsequently form the conditions attached to environmental permits and management programs.¹¹⁶ Given PNG's vast cultural and social diversity,¹¹⁷ this notion of "community" may be oversimplified. The literature also provides an argument that protected and conserved areas in PNG serve a broader role as international public goods to safeguard important biodiversity values.¹¹⁸

The Environment Act sets out several general objectives, including the wise use of resources, protection of the environment, sustainable development, fostering equity, and the employment of the precautionary approach, amongst others.¹¹⁹ To achieve these objectives, the Act utilises regulatory mechanisms such as attaching conditions to environmental permits and environmental impact assessments for activities that may threaten environmental values. Development proposals that require an EIS have the onus to demonstrate a commitment to conserve and protect the environmental values of the area.¹²⁰ However, the provisions do not elaborate on how or by who the values are identified or validated. Moreover, the legislation does not address the balance of worldviews that may contribute to the misalignment of values and power imbalances.¹²¹

The Regulations describe Level 2 and Level 3 activities that may require an EIA.¹²² The activities that may pose significant environmental threats within a WMA, Conservation Area, National Park, Protected Area, or any other area declared protected under an international treaty are considered Level 3 activities. This latter inclusion could reasonably include Ramsar sites and WHS that are not recognised domestically as protected areas. However, several protected areas and potential OECMs, such as LMMAs, LMCAs, and reserved lands, do not explicitly flag the need to undertake an EIA. The Act states that the prescribed activities will account for matters of national importance.¹²³ This is defined as preserving traditional social structures, protecting areas of biological diversity, habitats of unique or endangered species, and including

¹¹⁵ Section 25.

¹¹⁶ *Environment Act (No. 64 of 2000)* Section 6(2).

¹¹⁷ As represented through PNG's 840 living indigenous languages. Eberhard *Ethnologue* (accessed June 2025).

¹¹⁸ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 69.

¹¹⁹ *Environment Act (No. 64 of 2000)* Section 4.

¹²⁰ *GoPNG Operational Manual (Environment Act 2000)* (2004) 98.

¹²¹ For an example from the mining sector see Roche, et al. "Understanding why impact assessment fails; a case study of theory and practice from Wafi-Golpu, Papua New Guinea" (2021) *Environmental Impact Assessment Review*.

¹²² *Environment (Prescribed Activities) Regulations (No. 30 of 2002)*.

¹²³ *Environment Act (No. 64 of 2000)*. Section 42.

landowners in decision-making.¹²⁴ Given the inclusive definition of matters of national importance, it may seem that the Regulations do not adequately protect values from potential threats.

The initial phases of undertaking an EIA should include an inception report and the development and public review of an EIS.¹²⁵ Although public consultation may be required, there are no specific requirements identified for undertaking this activity other than that the Director shall approve the proposed program before proceeding, with the format, contents, and timeframes to be at the Director's discretion.¹²⁶ A 2014 amendment curtailed the provisions regarding public consultation, with the Environment Act currently failing to compel a potential developer to address matters identified through the public consultation process. This could hinder the expression and inclusion of local values for regulation and protection under environmental permits. The process to renew or apply for a variation of an existing permit¹²⁷ does not require documentation of the outcome of the public consultation process nor evidence of consent from the landowners, other stakeholders and rightsholders.¹²⁸ Although the Director may compel the provision of further information to make an informed decision,¹²⁹ there is no statutory obligation nor mechanism to prioritise specific values.

Interestingly, the Protected Areas Act does not prohibit development activities. It explicitly states that development and logging may be allowed where it is perceived to be for the benefit of the community and has a higher economic return than the loss of natural and cultural heritage.¹³⁰ The Act grants CEPA considerable decision-making power regarding the permission for future development. Although the development approval of a forested area of a protected area should be consultation with the PNG FA or CCDA,¹³¹ both of these authorities could reasonably be considered to have conflicting interests. This arrangement could question the constitutionality of the state assuming this degree of power over land subject to private or communal property rights without FPIC and compensation.¹³² Without clear and binding decision-making criteria, these provisions could be manipulated to disadvantage the protection of conservation values and potentially allow for unwanted development with no options for administrative appeal. The recognition and regulation of OECMs could seek to provide stronger and more inclusive protections.

The Environment Act and Protected Areas Act synergise to establish and regulate PNG's biodiversity offsets where development activities could result in significant or unavoidable environmental damage.¹³³ Although the international community suggests biodiversity offsets could fulfil the criteria of an OECM,¹³⁴ within the PNG context, these tools are

¹²⁴ Ibid. Section 5.

¹²⁵ Ibid. Section 51.

¹²⁶ Ibid. Section 55.

¹²⁷ Some of the issues are explored in Mudd, et al. "Mining in Papua New Guinea: A complex story of trends, impacts and governance" (2020) *Science of The Total Environment*.

¹²⁸ *Environment (Permits) Regulations* (No. 27 of 2002). Regulation 5 and 18.

¹²⁹ *Environment Act* (No. 64 of 2000). Section 54.

¹³⁰ *Protected Areas Act* (No. 9 of 2024). Sections 5(1) and 5(2).

¹³¹ Ibid. Section (1)

¹³² *GoPNG PNG protected area policy discussion paper* (2011) 10.

¹³³ *Environment Act* (No. 64 of 2000). Section 6(2)(f). *Protected Areas Act* (No. 9 of 2024). Section 25.

¹³⁴ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 191; Paterson "OECMs, biodiversity stewardship and statutory intervention" (2023) *Potchefstroom Electronic Law Journal* 17-19.

defined as compensation payment rather than an area-based measure.¹³⁵ While they may not be a potential OECM *per se*,¹³⁶ offsets could facilitate the protection of values through financial resources.¹³⁷ Although further provisions describing the nature and application of offset are absent from the legal frameworks, the management of a fund for the compensation payments may be described in future regulations.¹³⁸

The protection of values could be strengthened by obliging the inclusion in the mechanisms to propose and recognise potential OECMs, as well as within subsequent management planning and monitoring. Decision-makers could have a statutory mandate to consider and prioritise the important values of potential OECMs when regulating all activities that could undermine their protection.

5.5 GEOGRAPHICALLY DEFINING THE AREA

Land is commonly regarded as "the central value" in Melanesian culture.¹³⁹ As land issues are integrally linked to social and political structures within the community,¹⁴⁰ neglecting to recognise resource tenure, inheritance systems, and customary decision-making processes may result in conflict and, ultimately, failure of an OECM.¹⁴¹ Over the years, the PNG government has implemented various strategies to facilitate conflict resolution, clarify ownership rights, and mobilise customary land for development.¹⁴² However, these have been plagued with adverse outcomes primarily attributed to an inability to identify the rightful owners and the state's recognition of communal land rights.¹⁴³ Customary land tenure boundaries are largely not legally demarcated,¹⁴⁴ often resulting in contentious ownership claims and physical violence.¹⁴⁵ This has proven especially true when economic incentives are presented.¹⁴⁶

¹³⁵ *Environment Act (No. 64 of 2000)*. Section 2.

¹³⁶ A biodiversity offset in PNG is not defined in spatial terms.

¹³⁷ See section 4.6.7 of this text. *Protected Areas Act (No. 9 of 2024)*. Section 59(52) and Section 60; *Climate Change (Management) Act (No. 19 of 2015)*. Section 37.

¹³⁸ *Environment Act (No. 64 of 2000)*. Section 97.

¹³⁹ See section 0 of this text. Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull*.

¹⁴⁰ Ballard "It's the Land, Stupid! The Moral Economy of Resource Ownership in Papua New Guinea" in *Common Property* 52. Telesetsky "Graun bilong mipela" (2001) *Georgetown International Environmental Law Review* 750-752.

¹⁴¹ Clarke & Jupiter "Law, Custom and Community" (2010) *Environ Conserv*; Beehler & Kirkman *Lessons Learned from the Field* (2013).

¹⁴² For various perspectives and experience resulting from colonial influences and the formation of PNG's legal frameworks see: Weiner & Glaskin *Customary Land Tenure and Registration in Australia and Papua New Guinea: Anthropological Perspectives* (2007).

¹⁴³ Lea "Are there advantages to customary land in PNG?" (2002) *Pac Econ Bull*.

¹⁴⁴ Jupiter 2017 *Pacific Conservation Biology* 139-145.

¹⁴⁵ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 415.

¹⁴⁶ Jupiter 2017 *Pacific Conservation Biology* 139-145; Lea 2002 *Pac Econ Bull* 42-54; West & Kale "The Fate of Crater Mountain" in *Tropical Forests* 155-178. Beehler & Kirkman *Lessons Learned from the Field* (2013) 17.

5.5.1 Recognition of tenure and resource rights

It is generally recognised that in PNG, 97% of land is held under customary land tenure.¹⁴⁷ The remaining alienated land is either freehold (0.5%) or public land (2.5%) that may be subject to state lease.¹⁴⁸ Although all of these tenure types are afforded legal recognition, the Constitution confers a special right that grants only citizens¹⁴⁹ the privilege of acquiring freehold land.¹⁵⁰ Land under customary tenure is secured under statutory law as the Land Act expressly forbids the selling, leasing, or disposal of customary land except to other citizens¹⁵¹ as per custom.¹⁵² All land, other than customary land, is state property and subject to estates, rights titles or interests under the law.¹⁵³ The statistics associated with land tenure may not accurately recognise other forms of partial alienation and overlapping tenure, such as that associated with logging concessions, SABLs, extractive development licences, and terrestrial protected areas.¹⁵⁴

The state may acquire customary land as necessary for public purposes with just compensation¹⁵⁵ or as part of a lease-leaseback scheme employed to mobilise land for development purposes.¹⁵⁶ The state, however, may give a heightened regard to necessity, as opposed to desirability, for acquiring land, thus providing an elevated burden of proof that has effectively maintained the customary land tenure system. A thorough discussion of the implications of this is beyond the remit of this thesis. Nevertheless, it is critical to consider its influence on area-based conservation as customary tenure is often cited as a significant factor for both maintaining PNG's natural environment and hindering CEPA's ability to expand the national protected area network.¹⁵⁷

The literature draws attention to PNG's "dualistic land tenure system", where both the traditional undocumented systems and a centralised system described through the statutory legal frameworks co-exist, as a contributing factor to "land grabs".¹⁵⁸ The Land Registration Act has sought to establish a mechanism to provide proof of title for customary land.¹⁵⁹

¹⁴⁷ PNG's NEMS concedes that this statistic has likely decreased in recent years given the efforts to mobilise and acquire customary land. However, customary land remains significant as it likely still comprises more than 80% of land tenure. CEPA & SPREP PNG's *National Environment Management Strategy* (2021) 3.

¹⁴⁸ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 257.

¹⁴⁹ Corporations that may be regarded as citizens in this context have been defined as the state, governmental bodies, LLGs and Special Purpose Authorities, ILGs, business groups, and other corporations as declared by an Act. *Land (Ownership of Freeholds) Act* (No. 76 of 1976). section 15.

¹⁵⁰ *Constitution of the Independent State of Papua New Guinea* (1975). Section 56(1)(b). This is given effect by the *Land (Ownership of Freeholds) Act* (No. 76 of 1976).

¹⁵¹ A citizen is defined to be a customary kinship, descent, or local community group, a land group, or a business group. *Land Act* (No. 45 of 1996). Section 2.

¹⁵² *Ibid.* Section 132.

¹⁵³ *Ibid.* Section 4.

¹⁵⁴ It is noted within the literature that this could include mining and/or petroleum exploration licences which cover a considerable portion of PNG. However, the overlap with these areas may cause minimal impact on the rights of customary landowners. Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 6.

¹⁵⁵ Public purpose is defined by the *Land Act* (No. 45 of 1996). Section 2(1).

¹⁵⁶ The *Land Commission Act* (No. 47 of 2022). provides a framework to regulate the acquisition of land by the state with specific provisions for lands acquired before and after independence. It includes provisions relevant to payments, public notification, disputes, grievances, and record keeping.

¹⁵⁷ Beehler & Kirkman *Lessons Learned from the Field* (2013) 13-14.

¹⁵⁸ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 414.

¹⁵⁹ *Ibid.*

However, the uptake of the registration process has been slow and controversial.¹⁶⁰ As the landowners bear the costs associated with the registration process, this may restrict application to those with sufficient resources.¹⁶¹ It may also be attributed to the belief that land registration will result in the loss of power.¹⁶² Notably, the recognition of an ILG was not intended to be a mechanism to confirm tenure. However, it has, in some cases, been used as a substitution for formal registration. The literature observes concerns that land registration could be prone to the same procedural irregularities and misrepresentation¹⁶³ that has tarnished other initiatives, such as those associated with ILGs and SABLs. While the current land registration application requires a list of members of the customary group, it does not state the need for their FPIC, nor does it address the challenges associated with verification.¹⁶⁴ This process not only alienates land but also the identity of the customary land group as it severs the connection between land and custom through a transition to a Western legal system.¹⁶⁵ Furthermore, land formalisation may have the unintended consequence of less secure tenure as it concentrates land rights and may fail to recognise other resource users, particularly women and marginalised people.¹⁶⁶ The process of recognising OECMs may be cautious not to place an additional burden upon customary landowners and foster trust through the principles of good governance. Given the deep connection between people and land,¹⁶⁷ the land registration process could have negative social and cultural implications that hinder the move towards embracing a position of ethnobiological prioritisation.¹⁶⁸

The literature notes that the designation of protected areas on alienated land had been "abandoned" soon after independence.¹⁶⁹ In formulating the initial direction for protected areas, it was observed that protected areas that rely on the alienation of customary land by the state hold "limited value in PNG today", and future alienation "is unlikely to occur".¹⁷⁰ It therefore is surprising that the new Protected Areas Act fails to afford recognition to customary landowners. Rather it defines an "owner" as the person who holds the title to a protected area.¹⁷¹ This seems to misalign with the domestic context where the registration process has been slow and controversial.¹⁷² The Act does not elaborate on the role, rights, and responsibilities of the owners. Although the Protected Areas Act has yet to be tested and thoroughly critiqued within the literature, the recognition of OECMs could potentially fill a gap where landowners do not desire to register their land or obtain legal title for various cultural reasons.

¹⁶⁰ For a broad historical overview see Fingleton & ToLopa "Land registration among the Tolai".

¹⁶¹ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 417.

¹⁶² Ballard "It's Land, Stupid!" in *Governance of Common Property* (1997) 54.

¹⁶³ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 138.

¹⁶⁴ *Land Registration Act 1981 (Chapter 191)*, Section 34D-F.

¹⁶⁵ Filer "Two steps forward, two steps back" (2019) *Development Policy Centre Discussion Paper* 14-15.

¹⁶⁶ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 136.

¹⁶⁷ See section 0 of this text.

¹⁶⁸ *GoPNG PNG NBSAP 2019-2024* 28.

¹⁶⁹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 15.

¹⁷⁰ *GoPNG PNG protected area policy discussion paper* (2011) 10.

¹⁷¹ *Protected Areas Act (No. 9 of 2024)*.

¹⁷² For a broad historical overview see Fingleton & ToLopa "Land registration among the Tolai".

Most prospective and existing protected areas and OECMs in PNG have an overlapping lease under the Forestry Act, Mining Act, or Oil and Gas Act.¹⁷³ This may have notable consequences for the vertical dimension of potential OECMs,¹⁷⁴ as all minerals and petroleum remain the property of the state.¹⁷⁵ However, the Land Act creates synergies with the CEPA Act and Mining Act to reserve land from future lease for mineral exploration and mining.¹⁷⁶ The Forestry Act contains provisions for landowners to maintain their ownership rights over the land, with only the resource rights to the timber transferrable to a permit holder through a forest management agreement.¹⁷⁷ As the majority of forests exist on customary land, the Forestry Act accords a procedural right to customary landowners to be recognised in all transactions.¹⁷⁸ Similarly, climate change related project agreements may allocate land-use rights but not ownership rights.¹⁷⁹ Regulations may be developed to further establish the rights to carbon and guidance for the associated landownership.¹⁸⁰

Generally, the tools to legally recognise communal landownership in PNG lack clear mechanisms to provide evidence and validate ownership and boundaries of land. The recognition and regulation of OECMs could be strengthened through a culturally appropriate and equitable system to record customary laws. It may also seek to more adequately address the competing land and resource rights identified within this section. The literature notes that the overlap of a protected area or an OECM with an existing resource lease could create legal challenges.¹⁸¹ The law may seek to better account for an equitable balance of these competing tenure and resource rights through appropriate regulation.

5.5.2 Process to demarcate the boundaries of an OECM

The boundaries for various land uses in PNG, including protected areas and potential OECMs, are commonly based on customary land tenure.¹⁸² However, they may also be identified through geographical features, administrative boundaries, language groups or clan membership, or other aspects of local tradition and custom.¹⁸³ The amalgamation of identifiers is not uncommon. For example, PNG's Organic Law on Provincial Boundaries couples geographic coordinates with natural land boundaries, compass directions, distances, and former administrative boundaries to describe and delineate

¹⁷³ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 348; *GoPNG Papua New Guinea National REDD+ Strategy 2017-2027* 26. Site maps for permissions, both pending and granted, under the Mining Act and Oil and Gas Act are publicly available <https://portal.mra.gov.pg/Site/MapPage.aspx?PageID=e735c534-5f4e-4b2b-a544-89b90357e0f1> and https://petroleum.gov.pg/wp-content/uploads/2023/09/Petroleum-Licence-Tenement-Map-withbasin_December-2021.pdf.

¹⁷⁴ Although this thesis has been delimited to terrestrial areas, it would be an oversight not to draw attention to the implications that have arisen out of PNG's consideration of deep-sea mining activities with regard to the vertical dimension. For a synopsis on the implementation of the Mining Act, customary landowner rights, and the pursuit of environmental permits see: Filer & Gabriel "How could Nautilus Minerals get a social licence to operate the world's first deep sea mine?" (2018) *Mar Policy*; van Putten, et al. "History matters: societal acceptance of deep-sea mining and incipient conflicts in Papua New Guinea" (2023) *Maritime Studies*.

¹⁷⁵ *Mining Act (No. 20 of 1992)*. Section 5(1); *Land Act (No. 45 of 1996)*. Section 82.

¹⁷⁶ See section 4.6.3 of this text. *Mining Act (No. 20 of 1992)*. Section 7(1).

¹⁷⁷ Section 56.

¹⁷⁸ Section 46.

¹⁷⁹ *Climate Change (Management) Act (No. 19 of 2015)*. Section 91.

¹⁸⁰ *Ibid.* Section 92(A).

¹⁸¹ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 348.

¹⁸² Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 23.

¹⁸³ The traditional way of identifying boundaries may be represented through specific environmental features, such as the head of a river or where the birds perform their song. West *Conservation is Our Government* (2006) 136.

boundaries.¹⁸⁴ However, the demarcation of customary land ownership and boundaries in PNG can be notably contentious¹⁸⁵ and dynamic.¹⁸⁶

The Lands Dispute Settlements Act provides a mechanism to facilitate customary land disputes and clarify ownership boundaries. The legislation explicitly recognises custom as the primary source of law for fostering resolutions appropriate to each circumstance.¹⁸⁷ Disputes may first undergo mediation before being referred to a Local Land Court. Any agreement reached through this mechanism is documented and may be endorsed by a Local Land Court as binding.¹⁸⁸ A Provincial Land Court may hear appeals from a Local Land Court.¹⁸⁹ The resulting decisions are final with no opportunity for appeal.¹⁹⁰ An order may be given by the local land or district magistrate stipulating the land use conditions pending the dispute's outcome.¹⁹¹ Given the frequency of disputes, coupled with the nuances of custom, the Act's local focus may be appropriate to lessen the potential resource strain it could place on legal systems. Utilising the existing system for land disputes could be advantageous for OECMs as a precondition to recognition.

Although PNG's legal frameworks do not explicitly refer to vertical zoning, the alignment of the Land Act with the Mining Act and Oil and Gas Act may implicitly recognise the aspects of three-dimensional space given the distinct ownership rights of land and minerals. Several legal frameworks require the demarcation of boundaries, with many of these relying on the mechanisms found within the Incorporation of Land Groups Act and the Land Disputes Settlement Act to facilitate the demarcation of boundaries and the consent of communal landowners. Given the experience of misrepresentation, it is recommended to exercise caution when relying on the information presented as part of an ILG as the *de facto* boundaries.¹⁹² While the use of the Land Registration Act could facilitate the formalisation of boundaries, the onus it places on landowners could prove prohibitive.

The literature provides examples of protected areas being used as a proxy mechanism for landowners to formalise their land ownership and resource rights.¹⁹³ However, the new Protected Areas Act generally does not call for the demarcation of boundaries there are a few exceptions. First, the Act assert that a landowning clan and chief should consult with the Village Court Magistrate to identify and describe the boundaries of a sacred site.¹⁹⁴ As this does not involve agreement from external stakeholders, it may fail to adequately address challenges that arise from outside the boundaries. The Act also requires the areas set aside for conservation as per the conditions of a permit to be delineated on a map.¹⁹⁵ However,

¹⁸⁴ *Organic Law on Provincial Boundaries* (901 of 9998)

¹⁸⁵ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy*.

¹⁸⁶ GoPNG *PNG's 6th National Report to the CBD* (2019) 19. For further reading see: Sillitoe "Beating the boundaries: land tenure and identity in the Papua New Guinea Highlands" (1999) *Journal of Anthropological Research*.

¹⁸⁷ *Land Disputes Settlement Act 1975* (Chapter 45). Section 1.

¹⁸⁸ *Ibid.* Section 18-20.

¹⁸⁹ *Ibid.* Section 53.

¹⁹⁰ *Ibid.* Section 60.

¹⁹¹ *Ibid.* Section 30.

¹⁹² See section 5.2 of this text.

¹⁹³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 24.

¹⁹⁴ *Protected Areas Act* (No. 9 of 2024). Section 8(2).

¹⁹⁵ *Ibid.* Section 19.

mechanisms to validate agreement are noticeably absent. Lastly, the “Expression of Interest” form for a protected area asks for a description of the location but fails to necessitate clearly demarcated boundaries.¹⁹⁶

Despite the lack of explicit provisions for demarcation, the Protected Areas Act calls for disputes on customary land to be settled in accordance with the Land Disputes Settlement Act.¹⁹⁷ The Land Dispute Settlements Act draws on the principles of mediation and local custom to find equitable resolutions. As part of the dispute resolution process, the mediator is responsible for walking the boundaries with all parties. As the landscape can be rugged, where this is impossible, parties may identify and record the outstanding natural features denoting the agreed-upon boundaries. This should be witnessed and certified by representatives from the same or adjacent areas with local knowledge.¹⁹⁸ The Local Land Court may authenticate the agreement of boundaries as binding upon all parties¹⁹⁹ after ensuring that the terms are fully understood and agreed to by the “substantial majority” of persons under communally held arrangements.²⁰⁰ The demarcation of the boundaries of OECMs may include similar processes for validation, evidence of landownership, and dispute resolutions.

PNG’s legal frameworks may be strengthened through clear mechanisms for the demarcation of vertical and horizontal dimensions of an area. This may include processes of public participation and consultation with state authorities. Provisions for dispute resolution may be consolidated and reconciled through a single system for clarity and consistency.

5.5.3 Alignment with other strategic planning and land-use management tools

The international guidance provides that OECMs should seek to holistically conserve nature, not individual components of the ecosystem.²⁰¹ The alignment with other strategic plans may address duplication and overlap, as well as foster consistent approaches to area-based conservation. The Planning and Monitoring Responsibility Act establishes the structure to foster the alignment and integration of an OECM’s boundaries into development frameworks and budgets. The national planning framework cascades from the Constitution down to the National StaRS, Vision 2050, MTDP, sector plans, annual budgets for MTDP implementation and finally any other documents.²⁰² All plans developed by the various state entities are expected to comply and be consistent with this national planning framework.²⁰³ The alignment of the boundaries of OECMs within these statutory frameworks could promote inclusion into state planning and budgeting mechanisms to add security and legitimacy, as well as potential access to state resources.

The StaRS and Vision 2050 are high-level plans that impart a general duty that filters down to inform the various planning mechanisms for conserving and protecting important biodiversity values. The planning direction set by the StaRS has interpreted the Constitution’s Fourth NGDP as rejecting development that threatens the world’s biodiversity or jeopardises

¹⁹⁶ Ibid. Schedule 3, section 3.

¹⁹⁷ Ibid. Section 12(3).

¹⁹⁸ *Land Disputes Settlement Act 1975 (Chapter 45)*. Section 18(2).

¹⁹⁹ Ibid. Section 20(b).

²⁰⁰ Ibid. Section 19(2).

²⁰¹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 6.

²⁰² *Planning and Monitoring Responsibility Act (No. 1 of 2016)*. Section 4.

²⁰³ Ibid. Section 8(1)(a).

future generations.²⁰⁴ StaRS encourages the development of sectoral plans based on a set of guiding principles that builds on the foundations of sustainable development. Amongst these principles are a commitment to the protection of biodiversity, the precautionary approach, equity, justice, inclusivity and participation, and an "integrated approach to decision making", amongst others.²⁰⁵ Vision 2050 identifies several "critical enablers" that align with this thesis, including good governance, policies and laws, citizen values and participation, and accountability.²⁰⁶ Although both StaRS and Vision 2050 promote environmental sustainability, they strongly focus on the wise use of natural resources.

The MTDP begins to narrow the focus to a more operational level of planning. All plans developed by the various state entities are expected to ensure that the plans developed under their mandate are consistent with the MTDP.²⁰⁷ The MTDP 2023-2027 contains 12 Strategic Priority Areas (SPAs) that are intended to shape the national planning agenda. With relevance to this thesis, the 10th SPA seeks to foster climate change mitigation and adaptation, natural disaster management and environmental protection.²⁰⁸ Although this draws attention to the need for increased protected areas and better environmental compliance, the targets appear arbitrary, and the plan does not provide adequate information for further guidance other than the responsible agency being CEPA. The MTDP informs the development of five-year sectoral, district, and provincial development plans.

Although the planning frameworks seek to foster alignment across national and sub-national governments, gaps prevent effective coordination. Sectoral plans may not oblige the holistic consideration of factors, thus contributing to the compartmentalisation of planning frameworks. The current road expansion project, Connect PNG, may represent an example of the potential gap. If it progresses as proposed, the road expansion will transect a number of protected areas as well as potential OECMs that are considered as high conservation priority for providing critical habitat for endangered species, ecosystem services, and ecological connectivity.²⁰⁹ The development of roads is regarded as a public purpose under the Land Acts,²¹⁰ thus allowing for land acquisition with just compensation.²¹¹ Decision-makers are obliged to consider factors relating to social, economic, and national security impacts but not those relating to the environment.²¹² This creates a gap in the planning frameworks that fails to appropriately afford recognition to area-based conservation measures. The planning mechanisms provide an opportunity to integrate the boundaries of OECMs.

²⁰⁴ GoPNG PNG StaRS 23.

²⁰⁵ Ibid. 19.

²⁰⁶ GoPNG Papua New Guinea Vision 2050 ii.

²⁰⁷ Planning and Monitoring Responsibility Act (No. 1 of 2016). Section 8(1)(a).

²⁰⁸ GoPNG MTDP IV (2023-2027) 180-181.

²⁰⁹ The ecological impact of the planned road expansion can be found in Alamgir, et al. "Infrastructure expansion challenges sustainable development in Papua New Guinea" (2019) *Plos One*.

²¹⁰ Land Act (No. 45 of 1996). Section 2(j).

²¹¹ Constitution of the Independent State of Papua New Guinea (1975). Section 53(1-2).

²¹² Road (Management and Fund) Act (No. 41 of 2020). Section 7(3).

Several non-state actors and other stakeholders have worked with communities to develop local land-use plans.²¹³ A collection of laws²¹⁴ fosters the alignment of five-year development plans and annual budgets that feed up from the ward level to inform the LLG and District planning activities. This encourages the integration of OECDs into government planning and budgeting mechanisms. However, as the literature describes PNG's land-use planning as being in its infancy,²¹⁵ the broad application of integrated planning may take years to realise.

The Physical Planning Act provides the framework for planning and regulating physical development, including zoning.²¹⁶ A development plan created for the provincial, local, or subject level, is expected to describe current land use within the relevant area.²¹⁷ Development plans may link written documents, maps, existing land uses, and proposed zoning.²¹⁸ The Act also creates another mechanism that aligns with the Land Act as a development plan may recommend that state land be reserved from future leases.²¹⁹ The inclusion of reserve lands in the development planning process affords an additional mechanism for public participation and consultation with various state bodies,²²⁰ which may strengthen synergies and government cooperation. Although the Minister, national²²¹ or provincial,²²² may order a development plan to be prepared for any area within PNG, the literature notes that the state has not developed any plans outside of urban areas.²²³ The lack of inclusion of customary land limits the application of planning provisions under this legislation. The three zones defined by the NSLUP, namely development promotion, conservation, and rural sustainability,²²⁴ could provide a mechanism to integrate the boundaries of OECD into the planning frameworks aligned with the Physical Planning Act.

The recognition and regulation of OECDs could be better supported by including explicit provisions within the planning frameworks that foster alignment. The legal frameworks may be further strengthened by compelling decision-makers to account for environmental considerations and establishing legal consequences for non-compliance.

²¹³ Nane, et al. "Land-Use Planning for a Sustainable Future in Papua New Guinea" in Dabek, et al. (eds) *Tree Kangaroos: Science and Conservation* (2021); Lipsett-Moore, et al. *Ridges to Reefs Assessment for New Britain, PNG: Planning for Responsible, Sustainable Development* (TNC Pacific Division Report No. 2/10) (2017).

²¹⁴ *The Organic Law on Provincial Governments and Local-level Governments* (1995) Section 25(23); *District Development Authority Act* (No. 40 of 2014). Section 5(e); *Local-level Governments Administration Act* (No. 33 of 1997). Section 38(31).

²¹⁵ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 138-141.

²¹⁶ *Physical Planning Act* (No. 32 of 1989).

²¹⁷ Section 45(1).

²¹⁸ The requirements and procedures for the development plans are contained in the *Physical Planning Regulations* (No. 6 of 1990).

²¹⁹ Section 56(2). See section 4.3.3 of this text.

²²⁰ *Physical Planning Act* (No. 32 of 1989). Section 59-61.

²²¹ Section 50.

²²² Section 51.

²²³ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 139.

²²⁴ *GoPNG National Sustainable Land Use Policy* (2022-2023) 11-13 and 16-19.

5.6 DEFINING THE INSTITUTIONS AND MECHANISMS TO GOVERN AND MANAGE

Throughout PNG, customary landowners are often the day-to-day managers and the *de facto* decision-making authority for protected areas and potential OECMs.²²⁵ The first pillar of PNG's Protected Areas Policy aims to support effective governance and management to drive the new direction for area-based conservation.²²⁶ The policy recognises the protection of PNG's natural resources and biodiversity as a "shared responsibility".²²⁷ This perhaps underscores the importance of provisions supporting equity and good governance, as well as clear roles, responsibilities, and expectations for managing protected areas and OECMs. The recognition of OECMs may afford an opportunity to equitably acknowledge existing or customary governance structures and management regimes that could include both state and non-state actors. Although OECMs are not required to have conservation as a primary objective, the institutions and mechanisms for governance and management should result in positive outcomes for biodiversity.²²⁸

5.6.1 Identification of the governance authority

In PNG, customary landowners are often the primary decision-makers for area-based conservation.²²⁹ Of the protected areas listed on the WDPA, nearly all are identified as being governed by IPLCs.²³⁰ Although the current legal frameworks do not explicitly reference the IUCN categories for governance, the Protected Area Policy indicates that the changes introduced to PNG's protected area categories were developed to reflect and align with the IUCN guidance.²³¹ The policy recognises that it will be essential to include roles for the various levels of government as well as the customary landowners, community members, and other non-state actors.²³² Under the previous protected area frameworks, management decisions were mostly taken through statutory protected area management committees for each site. The literature observes that the lack of funding and support provided by the state²³³ cultivated a feeling of being "left behind".²³⁴ To counter this, local landowners and communities often desired to pursue shared governance models to overcome capacity and resource constraints.²³⁵ Although the IUCN's guidance for OECMs cautions that areas that face constraints resulting from limited capacity and resources may require evidence of a "reasonable likelihood" of future inputs and resources,²³⁶ this model may help to overcome challenges.

The Protected Areas Act is less prescriptive regarding site-level decision-making bodies. Although CEPA may establish a management committee, the composition, governance, and decision-making functions are absent from the legislation.²³⁷

²²⁵ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law*.

²²⁶ GoPNG PNG Protected Areas Policy (2014) 28-43.

²²⁷ Ibid. 20.

²²⁸ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 11.

²²⁹ Leverington *A guide to protected area types in PNG* (2019) 9.

²³⁰ UNEP-WCMC WDPA Profile for PNG (accessed October 2024).

²³¹ GoPNG PNG Protected Areas Policy (2014) 11-12.

²³² Ibid. 37.

²³³ UNDP *Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 69.

²³⁴ Ibid.

²³⁵ Ibid. 67.

²³⁶ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 12.

²³⁷ *Protected Areas Act* (No. 9 of 2024). Section 39.

The Act stipulates that CEPA is the foremost governance authority for any land set aside, reserved, or placed under their authority.²³⁸ Unlike most protected areas and potential OECMs, reserved lands are typically state land held in trust for the citizens of PNG.²³⁹ Under the Land Act, reserved land is registered to the state. However, the Head of State may commit it to the authority of CEPA to be utilised for the protection of flora and fauna.²⁴⁰ The Minister may appoint trustees with the powers to govern and manage the reserved land.²⁴¹ This includes creating by-laws and penalties for the area with the approval of the Head of State.²⁴² In reality, however, all levels of government face capacity and resource constraints to effectively implement their roles and responsibilities.²⁴³ Considering these constraints, CEPA may be hindered from adequately implementing this duty.

The legal frameworks could be improved with clear and consistent governance arrangements for OECMs. The use of co-management agreements could be strengthened by prescribing the form, nature, roles of parties, and governance arrangements to promote transparency and credibility.

5.6.2 Decision-making and good governance

PNG's Constitution advances in the Second NGDP that all citizens should have an equal opportunity to participate in matters that may affect their personal or community interests. The constitutional provision explicitly extends to women and calls for the participation of the maximum number of citizens in all facets of development.²⁴⁴ This is further qualified in the Fifth NGDP as embracing Papua New Guinean forms of participation, consultation, and consensus.²⁴⁵ The Constitution asserts that all consultations should be "meaningful" and foster the "genuine interchange and consideration of views".²⁴⁶ Collectively, these provisions may provide constitutional protection to the principles of good governance, especially those of participation and equity.

The literature suggests that "systematic governance" issues may undermine the effectiveness of PNG's protected area estate.²⁴⁷ Many existing management committees have failed to have systems to facilitate good governance and effective management.²⁴⁸ There is recognition that good governance principles, particularly transparency and accountability, are complex challenges that may necessitate broad institutional reforms.²⁴⁹ The broad achievement of good governance in PNG may be challenged as the cultural diversity and rugged geographical features accentuate the physical and social

²³⁸ Ibid. Section 19.

²³⁹ *Land Act (No. 45 of 1996)*. Section 2

²⁴⁰ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 39(1)(a).

²⁴¹ *Land Act (No. 45 of 1996)*. Section 50(1).

²⁴² Ibid. Section 50(2).

²⁴³ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG (2022)* 17.

²⁴⁴ *Constitution of the Independent State of Papua New Guinea (1975)*. Preamble NGDP 2.

²⁴⁵ Ibid. Preamble NGDP 5.

²⁴⁶ Ibid. Section 255.

²⁴⁷ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 347.

²⁴⁸ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG (2022)* 66.

²⁴⁹ Wickham, et al. *Assessing the capacity of Papua New Guinea to implement the United Nations Convention on Biological Diversity (UNCBD), the United Nations Convention to Combat Desertification (UNCCD), and the United Nations Framework Convention on Climate Change (UNFCCC)* (2010) 101.

divide.²⁵⁰ Although the OLPGLLG has sought to facilitate decentralisation of specific functions, this has failed to adequately address capacity and resource constraints of the provincial and local-level governments.

The Protected Area Policy and guidance documents²⁵¹ envisions National and Regional Protected Area Round Tables²⁵² to facilitate the administrative processes between state and non-state actors. However, the recently enacted Protected Areas Act has failed to give the NPART and RPART legal recognition. Although the NPART clearly was intended to apply to national protected areas, thus is beyond the remit of this thesis, OECMs could fit within the scope of the RPART. The guidance documents describe the round tables as "a process, not an entity"²⁵³ that may be incorporated into other decision-making structures.²⁵⁴ OECMs could use the RPART as a decision-making structure to facilitate good governance and align area-based conservation tools under a single mechanism.

Collectively, PNG's legal frameworks fail to adequately provide for the principles of equity, public participation, clear, transparent decision-making, accountability, and justice. The processes for decision-making and public participation are largely discretionary which has led to a broad interpretation when applied in practice. Legal reforms relevant to OECMs could seek to target issues of good governance. To reduce repetition, the elements of good governance have been integrated throughout this chapter.

5.6.3 Identification of the management authority

Prior to its repeal, the Conservation Areas Act mandated management planning to a site-level management committee comprised of local landowners, and local and provincial government representatives.²⁵⁵ This management committee was granted powers to oversee the work of rangers and advise the Minister on establishing rules for the area.²⁵⁶ The absence of similar provisions within the new Protected Areas Act could diminish the statutory power of the site-level management authorities. Although, the Protected Areas Act grants powers to CEPA to establish a protected area management committee, the provisions infer that this is intended to be at a national level as it may develop guidelines and oversee conflict resolution.²⁵⁷ The Act does not prescribe the composition of this committee, but does state that it should facilitate the inclusion of women's voices in planning processes.²⁵⁸

Historically, in PNG, external environmental NGOs and other non-state actors have been the strongest promoters of protected areas and potential OECMs.²⁵⁹ The literature observes that these non-state actors have been inclined to

²⁵⁰ May "Policy making on decentralization" in *Policy making implementation* (2009) 227.

²⁵¹ Wolnicki, et al. *Sharing governance* (2019).

²⁵² There may also be Provincial Roundtables, however, as the province may not have the capacity to undertake all responsibilities, the use of a RPART may be more appropriate. *GoPNG PNG Protected Areas Policy* (2014) 65.

²⁵³ Wolnicki, et al. *Sharing governance* (2019) 13.

²⁵⁴ For example some provincial governments have expressed using the Provincial Climate Change Adaptation Committees as a mechanism for the RPART. Wolnicki, et al. *Protected Area Governance: Role of Provincial Government in Management* (2019) 1.

²⁵⁵ *Conservation Areas Act 1978 (Chapter 362)*. Section 25.

²⁵⁶ *Ibid.* Section 27.

²⁵⁷ *Protected Areas Act (No. 9 of 2024)*. Section 39.

²⁵⁸ *Ibid.* Section 39(b)(ii).

²⁵⁹ Melick, et al. 2012 *Conserv Soc* 344-353.

promote a Western protected area model driven by the desire to access donor funding rather than encourage conservation approaches more relevant to local worldviews.²⁶⁰ The experience from managing protected areas reveals that non-state actors, such as international NGOs, often encourage local landowners and communities to formally commit land to conservation objectives.²⁶¹ However, this may result in a misalignment of worldviews and values that could threaten the longevity of conservation objectives.²⁶² A low capacity to implement protected area legislation and a high financial dependence may perpetuate reliance on external partners. Although the support from external NGO partners and other non-state actors may stimulate access to financial resources and capacity development opportunities, there are also critiques that this has led to the creation of “paper parks” with outcomes based on donor priorities rather than reflecting the local circumstances.²⁶³ OECMs may expand the notion of area-based conservation and extend greater recognition to locally driven efforts that may not have conservation as a primary objective.

When enacted, the Fauna Act was recognised for its innovativeness and the explicit inclusion of landowners in management decision-making.²⁶⁴ This included appointments to the management committee²⁶⁵ and rangers tasked with enforcing the rules associated with the area.²⁶⁶ In 1975, the first protected area declared under the remit of the Fauna Act utilised a co-management arrangement that provided for collaborations with local communities, non-state actors, and government.²⁶⁷ However, this level of engagement of non-state actors and local communities was discretionary. Under the new Protected Areas Act, WMAs established under the Fauna Act may be assessed to transition to CCAs.²⁶⁸ These areas are considered regional protected areas that may be managed by customary landowners, local and provincial governments, an ILG, corporation, or individual person.²⁶⁹ However, the new Act lacks explicit provisions that replicate the collaboration of state and non-state actors found in previous legislation and also fails to afford recognition to the co-management arrangements.

Although the legal frameworks do not explicitly provide for formal co-management agreements, there are examples of other types of agreements filling this gap. Several LMMAs and LMCAs have utilised conservation deeds, as a common law mechanism, to define site-specific management arrangements. This seemingly has largely been driven by non-state actors and external partners in collaboration with local landowners. Conservation deeds typically have had a duration of five to ten years.²⁷⁰ Such a period would likely not be justifiable as a sustained long-term commitment per the OECM criteria. However, the duration can be adjusted to suit the specific context, as no statutory requirements exist. It may also

²⁶⁰ Melick, et al. “Biodiversity Targets Risk Becoming Counterproductive” (2012) *Conserv Soc* 347; Filer “Why Green Grabs Don't Work in PNG” (2012) *J Peasant Stud* 610.

²⁶¹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 16.

²⁶² Ibid. ; Keppel, et al. “Conservation in tropical Pacific countries” (2012) *Conserv Lett* 257.

²⁶³ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 25.

²⁶⁴ Rose “Grassroots conservation in Pacific” (2021) *Journal of South Pacific Law* 4; *Fauna (Protection and Control) Act 1966* (Chapter 154).

²⁶⁵ *Fauna (Protection and Control) Act 1966* (Chapter 154). Section 16.

²⁶⁶ Ibid. Part VII.

²⁶⁷ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 67.

²⁶⁸ *Protected Areas Act* (No. 9 of 2024). Section 22.

²⁶⁹ Ibid. Section 28.

²⁷⁰ Van Helden *Lessons learned in community based conservation in PNG* (2005) 57.

be notable that long-term relationships are an important aspect of PNG society.²⁷¹ The duration and terms of a conservation deed may need to balance a cultural expectation of a long-term commitment with provisions to promote self-reliance through adaptive management and continued monitoring of capacity and support for area-based conservation objectives. The reports from the early adoption of conservation deeds have indicated that they afford greater flexibility to fit specific situations and can be a locally-led tool.²⁷² Lessons learned from using conservation deeds could be replicated to legally recognise the management authority of OECMs.

The climate change regime has employed project agreements to describe and recognise the governance and management of a climate change project.²⁷³ This document should be in writing in both English and Tok Pisin, as well as any relevant local language, describe the nature and duration to allow measures "to be carried out to completion", contain a map of the boundaries, and a stakeholder engagement plan.²⁷⁴ The agreement requires legal clearance from the Office of the State Solicitor before execution.²⁷⁵ However, no REDD+ project agreements had been finalised or implemented by the end of 2021. As a moratorium had been placed on projects in 2022, the literature queries the legality of any agreements created in recent years.²⁷⁶ This creates a compelling case to critically assess any management agreement made with local landowners for potential OECMs that are identified under the remit of the Climate Change Act

Opportunities exist to improve the clarity and consistency of the legal provisions for recognising the management authorities of OECMs. Reforms may seek to address who represents the management authority, their powers, and functions.

5.6.4 Management regime

According to the WDPA, 95% of PNG's current protected areas have not reported an IUCN management category.²⁷⁷ Before the new direction set forth by the Protected Areas Policy, PNG had not explicitly adopted the IUCN management categories. The Protected Areas Act calls for new protected areas to align with the Guide to Protected Area Types in PNG.²⁷⁸ This guidance describes eight protected area types and assigns each an IUCN management category.²⁷⁹ The guidance also identifies a ninth category for other protected or conserved areas that will require the objectives to be assessed individually but may relate to local culture or sustainable management.²⁸⁰ This latter category reflects the international guidance for OECMs and could guide future legal recognition of OECMs within PNG's domestic context.

²⁷¹ Aini, et al. "Reimagining conservation practice" (2023) *Oryx* 357.

²⁷² Van Helden *Lessons learned in community based conservation in PNG* (2005) 58.

²⁷³ *Climate Change (Management) Act* (No. 19 of 2015).

²⁷⁴ *Ibid.* Section 90(1).

²⁷⁵ *Ibid.* Section 90(2).

²⁷⁶ Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 26.

²⁷⁷ UNEP-WCMC & IUCN *Protected Planet: WDPA* (accessed January 2025).

²⁷⁸ Protected Areas Act (No. 9 of 2024). Section 48.

²⁷⁹ Leverington *A guide to protected area types in PNG* (2019) 7.

²⁸⁰ *Ibid.*

A recent push in PNG has seen the development of management plans for existing protected areas and some potential OECMs. However, this seems to be more donor-driven than legal obligation.²⁸¹ The Protected Areas Act provides minimal guidance for establishing, implementing, and enforcing a management regime. All protected areas are expected to submit a management plan to CEPA for approval by the Managing Director. Although the Act provides 90 days for public objections, there are no explicit provisions to clarify by who, how, when, or where the public may consider the management plan nor the procedure to raise objections.²⁸² The Act also does not prescribe the contents of the management plan nor who is mandated with its development.

The literature observes that complex and laborious management planning and reporting requirements may deter participation and compliance.²⁸³ CEPA has sought to facilitate guidance for management planning by creating a template for protected area management plans.²⁸⁴ The employment of the template is not a requirement but could alleviate uncertainty and empower non-state actors to drive management planning mechanisms. Although the Protected Areas Act does not prescribe the contents of a management plan, the template explicitly encourages the identification of important values relevant to biodiversity, environment, society, and culture.²⁸⁵ Notably, the management planning template was developed for protected areas. However, it could reasonably be extended for adoption by OECMs to make management planning more accessible across a range of capacities. Legal frameworks could be strengthened by prescribing the contents of the management plan and making it a statutory requirement.

Although not required, the Protected Areas Act allows for the development and regulation of a system of zoning within protected areas.²⁸⁶ Where a system of zoning is employed, it may require social mapping and consent from the customary landowners.²⁸⁷ The Act does not clarify further mechanisms for documentation, approval, nor inclusion into planning instruments.

Critically, a reflection on PNG's current protected area estate reveals that most management authorities lack the resources and capacity to manage the area effectively.²⁸⁸ Eighty-three percent of protected areas lack an annual budget.²⁸⁹ The Protected Areas Act asserts that all protected areas will be granted an annual budget for implementing management plans.²⁹⁰ However, no guidance is provided regarding distribution, financial management, and oversight. Without further

²⁸¹ The process has been initiated with 46 protected areas and several potential OECM, including the Kuk WHA, Kokoda IPZ, and proposed protected areas. *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 66.

²⁸² *Protected Areas Act* (No. 9 of 2024). Section 38.

²⁸³ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law* 24.

²⁸⁴ Leverington, et al. *Papua New Guinea protected areas: Living management plans template* (PNG Protected Area Management Guideline No.MP2, Version 1) (2019).

²⁸⁵ *Ibid.* 10.

²⁸⁶ *Protected Areas Act* (No. 9 of 2024). Section 43.

²⁸⁷ *Ibid.* Section 43(41).

²⁸⁸ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 66; Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017).

²⁸⁹ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 66.

²⁹⁰ *Protected Areas Act* (No. 9 of 2024). Section 58(2).

information, this may seem like an ambitious undertaking.²⁹¹ CEPA's limited resources and capacity may restrict the support that it can provide beyond formal protected areas. Significant inputs from the state to develop and maintain the institutions and mechanisms to govern and manage OECMs may be unlikely. This underscores the significance of ensuring that local landowners and communities have the statutory authority and power to effectively manage and enforce the rules of protected and conserved areas. The 2017 METT Assessment identified the limited capacity of customary landowners as a threat to many protected areas across the country, as local communities may not have the resources or knowledge to effectively address other potential threats.²⁹²

A 2016 review of several LMMAs found that the areas were no longer actively managed due to capacity and resource constraints.²⁹³ The establishment of these LMMAs was facilitated through a partnership with an external NGO with the intention of management by the local community. However, the review noted that the communities failed to implement the fines and penalties. Communities and lower levels of government may have limited capacity and resources, and perhaps the will, to adequately manage and enforce conservation rules.²⁹⁴ Although this is not expounded upon within the literature, it is submitted that the consideration of the social and cultural influences that may impact the overall effectiveness of the area should be included within the management regime.

Reserved land is not required to be actively managed. However, to protect the flora and fauna, it may be placed under the "care, control and management" of CEPA.²⁹⁵ The CEPA Act allows for regulations to be prescribed for these lands, stipulating the various management activities, prohibitions and regulations that may be made.²⁹⁶ While management may include intentional decisions to leave the area in a natural state, the absence of a management regime does not meet the OECM criteria.²⁹⁷

Generally, the provisions for implementing a management regime for potential OECMs are not comprehensively provided for within the legal frameworks. To support and strengthen management, key reforms may include formal provisions for management planning for OECMs. It is submitted that clarity on the form, nature, duration, and approval mechanisms could lead to improved outcomes.

²⁹¹ A national review of protected area management and financing suggests that CEPA has supported only 1% of protected areas. However, it is unclear how the author derived this statistic, and if it is cumulative or based on the current level of support. Nevertheless, it draws attention both to the significant financial constraints faced by CEPA. Bito *Institutional and Regulatory Review of Protected Area Management and Financing in Papua New Guinea. Sustainable Financing of Papua New Guinea's Protected Area Network*. (2021).

²⁹² Leverington, et al. *Assessment of Management Effectiveness for Papua New Guinea's Protected Areas 2017*.

²⁹³ Wise, et al. *Locally managed marine areas in Kimbe Bay: Reflections and future possibilities* (2016).

²⁹⁴ Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009) 116.

²⁹⁵ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 39(1).

²⁹⁶ *Ibid.* Section 48(2).

²⁹⁷ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* 1-22.

5.6.5 Equity

PNG's Constitution enshrines linkages to each of the three dimensions of equity within the NGDP. For example, this extends to the equitable distribution of benefits,²⁹⁸ the equal participation by women,²⁹⁹ open participation extended to all citizens,³⁰⁰ government bodies to have representatives from various parts of the country,³⁰¹ and the wise use of natural resources held in trust for future generations.³⁰² The concepts of distributional, recognition, and procedural equity have been woven throughout this chapter as they have been represented within the legal frameworks. However, it may be notable to highlight the use of social mapping as present in the Climate Change Act, Protected Areas Act, and Oil and Gas Act. Although social mapping is not defined, it may be inferred that it has been employed to provide decision-makers with insights into composition and representation of social structures within a community, as well as to inform benefit-sharing agreements. The legal frameworks may be strengthened through a clear definition and prescribed details to be included within this exercise.

5.6.6 Integration for holistic management

Although CEPA has the statutory function to promote the coordination of environmental and conservation strategies with local and provincial governments, as well as with other sub-national authorities, there is generally an absence of harmonisation of management activities that support a functioning and integrated landscape. An LLG may have ward development committees which serves as a mechanism to integrate local area-based conservation into district and provincial planning frameworks.³⁰³ As any act by the ward development committee is non-binding unless approved by the local-level government,³⁰⁴ it may be considered more advisory with decision making powers held by the local-level government. The JPPBPC has the role to oversee, coordinate and make recommendations for planning and budget priorities, including rolling 5-year development plans for provinces.³⁰⁵ This could provide a mechanism to align with government planning timeframes and potentially encourage budget allocations to support the management regime. The integration of the management plan into the 5-year development plans may also support management of the vertical dimension of an OECM. Despite the system of decentralised supported by the OLPGLLG, the alignment of site-level management plans and the broader planning mechanisms could be strengthened.

²⁹⁸ *Constitution of the Independent State of Papua New Guinea* (1975) NGDP 2(3).

²⁹⁹ *Ibid.* NGDP 2(5).

³⁰⁰ *Ibid.* NGDP 2(9).

³⁰¹ *Ibid.* NGDP 2(10).

³⁰² *Ibid.* NGDP 4(1).

³⁰³ *Local-level Governments Administration Act* (No. 33 of 1997). Sections 11 and 34.

³⁰⁴ *Ibid.* Section 35(2)

³⁰⁵ *The Organic Law on Provincial Governments and Local-level Governments* (1995). Section 25(3).

5.7 ENSURING THE AREA ACHIEVES POSITIVE AND SUSTAINED LONG-TERM OUTCOMES

A critical determinant of an OECM is the criterion of achieving positive and sustained long-term outcomes. This differentiates an OECM from the broader collection of conserved areas. PNG's domestic capacity to undertake monitoring is generally underdeveloped.³⁰⁶ Despite a process of decentralisation on paper, the national government has undergone very little physical decentralisation out of the capital. PNG's under-developed infrastructure and lack of an extensive road network have left the capital city essentially an island. This has negatively affected CEPA's capacity to adequately support management and undertake monitoring activities.³⁰⁷ Despite a legal mandate, state bodies are often underfunded and understaffed to adequately implement functions, especially in rural areas.³⁰⁸ Although, it is submitted that the domestic legal frameworks for monitoring OECMs could be improved, it may be important to note that the international community also continues to grapple with the challenges of resource constraints, uncertainty as to how to monitor, and a general lack of monitoring.³⁰⁹

The terms of long-term security are noticeably absent from PNG's legal frameworks. For example, protected areas under previous legal frameworks have been vulnerable to development and extractive activities resulting from overlapping tenure, and a reservation of land made under the Mining Act or Oil and Gas Act may not be indefinite as it may be revoked or expire.³¹⁰ The new Protected Areas Act likewise fails to provide sufficient safeguards as development and logging could be permitted. There have been critiques from local stakeholders that PNG's environment and conservation legislation may "look good on paper" but the government lacks the will, capacity, and incentives to adequately enforce the provisions.³¹¹ Although this lends to a number of underlying challenges that will need to be addressed to foster long-term security, the Environment Act and Protected Areas Act could be strengthened with clear definitions, mandatory decision-making criteria for permits, and minimum durations for agreements.

Conservation deeds have been used as a non-statutory mechanism employing the law of contracts to provide legal protection for some protected areas and potential OECMs. Although previous versions of the Protected Area Bill had proposed making these a statutory obligation for all protected areas, this was not legislated in the final Act. The employment of conservation deeds by state and non-state actors has taken various forms. Notably, the law does not provide an explicit duration or mechanism for review and renewal. However, the conservation deeds utilized by several conservation projects in PNG have had a suggested duration of five to ten years.³¹² Such length would likely not be justifiable as a sustained long-term commitment per the OECM criteria, nor would it align with the guidance for protected areas to demonstrate an intention to extend in perpetuity. However, there are examples of community and non-state

³⁰⁶ Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 348.

³⁰⁷ Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 26.

³⁰⁸ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett* 259.

³⁰⁹ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 10.

³¹⁰ *Mining Act* (No. 20 of 1992). Section 8(1); *Oil and Gas Act* (No. 49 of 1998). Section 20(1)

³¹¹ Woods 'Beautiful legislation' fails to protect PNG (accessed November 2024).

³¹² Van Helden *Lessons learned in community based conservation in PNG* (2005) 57.

actors working together for over twenty years to manage conserved areas by utilising conservation deeds as the primary mechanism for protection.³¹³ This, coupled with an established monitoring and reporting program, could suggest a long-term commitment to conservation outcomes.

5.7.1 What to monitor

Monitoring of an OECM may primarily seek to assess the extent to which the management regime is protecting values and achieving objectives.³¹⁴ This may be represented through the monitoring of effectiveness, continued commitment, compliance, and other socio-economic and political factors that may influence the long-term outcomes of the OECM. The Protected Areas Act calls on CEPA to establish targets for the development of the protected area network in compliance with the CBD.³¹⁵ However, it fails to extend this provision to include the monitoring of progress, nor does it establish mechanisms to foster accountability. Without on-going monitoring, PNG may fail to meet its obligations such as those under the KMGBF.

None of the potential OECMs canvassed within this thesis have a statutory obligation to demonstrate effectiveness nor a long-term commitment. The Protected Area Management Plan template provides guidance for the monitoring activities of protected areas.³¹⁶ Although this provides opportunities to list indicators and mechanisms for measurement, it fails to afford a meaningful long-term monitoring strategy. The legal frameworks could be strengthened with a definition for effectiveness and measure for assessing a length of time that constitutes long-term.

CEPA is the state body responsible for monitoring compliance with environmental permits.³¹⁷ The contents of an EIS are expected to include monitoring and reporting requirements that are inclusive of a mechanism and frequency for sharing results with the affected stakeholders.³¹⁸ The monitoring and reporting however is generally not prescriptive and may be adapted to each situation. While flexible, this degree of discretion can be abused.

5.7.2 How to monitor

The METT assessment has been adopted to reflect the domestic circumstances of PNG while maintaining the core of the assessment to foster alignment with international standards for monitoring and reporting.³¹⁹ The METT-PNG was implemented with various local stakeholders of both nationally gazetted protected areas, non-gazetted conservation areas such as LMMAs, and proposed protected areas. The Protected Area Policy suggests an evaluation of management effectiveness to be implemented every three years.³²⁰ This may be an ambitious target as little evidence within the public domain indicates that PNG's protected and conserved areas have undertaken repeat assessments since the METT was

³¹³ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 72.

³¹⁴ Hockings, et al. *Evaluating Effectiveness* (2006) 1.

³¹⁵ *Protected Areas Act (No. 9 of 2024)*. Section 46.

³¹⁶ Leverington, et al. *PNG protected areas: Living management plans template* (2019).

³¹⁷ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 8(b).

³¹⁸ *GoPNG Operational Manual (Environment Act 2000)* (2004) 101.

³¹⁹ Leverington, et al. *Methodology for assessment of PAME in PNG* (2017) 4-5.

³²⁰ *GoPNG PNG Protected Areas Policy* (2014) 18 and 48.

implemented in 2016-2017. The Protected Areas Act does not explicitly reference the need to monitor management effectiveness. However, it calls for a “public review” to occur every five years to assess the progress of a protected area and “social well-being of communities”.³²¹ Notably, the Act does not define the measures of progress nor well-being. The review is expected to be undertaken through a public consultation and may cover generally “all aspects” of the protected area.³²² Although the Managing Director is mandated to undertake the review, it may be ambitious for all protected areas to have a site-review every five-years given capacity and resource constraints. The lack of clear parameters and criteria to assess outcomes may not be conducive to monitoring the effectiveness of protected areas and potential OECMs. The legal frameworks could be strengthened through realistic monitoring expectations for potential OECMs.

CEPA’s Managing Director is given the power to appoint an officer for each protected area.³²³ However, CEPA likely would not have the capacity or resources to extend this provision to all protected areas and OECMs throughout the country. The remote nature of PNG perpetuates challenges for monitoring,³²⁴ which may be further exacerbated by the lack of CEPA to decentralise into the provinces. Other state authorities, such as those associated with forestry and fisheries, may have provincial offices or staff. As the CEPA Act provides for coordination with local and provincial governments, as well as sub-national authorities, to monitor environmental and conservation programs, this could provide an opportunity to decentralise monitoring of OECMs.³²⁵

Notably absent from the Protected Areas Act are provisions relating to the establishment, enforcement, and compliance of rules, actions, and prohibitions to protect important values. The offences identified within the Act are generally non-specific and do not define who has the authority and responsibility for enforcement. Rangers appointed under the Fauna Act and Conservation Areas Act are empowered to continue to undertake functions by the Protected Areas Act.³²⁶ The now repealed Conservation Areas Act provided for the management committee to oversee the activities of the rangers. However, the new legislation fails to clarify questions relating to appointment, powers, jurisdiction, and reporting. The opportunity to appeal the act or decision of a ranger has been repealed. This may disadvantage local landowners, resource users, and other stakeholders.

CEPA is the state body responsible for monitoring compliance with environmental permits. The contents of an environmental impact statement are expected to include monitoring and reporting requirements that include a mechanism and frequency for sharing results with the affected stakeholders.³²⁷ However, monitoring and reporting are generally not prescriptive and may be adapted to each situation. While flexible, this degree of discretion can be abused. The legal frameworks can be supported through clear provisions that address what, who, and how to monitor. Additional guidance

³²¹ *Protected Areas Act (No. 9 of 2024)*. Section 57(51).

³²² *Ibid.* Section 57(54).

³²³ *Ibid.* Sections 21(23) and 65.

³²⁴ *GoPNG PNG’s National REDD+ Strategy* 30.

³²⁵ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG (2022)* 67.

³²⁶ *Fauna (Protection and Control) Act 1966 (Chapter 154)*. Section 81.

³²⁷ *GoPNG Operational Manual (Environment Act 2000)* (2004) 101.

may foster clarity for monitoring at both the site-level and national-level to strengthen the network of protected areas and OECMs.

5.7.3 Reporting

Many of the potential OECMs identified in Chapter 4 do not have a statutory obligation for reporting. However, there are several exceptions. The Protected Areas Act institutes monitoring and reporting activities at various levels. Nationally, CEPA is mandated to report on international obligations as well as the status of all national protected areas to parliament.³²⁸ As OECMs have been integrated into the CBD's KMGBF Monitoring Framework, it would seem reasonable to grant this mandate to CEPA. The reporting for regional protected areas will be determined by the terms of agreements developed between the Managing Director and relevant stakeholders.³²⁹

Where a potential OECM overlaps with a climate-related project there may be an expectation to undertake reporting obligations, in relation to benefit-sharing agreements, after a project has been completed. Although the report may describe the net income or benefits resulting from the project, there is little further statutory guidance. This report may be shared with the customary landowners, CCDA, and the relevant provincial authorities.³³⁰ The Act obliges a summary of the report to be published twice in a newspaper with circulation within the project area.³³¹ Prior to a 2021 amendment, reporting was an annual requirement. This shift from annual reporting to project reporting may diminish transparency and accountability.

The law could be strengthened with greater guidance on the form of reporting, to whom, and when. The provision of a dedicated reporting tool with the explicit provisions for OECMs to meet obligations under the KMGBF and clear guidance for reporting to WD-OECMs could enhance reporting.

5.7.4 Outcomes of monitoring and reporting

PNG's weak system of monitoring and reporting does not promote credibility and leaves the network of protected areas and potential OECMs exposed to greenwashing. The legal frameworks generally do not contain provisions for a failure to monitor and report. Although the Protected Areas Act does provide for the deregistration of protected areas that are broadly inconsistent with the Act, the process is not explicitly linked to a failure to undertake monitoring and reporting. The process of deregistration lacks the decision-making criteria and associated processes that may lend to inconsistency and potentially hinder implementing of the provision.

Unfortunately, in PNG, neither the statutory legal frameworks nor the presence of a non-statutory conservation deed has prevented communities and landowners from withdrawing their support for area-based conservation with limited

³²⁸ *Protected Areas Act (No. 9 of 2024)*. Section 63.

³²⁹ *Ibid.* Section 29.

³³⁰ *Climate Change (Management) Act (No. 19 of 2015)*. Section 94(1).

³³¹ *Ibid.* Section 94(2).

repercussions.³³² The literature submits that the reliance on external partners for resources and financial support has contributed to the breakdown of protected areas and potential OECMs.³³³ This underscores the importance of local engagement and the need for conservation efforts to be self-sustaining. Monitoring and reporting efforts could be strengthened through incentives linked to positive outcomes.

The Environment Act, Protected Areas Act, and Climate Change Act collectively establish funding mechanisms to promote greater independence and autonomy. Regulations may be made under the Environment Act to regulate and manage a fund for any resulting compensation payments received from PNG's biodiversity offsets.³³⁴ The Climate Change Act establishes a trust fund to finance small grants, mitigation, and adaptation activities under the Act.³³⁵ Similarly, the Protected Areas Act institutes the Biodiversity Trust Fund³³⁶ and Protected Area Small Grants Program³³⁷ to support local communities in establishing and managing protected areas. These have been channelled into PNG's Biodiversity and Climate Fund, an independently governed³³⁸ entity that aims to financially support and build capacity to manage protected areas and OECMs throughout PNG.³³⁹

The literature cautions of the unintended consequences of creating an "unsustainable precedent" of development and other financial benefits in exchange for conservation.³⁴⁰ The Second Pillar of the Protected Area Policy focuses on providing sustainable livelihoods for communities in protected areas to encourage long-term support for conservation objectives.³⁴¹ The literature suggests that supporting traditional livelihoods may also protect local traditions, languages, and cultural heritage³⁴² and potentially manage the risks associated with Western influences.³⁴³ The provisions for livelihood activities under the Protected Areas Act may be subject to sufficient funding³⁴⁴ and the development of benefit-sharing agreements.³⁴⁵ In PNG, it may be appropriate to link incentives for positive outcomes of monitoring and reporting to opportunities for sustainable livelihoods. This could be supported and strengthened through inclusion within the legal frameworks.

³³² *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 72; Beehler & Kirkman *Lessons Learned from the Field* (2013) 16.

³³³ Beehler & Kirkman *Lessons Learned from the Field* (2013) 16; West & Kale "The Fate of Crater Mountain" in *Tropical Forests of Oceania* (2015) 169-170.

³³⁴ *Environment Act* (No. 64 of 2000). Section 97.

³³⁵ *Climate Change (Management) Act* (No. 19 of 2015). Section 37.

³³⁶ *Protected Areas Act* (No. 9 of 2024). Section 59.

³³⁷ *Ibid.* Section 60.

³³⁸ It has been suggested that issues regarding the control of the trust fund has been a primary cause in the delay to enact the Protected Areas Act. Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 25.

³³⁹ PNG Biodiversity and Climate Fund *About the Papua New Guinea Biodiversity and Climate Fund* (unknown).

³⁴⁰ Jupiter "Culture, Kastom and Conservation" (2017) *Pacific Conservation Biology* 142.

³⁴¹ *GoPNG PNG Protected Areas Policy* (2014) 44-47.

³⁴² *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 69.

³⁴³ Aini, et al. "Reimagining conservation practice" (2023) *Oryx*; West & Kale "The Fate of Crater Mountain" in *Tropical Forests of Oceania* (2015).

³⁴⁴ *Protected Areas Act* (No. 9 of 2024). Section 35.

³⁴⁵ *Ibid.* Section 58.

5.8 IMPLICATIONS AND OUTLOOK FOR OECMS

After 50 years of implementing the current legal regime, it is evident that PNG's ambitious agenda to extend the protected areas network cannot be realised through formal protected areas alone. The aspiration and urgency of meeting international targets should not compromise the quality of conservation measures nor neglect to secure the consent of customary landowners. The review of PNG's legal frameworks suggests that it could afford opportunities to recognise OECM. As PNG's protected area reporting has drawn from statutory laws, a further examination of the system of legal pluralism may be conducive to creating space to recognise both protected areas and OECMs within domestic objectives and international obligations. Notably, the current protected area frameworks neglect to afford local and provincial conservation efforts with equitable representation. However, the Constitutional recognition of custom, complemented by the system of legal pluralism given, effect through the Underlying Law and the OLPGLLG, could provide a legal foundation for recognising a more holistic approach to conservation that could encompass OECMs.

Importantly, the critical review presented within this chapter was based on the speculative recognition and inclusion of OECMs into PNG's legal frameworks relevant to area-based conservation. PNG's current policy and laws do not explicitly provide for nor contain evidence that PNG will pursue domestic inclusion of OECMs. However, the new policy direction and legal frameworks could facilitate the inclusion of contemporary conservation thinking and acknowledge the efforts and contributions of state and non-state actors in their endeavours to promote area-based conservation outside of traditional protected areas. Amending this to provide the explicit legal recognition of OECMs could provide a formal structure to foster alignment and manage the threat of overstating the extent and effectiveness of PNG's protected and conserved areas.

The main points of reform will include aspects associated with evidence and validation, clear mechanisms and thresholds for FPIC, improved issues of good governance, alignment and integration of OECMs with the broader policy and legal frameworks, clear powers and functions of actors, and undertaking monitoring and reporting to support informed decision-making and protecting important values. Reflecting upon the critiques presented within this chapter, several cross-cutting challenges will require attention to effectively implement domestic legal frameworks for recognising and regulating OECMs, including inadequate management, fragmented and weak governance, and capacity and resource constraints. Notably, the literature emphasises that although the legal frameworks appear to afford protection for the rights of local landowners and communities, in reality these face challenges of enforcement.³⁴⁶ PNG's environment and conservation laws have been subject to corruption, fraudulent consent, and misappropriation of funding.³⁴⁷ This, coupled with the threats to other human and environmental rights,³⁴⁸ requires a more holistic approach to address the underlying implementation challenges

³⁴⁶ UNDP *Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18; Amnesty International *The State of the World's Human Rights* (2025) 294; UNEP *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders* (2023) 15.

³⁴⁷ UNDP *Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18.

³⁴⁸ For recent reports on the status of human rights in PNG see: Amnesty International *The State of the World's Human Rights* (2025) 294; Human Rights Watch *World Report 2024* (accessed July 2025); Human Rights Watch *World Report 2023* (accessed July 2025).

than can be afforded by this thesis.³⁴⁹ Chapter 6 will explore the potential legal opportunities and reforms required to support and strengthen the recognition, regulation, and reporting of OECMS in PNG.

³⁴⁹ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18.

Chapter 6 Strengthening the Legal Frameworks to Recognise OECMs in PNG

The literature asserts that over the past decades, the implementation of the protected area regime has proven ineffective in PNG.¹ This may be for various reasons, including capacity and resource constraints,² as well as the design and implementation of area-based conservation not being conducive to the domestic context.³ Although PNG's traditional systems of resource management have existed for generations, the underlying values and social nuances may be misaligned with the statutory laws that have guided the establishment of the formally gazetted protected area estate.⁴ As PNG embarks on the changes introduced under a new Protected Areas Act that was enacted in 2024, the present may be an appropriate time to reflect upon the lessons learned from the past 50 years of area-based conservation as an independent state. This chapter aims to consider the potential legal opportunities and reforms (Chapter 5) that may be relevant for recognising, regulating, and reporting OECMs within the context of PNG to strengthen *in-situ* conservation. Notably, PNG has not explicitly expressed a desire to pursue the inclusion of OECMs within its legal frameworks. The opportunities and reforms canvassed within this chapter are based on the premise that PNG may seek to align with the contemporary advancements in conservation thinking (Chapter 2).

In the context of PNG, it is argued not to present OECMs as a new mechanism but rather to identify current domestic measures that could be legally strengthened and reported as part of international commitments. This aligns with the literature as it notes that the international community may not have intended the generation of specific OECM legislation.⁵ Recognition of OECMs may draw from existing legal frameworks to afford equitable acknowledgement of conservation efforts. Considering the OECM criteria and the theoretical legal framework developed in Chapter 3, this chapter poses key opportunities and reforms primarily through the Protected Areas Act, Environment Act, CEPA Act, and OLPGLLG to foster recognition and strengthen *in-situ* biodiversity conservation in PNG. As the realisation of the Protected Areas Act has taken over a decade, specific OECM legislation at the national level may be a prolonged process. The creation of relevant Regulations, where empowered to do so, may be useful to provide clarity and consistency to existing provisions within the legal frameworks. This approach intends to provide focus, build upon existing mechanisms for area-based conservation, and align relevant institutions to reduce repetition.

¹ GoPNG *Protected Areas Policy Implementation Plan 2018-2028* (2018) 4(1)(b). Leverington, et al. *Assessment of Management Effectiveness for Papua New Guinea's Protected Areas* 2017.

² UNDP *Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 67.

³ Van Helden *Lessons learned in community based conservation in PNG* (2005) 66-71; Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*.

⁴ At the time of writing, no protected areas had yet been gazetted under the new Protected Areas Act. Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 346.

⁵ Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 179-180.

Critically, the opportunities and reforms should not compromise the quality of area-based conservation. An overarching Protected Areas and OECM Act could foster credibility to overcome threats of greenwashing and give effect to the Constitutional NGDP that encourages a “fundamental re-orientation” towards “Papua New Guinean ways”.⁶ Amendments to the Protected Areas Act could extend its provisions to encompass OECMs thus promoting clarity and consistency for both protected areas and OECMs. The alignment under a single framework may support and strengthen the entire network of area-based conservation in PNG. This could further address the risks associated with the “compartmentalisation of conservation”⁷ by aligning the mandates and functions for both protected areas and OECMs. In the interim, the Minister for Environment, Conservation, and Climate Change may use their powers to give advice and direction for the development of a policy specific for the integration of OECMs into the domestic context.⁸ Given the strength and diversity of customary law, coupled with the lawmaking powers entrusted to local and provincial governments through the OLPGLLG, the opportunities to recognise potential OECMs may be numerous (Chapter 4). This thesis does not have the space or capacity to fully assess all customary, local, and provincial laws. However, the opportunities and recommendations provided within this chapter may recognise the pathways for areas recognised under custom and sub-national laws to be assessed as an OECM with the consent of the governance authority.

In 2019, CEPA developed a collection of guidance documents that addressed the process and procedures for proposal, recognition, governance, and management of protected areas. Although these documents were informed by the Protected Area Policy, the new Protected Areas Act has largely failed to legislate many of processes, procedures, institutions, roles, and functions. The guidance highlights mechanisms to foster good governance, equity, and inclusion of a variety of state and non-state actors. It is recommended to utilise this guidance as a building block for implementing reforms to recognise OECMs.

6.1 IDENTIFYING POTENTIAL OECMS

Fundamentally, an OECM seeks to recognise existing area-based measures for delivering effective conservation.⁹ Across PNG there are a number of examples of existing conservation efforts that are not recognised within the Protected Areas Registry or in the WDPA. This includes some LMMAs, Ramsar and tentatively listed WHS, and community conservation areas. The literature cites examples of customary landowners attempting for over a decade to have their lands gazetted as protected areas.¹⁰ To provide legal recognition in the interim, some areas have adopted conservation deeds¹¹ or utilised the powers granted to provincial and LLG under the OLPGLLG. These areas could be assessed as potential OECMs. Such a measure would not prevent them from becoming protected areas but could provide an opportunity for more

⁶ *Constitution of the Independent State of Papua New Guinea* (1975) Preamble.

⁷ Claudet, et al. “Avoiding misuse of OECMs in the blue economy” (2022) *One Earth* 970.

⁸ *Conservation and Environment Protection Authority Act* (No. 9 of 2014). Section 5.

⁹ IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 11.

¹⁰ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 65.

¹¹ *Ibid.*

representative reporting on international obligations. Landowners could also have an option to nominate a potential OECM through their ward development committees.

Within the PNG context, it is submitted that the alignment of protected areas and OECMs could reduce confusion and overlap, as well as to provide OECMs with enhanced credibility. This could be accomplished by amending the Protected Areas Act to explicitly recognise and align OECMs as the Protected Areas and OECM Act. The IUCN definition of an OECM could be adopted within this Act as well as replicated in the Environment Act for consistency. Any known sub-national legislation, as empowered by the OLPGLLG, that gives effect to protected areas and potential OECMs could be contained in a schedule attached to the Act. Although listing sub-national legislation will likely prove challenging, the inclusion in a schedule will allow continuous updating as required. Laws that explicitly reference OECMs in the future could be identified in a similar manner.

The types of OECMs, as described by their management objective of primary, secondary, and ancillary conservation, may be defined and described within regulations. To manage the risk of overstating the status of the protected areas estate, it is recommended to amend the provisions of the Protected Areas Act that may not meet the IUCN definition of a protected area, including sacred sites, areas required to be set aside as a condition of an environment or timber permit, and some biodiversity offsets to be assessed as either protected area or OECMs. Where a proposed area does not meet the qualifications of a protected area, it may be assessed against the criteria of an OECM with the consent of the governance authority.

The Protected Areas Act could also clarify by who and how potential OECMs are identified and assessed. The law could oblige the use of the Expression of Interest Form for both protected areas and proposed OECMs to foster consistency. Decision-makers may be compelled first to consider the proposal's suitability as a protected area. Where such a designation is not appropriate or desired by the governance authority, it may be assessed as an OECM.¹² The Protected Areas Act could explicitly state that either state or non-state actors may make a proposal. Notably, a proposal for recognition as an OECM may complement, not replace, the recognition afforded under other legal frameworks, such as a law established by a local and provincial government. It may be appropriate to utilise a process that decentralises the assessment of potential OECMs and shift validation to an authority that may be more aware of the local context, such as a provincial government. However, the capacity and resources of provincial governments to fully implement these powers and responsibilities could pose a challenge.

6.2 SECURING CONSENT

Obtaining FPIC is an essential cross-cutting theme that is inadequately addressed within PNG's legal frameworks. As the vast majority of land in PNG is owned and controlled by customary landowners, their consent will be fundamental for the

¹² Fitzsimons, et al. "OECMs in Australia: Key Considerations" (2024) *Conservation* 178.

long-term outcomes of potential OECMs. Legal frameworks can generally be strengthened by including explicit mandates to obtain and validate consent. Landowners and other stakeholders could be provided with opportunities for administrative action where FPIC has not been adequately obtained or documented.

Chapter 5 noted several of the disparities across the legislation concerning FPIC. Generally, the legal frameworks associated with the land, resources, and rights of local people should be amended to adopt a consistent definition of FPIC. The relevant provisions of the Environment Act, Climate Change Act, Forestry Act, and Protected Areas Act, as they apply to this thesis, may be updated accordingly. This could draw together several existing interpretations, such as the special right to both give and withdraw consent per the Climate Change Act¹³ and having adequate information to make an autonomous and informed decision as provided by the Protected Areas Act.¹⁴ The obligation of FPIC could be further elaborated as an ongoing process that could be integrated into monitoring plans for potential OECMs. Given the global emphasis on FPIC, the national government should assume responsibility for defining and developing legal provisions for FPIC. The OLPGLLG could be amended to include an explicit provision that compels local and provincial laws to align with the mandate to obtain and validate FPIC.

As the Environment Act serves as the primary legislation for regulating the environment, this could be an appropriate home for mandating FPIC. The Act allows for regulations to be developed for the “notification, referral and consultation requirements” for environmental permits.¹⁵ These regulations could be cross-referenced across the various sectors, including any law developed with specific relevance to OECM. The regulations could further support FPIC through explicit mechanisms for validation.

The regulations could provide specifically from whom and by whom FPIC is required, including landowners and resource users. Social mapping and landowner identification may be established as a precondition with validation by a local magistrate or government official with an understanding of the local context. Although Chapter 5 identified several critiques regarding the use of a specified percentage of the community to establish FPIC, where such a provision is adopted, it would be advantageous to replicate a single measure. The law could compel the provision of information for decision-making, such as maps of the site, benefits, costs, changes in access or use rights, management responsibilities, governance functions, and other obligations. Information may be provided through various mediums,¹⁶ both written and oral, during a public forum and in the appropriate language to facilitate understanding by the community. All stakeholders could have an opportunity to have questions and concerns addressed within a stated time period.

¹³ *Climate Change (Management) Act (No. 19 of 2015)*.Section 3.

¹⁴ *Protected Areas Act (No. 9 of 2024)*.Section 11.

¹⁵ *Environment Act (No. 64 of 2000)*.Section 64.

¹⁶ In addition to more traditional mediums, the use of photographs, video recordings, and smartphone applications could be appropriate in PNG. Mitchell “Gwala marine customary closures in PNG” (2023) *SPC Traditional Marine Resource Management and Knowledge Information Bulletin* 38.

Obtaining consent from the state authorities for certain development activities may also strengthen the protection of environmental values.¹⁷ As the state maintains rights to PNG's mineral and petroleum resources, the Environment Act could be amended to explicitly oblige the consent of the Minister for Conservation, Environment, and Climate Change before issuing an environment permit for an area recognised, either wholly or partly, as an OECM under any law. Where an OECM is afforded protection under a provincial or local-level law, CEPA could be compelled to document the consent of the relevant authority prior to issuing any permits that may overlap, such as those associated with development and forestry. Landowners and other stakeholders could be provided with options for administrative appeal where consent has not been obtained or appropriately documented.

A reliance on the ILG Act, such as under the Climate Change Act and Forestry Act, as a mechanism to secure consent from customary landowners has proven problematic. Given the misrepresentation, illegitimacy, overlapping claims, and procedural irregularities associated with ILGs,¹⁸ it is questionable if this mechanism fosters a just and equitable system that supports the principles of FPIC. A comprehensive review of potential reforms to the ILG Act is beyond the capacity and scope of this thesis. However, future policy and legal frameworks for OECMs should be wary of creating unintended consequences by encouraging the use of ILGs as the sole mechanism for securing consent. The legal frameworks that necessitate FPIC, as stated above, could provide alternative mechanisms that equitably recognise the inclusion of all landowners and resource users, including women and marginalised people. To counter the reliance on tools derived from Western worldviews, it is suggested within the literature that the community be encouraged to self-organise to form an alternative mechanism for obtaining consent.¹⁹ This would align with the Constitution's Fifth NGDP, which allows for the "fundamental re-orientation" towards forms of participation, consultation, and consensus that reflect the national identity²⁰ and may account for the nuances associated with custom and social expectations.²¹ However, not all customs are equitable and inclusive. The legal frameworks could establish and describe broad criteria to foster good governance and equitable inclusion of women, youth, and other marginalised people.²² As it is common in PNG for community decisions to be determined through consensus,²³ FPIC may be a lengthy and challenging process.²⁴ Establishing FPIC as a cross-sectoral statutory requirement will ensure that it cannot be easily disregarded.

For consistency, the Protected Areas Act could be amended to provide for all protected areas and OECMs to be legally recognised under the provisions of a conservation deed that describe the terms and conditions, obligations, dispute

¹⁷ See section 6.4.2 of this text.

¹⁸ Filer "Why Green Grabs Don't Work in PNG" (2012) *J Peasant Stud*; Filer "Two steps forward, two steps back" (2019) *Development Policy Centre Discussion Paper*. Filer, et al. "The construction of voluntary forest carbon projects in PNG" (2023) *Development Policy Centre Discussion Paper No. 105* 81-90; Weiner & Glaskin *Customary Land Tenure and Registration* (2007). Also see *Kawira v Bone* [2017] (PGNC) as a legal case example.

¹⁹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 17.

²⁰ *Constitution of the Independent State of Papua New Guinea* (1975) Preamble.

²¹ A local adaptation of obtaining FPIC is described in Aini, et al. "Reimagining conservation practice" (2023) *Oryx*.

²² See section 6.6.2 of this text.

²³ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 414.

²⁴ vanNimwegen, et al. *Conserving our sea of islands* (2022) 240; GoPNG PNG's 6th National Report to the CBD (2019) 146; Green, et al. "Designing a resilient network of marine protected areas for Kimbe Bay, Papua New Guinea" (2009) *Oryx* 497.

resolution and signature as an indication of consent by the participating parties. The inclusion of a general template as a schedule attached to the Act could foster consistency and clarity. The Act may require the deed to be read and agreed to during a public meeting.²⁵ Documentation of FPIC, either written or recorded, may be required for validation with certification by a Commissioner of Oaths and a District Officer appointed under the OLPGLLG. The management plan and any co-management or benefit-sharing agreements may be attached to the deed for transparency. The deed could include the mechanisms to withdraw consent that could mirror the rigour for obtaining FPIC.

6.3 ENSURING THE AREA IS NOT A PROTECTED AREA

The Protected Areas Act has become the primary legislation for area-based conservation as it repeals the Conservation Areas Act and the Fauna Act.²⁶ The new Act has seemingly sought to provide legal recognition and protection to a number of area-based measures. However, as Chapter 5 observed, these may not meet the IUCN's criteria of a protected area. This section will identify several reforms that could strengthen the definition and management objectives of protected areas to establish the exclusionary criteria for domestic OECMs.

6.3.1 Definition of a protected area

A significant weakness discussed in Chapter 5 was the failure of the PNG's legislation to discretely define protected areas and OECMs. The definition of a protected area drawn from the Protected Areas Act may risk overstating the protected area coverage and exposing PNG to criticism of greenwashing. To reduce the threat of diluting the protected area estate, the Protected Areas Act could be amended to refine the definition of a protected area and include a complementary definition of an OECM that recognises the equitable contribution of various actors. This could foster alignment with international targets and strengthen a network of protected areas and OECMs.

CEPA may be best positioned to update and establish clear definitions and guidance as to what constitutes protected areas and OECMs as they have the primary mandate for conservation and protected areas, as well as representing the authority for international reporting obligations under the CBD. This could address the risk of overlap and double reporting of protected areas and OECMs. It may be appropriate for the Protected Areas Act to adopt the IUCN definition of a protected area as suggested by PNG's Protected Areas Policy. To alleviate the strain on human resources, CEPA's Managing Director could engage technical advisors or consultants to assist with creating domestically appropriate criteria to distinguish and define protected areas and OECMs.²⁷ As policy makers and law makers legislate definitions, they may be cognisant of the terms of conservation and protected areas being linked to colonial influence and land alienation.²⁸

²⁵ *Protected Areas Act (No. 9 of 2024)*. Section 50(2) and Schedule 11.

²⁶ *Ibid.* Section 80.

²⁷ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 30.

²⁸ Bartlett, et al. "Policy Implications of Protected Area Discourse in Pacific" (2010) *Mar Policy* 101.

The recognition of protected areas by the NSLUP could risk the overstating of the protected area estate. However, there may be merit to identify these areas as potential OECMs to clearly distinguish them from areas recognised under Protected Areas Act. The inclusion of an explicit definition for conserved areas within the Protected Areas Act and relevant planning frameworks could be extended to included areas that have not been assessed as either a protected area or an OECM and may be recognised outside of the scope of these legal frameworks. Future legislation for land-use may explicitly align all protected areas and OECMs under the mandate of CEPA to facilitate clarity and consistency for effective monitoring and reporting.

6.3.2 Management objective

An estimated 75% to 80% of PNG's population is engaged in the subsistence sector.²⁹ Therefore, it may be expected that the land, natural resources, and ecosystem services serve multiple functions at a household and community level. Although the nexus of conservation and sustainable use may not be seen as a threat if the landowners utilise sustainable practices and continue to promote the values of an area,³⁰ the management regime could be given guidance to effectively address this balance of objectives. As CEPA has the primary mandate for promoting the state's environmental and conservation policies and laws, it is submitted that the CEPA Act could define area-based conservation as relevant to the domestic context. This could include explicit reference to the thresholds for sustainable use within protected areas and OECMs.

The Protected Areas Act could change the status of some community and locally managed areas, *ples masalai*, sacred sites, *tambu* areas, forest areas, and heritage sites. Where conservation is the primary objective, these may qualify for reporting against international objectives as protected areas. As it is proposed that protected areas in PNG are permitted to have 10% of the area designated as non-conforming with the primary objective of conservation,³¹ CEPA may be given the responsibility to collaborate with the governance authority and landowners to accurately assess the amount of proposed land with the primary objective of conservation. Where an area does not meet this threshold, the Protected Areas Act could be amended to provide opportunities to implement site-level assessments against the criteria of an OECM. The Act could be amended to explicitly state that OECMs extend equal protections under the law but can encompass a broader diversity of area-based measures where conservation is the primary, secondary, or ancillary objective. Clear and consistent reporting against international obligations can be facilitated by defining and qualifying the measures for assessing the types of OECMs, namely primary, secondary, and ancillary. This could be further refined within the Regulations under the Protected Areas Act.

The recognition and regulation of OECMs could strengthen area-based conservation by fostering ecosystem connectivity and filling gaps in legal protection. For example, the Kikori River Basin spans 2.3 million hectares and encompasses a

²⁹ GoPNG *Papua New Guinea 6th National Report to the Convention on Biological Diversity* 149.

³⁰ Leverington, et al. *Assessment of Management Effectiveness for Papua New Guinea's Protected Areas* 2017.

³¹ Importantly, this is only suggested and has not yet been legislated. Leverington *A guide to protected area types in PNG* (2019) 5.

tentatively listed WHS and five recognised protected areas.³² The recognition of OECMs could provide a legal mechanism to facilitate conservation in the connecting areas where conservation may not be a primary objective or where it would be inappropriate to identify these as protected areas. The tentatively listed WHS could also be assessed as an OECM with the consent of the landowners and governance authority. The Protected Areas Act could be amended to recognise and regulate the role of OECMs to support connectivity and provide legal protections to tentatively listed WHS. Ramsar sites and wetlands could be extended the same recognition.

6.4 SUPPORTING IMPORTANT BIODIVERSITY VALUES

As PNG looks to a new direction for the protected areas regime, it may be timely to review lessons learned from implementing the current environment and conservation legislation for nearly 50 years. Although the Protected Areas Act seeks to protect nature and conservation as “prime values”, the literature highlights the potential challenges ahead given the ineffectiveness of the past legislation³³ to protect important biodiversity values.³⁴ A review of existing protected area values suggested that the stated values have deteriorated over time despite the local communities’ expressed desire to foster biodiversity protection.³⁵ Explicit provisions for identifying and protecting important biodiversity values may prove critical for both protected areas and OECMs. Consistent monitoring and reporting may also support positive outcomes for biodiversity values.³⁶

6.4.1 Identifying values

It will be advantageous to couple the important international values with mechanisms for public participation to provide information for identifying the local values that may influence the objectives and management of an OECM. The Environment Act, Protected Areas Act, and any other legislation that is developed with relevance to OECMs could have an explicit inclusion that compels procedures for public participation to identify local values. This could be broadly included as part of the procedures for developing an EIS, proposals for potential OECMs, and demarcation of boundaries. Local values may also be drawn from existing documentation of custom. The Customs Recognition Act recognises the use of books, reports, statements from local leaders, opinions, and other evidence as proof of custom.³⁷ The legal frameworks that reference custom could contain an explicit link to the Customs Recognition Act to mitigate uncertainty.

CEPA’s Land-Sea Conservation Assessment couples important biodiversity values with spatial overlays to identify the domestic areas of interest and best solutions for conservation.³⁸ This data could facilitate the criteria of an OECM

³² *Hitchcock & Gabriel World Heritage Tentative Listed Sites in PNG* (2015) 12-52.

³³ The new Protected Areas Act remains untested at the time of writing.

³⁴ Leverington, et al. *Assessment of Management Effectiveness for PNG’s Protected Areas* (2017) 149.

³⁵ *Ibid.* 148.

³⁶ See section 6.7 of this text.

³⁷ Section 2.

³⁸ Adams, et al. *Land-Sea Conservation Assessment* (2017) 16-17.

supporting at least one important biodiversity value.³⁹ A spatial overlay with formal protected areas provides evidence of gaps in coverage and connectivity.⁴⁰ The resulting priority areas represent both national and provincial interests for expanding the domestic protected area estate.⁴¹ The Protected Area's Act could be amended to compel CEPA to use this data to undertake systematic planning and identify potential OECMs that may complement and connect protected areas. The Environment Act Regulations could also identify the areas recognised in the Land-Sea Conservation Assessment a Level 2 or Level 3 activity despite their legal status as a protected area or OECM.

Although the Protected Areas Act does not extensively provide for the identification of values, the development of Regulations may complement the primary legislation.⁴² The identification of important biodiversity values could be compelled during the processes for preparing proposals, assessing proposals, selecting and prioritising new areas, and management planning. To foster consistency, the processes may be extended to include both protected areas and OECMs. A list of relevant values drawn from internationally recognised sources such as KBAs, IUCN Red Listed species and ecosystems, and Ecologically or Biologically Significant Marine Areas (EBSAs), amongst others, may assist decision-makers to make informed decisions.⁴³ This list may be included within the Regulations to foster credibility, clarity, and consistency.

The Protected Area Expression of Interest form provides an opportunity to state the reason for recognising a site.⁴⁴ This form could be extended for use by potential OECMs. It is recommended that the form be amended to include specific pre-selected values, such as those identified in the OECM site-level assessment tool, as well as space to include other motivations. The Expression of Interest may annex existing data for identifying important biodiversity values, such as maps of KBAs and listing rare or restricted range endemic species.⁴⁵ As certain values may require validation from CEPA or advisors to reduce the risk of greenwashing, this responsibility should be clearly stated within the legal frameworks. Clear thresholds may be included within the Standard Operating Procedures⁴⁶ to inform decision-making. Once the values are identified and validated, they may be integrated within the management regime and monitoring and reporting mechanisms.

³⁹ These are identified as being areas with rare, threatened, or endangered species and/or ecosystems; domestically under-represented natural ecosystems; significant intactness; endemic or range-restricted populations or ecosystems; important for species aggregation; and ecological connectivity. Jonas, et al. *Site-level tool for identifying OECMs* (2023) 5 and 10; IUCN-WCPA Task Force on OECMs *Recognising and Reporting OECMs* (2019) 7.

⁴⁰ Most areas of international importance remain outside of protected areas and may be vulnerable to threats. For example, PNG contains 132 KBAs, with approximately only 7% of the area under a formal protected status. Key Biodiversity Areas Partnership *PNG's Key Biodiversity Areas* (accessed 2024); *ibid*.

⁴¹ Adams, et al. *Land-Sea Conservation Assessment* (2017).

⁴² *Protected Areas Act* (No. 9 of 2024). Section 83.

⁴³ A list of potential sources is included in Jonas, et al. *Site-level tool for identifying OECMs* (2023) 10.

⁴⁴ *Protected Areas Act* (No. 9 of 2024). Schedule 3. *GoPNG Detailed proposal forms: protected areas in PNG* (Form No. PA2) (2019) 1-2.

⁴⁵ The land-sea conservation assessment identifies a list of those used to inform the identification of priority areas. This may form a starting point, however, it could be helpful to provide a translation of the scientific names to facilitate identification by a greater range of actors. Adams, et al. *Land-Sea Conservation Assessment* (2017) 25-26.

⁴⁶ *Protected Areas Act* (No. 9 of 2024). Section 37.

6.4.2 Protecting values

PNG's Environment Act creates the enabling environment for protecting important values through provisions for EIAs, environmental permits, and monitoring. As this legislation will require amendments to reflect the changes of the Protected Areas Act, it may be a reasonable time to holistically review and strengthen the procedures and mechanisms to facilitate the protection of values. The prescribed activities under the Environment Act Regulations may be amended to reflect the transition to the new protected area types and include areas with international and local value. The Level 3 activities could be further strengthened by explicitly referencing PNG's Ramsar and WHS sites to address ambiguity. The prescribed activities could emphasise the precautionary approach by extending to include all wetlands,⁴⁷ any area recognised and protected under a local or provincial law, all areas covered by a conservation deed, and places with evidence of being part of a *ples masalai*, sacred site, and *tambu* area. The Operations Manual of the Environment Act could be updated to provide greater guidance for demonstrating the commitment for the protection of environmental values.⁴⁸ An OECM may be granted the same protections as a protected area to foster clarity and consistency. The law could necessitate a process of public participation as part of the development of an EIS to comprehensively identify and account for important values that will inform the EIA.⁴⁹ To foster accountability and justice, the Environment Act could be amended to provide landowners with an option for administrative appeal or to seek other remedies where public participation is not adequately implemented.

CEPA's limited capacity to effectively monitor compliance could hinder the protection of values. The process of renewing or applying for a variation of an environmental permit under the Environment Act could compel an opportunity for public participation. Landowners, resource users, and other stakeholders may have valuable insights to contribute to monitoring and assessing compliance under a current permit. With proper support and oversight, state and non-state actors could be engaged to develop a report for consideration as part of an application for renewal or variation of an existing permit. Under the circumstances for minor approvals, the law should prescribe the thresholds that require the Managing Director only to consult with the management authority of a protected area or OECM.

Experience has proven that the process of gazetting a protected area can be long and cumbersome.⁵⁰ This may fail to provide adequate protection for the values of potential protected and conserved areas. Communities and landowners could work with their respective local and provincial governments, as empowered by the OLPGLLG, to create laws to recognise and enforce the rules of protected and conserved areas. Ensuring that the laws created under the powers of OLPGLLG are afforded recognition within sectoral laws, especially those relating to forest, mining, and development, would strengthen legal status.

⁴⁷ To align with the international obligation to promote the conservation of all wetlands as a party to Ramsar.

⁴⁸ GoPNG Operational Manual (Environment Act 2000) (2004) 98.

⁴⁹ See section 6.6.2 of this text.

⁵⁰ Dabek & Wells "Creating the first conservation area in PNG" in *Tree kangaroos* (2021) 140-150.

The CEPA Act broadly outlines functions such as coordinating affairs with local and provincial governments to foster, manage, and monitor conservation initiatives,⁵¹ as well as promote⁵² and advise⁵³ on environmental policies and laws throughout the country. CEPA could advise local and provincial governments of critical areas to strengthen the protected area network, enhance ecological connectivity, represent key species and ecosystems, and generally protect important biodiversity values. Local and provincial governments may have a stronger rapport with local communities than centralised government bodies as they are more accessible. They may be best suited to engage with communities to develop local and provincial laws to protect the important values of an OECM. The condition of values may be critical for informing monitoring and reporting mechanisms

The Protected Areas Act could be amended to explicitly prohibit development and logging activities within protected areas and OECMs. Where development is proposed, the NEC may be required to obtain consent from CEPA and the landowners in an open forum held in the community. Decision-makers should have the statutory mandate to consider and prioritise important biodiversity values. The Protected Areas Act and Environment Act could be aligned to describe a set of criteria that may be weighted to address intergenerational equity and utilise long-term environmental accounting mechanisms. The legal frameworks could compel decision-makers to employ the precautionary principle.

As PNG develops further guidance and policy direction for a biodiversity offset program, it could acknowledge the inclusion of OECMs to facilitate representativeness and connectivity where the establishment of a protected area may not be appropriate. Regulations could describe a suitable duration for the offset, management and governance responsibilities, and benefit-sharing mechanisms. The inclusion of OECMs could be a reasonable alternative to foster the protection of endemic species. Notably, as an OECM should demonstrate effectiveness, an area may be required to have existing mechanisms in place to manage pressures. This could reasonably extend to customary practices for sustainable land and resource use.

6.5 GEOGRAPHICALLY DEFINING THE AREA

Although the Constitution encourages the pursuit of “Papua New Guinean Ways”, land policies and laws advance a disconnect that promotes statutory laws, developed under Western influences, to establish a regulatory system.⁵⁴ As PNG’s land policies and laws have been susceptible to corruption, fraud, and prolonged disputes,⁵⁵ it is argued that the demarcation of OECMs should be informed by the social and cultural context of land to foster improved long-term outcomes. The specific legal reforms required to enable recognition and regulation of OECMs may require a more in-

⁵¹ Section 8(b).

⁵² Section 8(e).

⁵³ Section 8(f).

⁵⁴ Weiner & Glaskin *Customary Land Tenure and Registration* (2007) 2.

⁵⁵ Filer “Two steps forward, two steps back” (2019) *Development Policy Centre Discussion Paper* 62; Numapo “Commission of inquiry into SABLs” (2013).

depth exploration that is beyond the capacity of this thesis. Notably, the opportunities and reforms canvassed within this section are from an outside worldview with a focus on the written law, thus may fail to holistically account for local and cultural nuances.

6.5.1 Recognition of tenure and resource rights

Although the land registration process was established to provide evidence of tenure, in PNG it has been countered that it generally does very little to empower customary landowners in the management and decision-making functions associated with land. Instead, it primarily serves as a mechanism for development and extractive projects to validate landowner consent⁵⁶ with the financial and administrative burdens borne by the landowners. Furthermore, before compelling land registration the state may first need to address the challenges associated with corruption and manipulation of land claims by both state and non-state actors that are deeply embedded across all sectors.⁵⁷ A comprehensive exploration of the associated reforms is beyond the remit of this thesis. Generally, however, the land registration process may be strengthened with clear procedures for FPIC and mechanisms for validation. The Protected Areas Act could be amended to afford recognition to customary landowners as holding tenure and resource rights over OECMs. The implicit requirement to register land should not create additional burdens for the recognition of an OECM.

A significant degree of diversity exists regarding custom, land and resource use rights, and the mechanisms for inheritance in PNG.⁵⁸ Under the OLPGLLG, the provincial government is granted lawmaking powers relevant to land, including provincial titles and leases.⁵⁹ This could create an opportunity to recognise de facto tenure and resource rights that may be governed by custom. The law could utilise the systems the Customs Recognition Act provides to establish evidence of custom and validation.

Potential OECMs in PNG will likely be recognised on customary land, given the extent of customary tenure⁶⁰ and the government's reservations to designate protected areas on alienated land.⁶¹ The rights associated with customary tenure may vary considerably across geographical areas and within a clan based on social placement.⁶² Understanding the local context may be imperative for recognising and regulating OECMs as long-term success will depend on the appropriate inclusion of social relationships and cultural practices. The Environment Act may compel social mapping and the documentation of customs and inheritance systems relevant to land ownership and resource rights prior to granting any permissions or permits as this has a broad application. This process could be explicitly replicated under the Protected Areas Act to extend to both protected areas and OECMs to inform the early stages of a proposal and management

⁵⁶ Weiner & Glaskin *Customary Land Tenure and Registration* (2007) 5.

⁵⁷ Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 415.

⁵⁸ Ibid.

⁵⁹ Ibid. 414

⁶⁰ Keppel, et al. 2012 *Conserv Lett* 256-265.

⁶¹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 15.

⁶² Chand "Registration and release of customary-land for private enterprise" (2017) *Land Use Policy* 414.

functions. These legal frameworks could compel explicit recognition of the rights and potential impact on women, youth, and other marginalised populations.

Chapter 5 identified the challenges of overlapping tenure of OECMs with the extractive, forestry, and development sectors. Ideally, the law should prohibit mining and other extractive activities within protected areas and OECM. However, such a policy could encounter legal challenges given the extent of existing and pending permissions. The Protected Areas Act could be amended to strengthen the provisions for development permissions that may also account for potential OECMs. This may explicitly include mechanisms for public participation and environmental accounting. Regulations could be developed to facilitate clarity and consistency in decisions making.

The Protected Areas Act and Environment Act could compel co-management agreements and benefit-sharing agreements, with consent being sought from the landowners and authorities with existing tenure and resource rights. Although the Climate Change Act provides for the development of benefit-sharing agreements, Regulations may foster clarity and transparency regarding the ownership rights associated with carbon.⁶³ Where land is reserved under the Land Act and entrusted to CEPA, the CEPA Act could compel co-management and benefit-sharing agreements with the local landowners or any current occupiers of the land. The relevant laws could establish a reasonable timeframe for the completion of these agreements. Templates for agreements could be provided within a schedule attached to the primary legislation. The agreements may include the results of social mapping and the documentation of customs and inheritance systems. These agreements could be a precondition for granting an environmental permit under the Environment Act. Evidence of FPIC and the terms of overlapping tenure could be attached as a condition of the permit. Finalised copies of all agreements could be endorsed by the Local Land Court and kept by all parties and the relevant state actors. It may also be advantageous for these to be kept by the applicable Provincial Administration to foster accessibility and accountability.

6.5.2 Process to demarcate the boundaries of an OECM

The flexibility of customary land boundaries and contentious land claims in PNG may motivate landowners to seek opportunities to secure ownership and resource rights through various means. Although the Land Registration Act provides a legal mechanism to attain proof of title, landowners may find this a costly endeavour that may result in the loss of power. The literature provides examples of protected areas being used as a proxy mechanism for landowners to formalise their land ownership and resource rights.⁶⁴ The Protected Areas Act may therefore adopt provisions that incorporate rigour and agreement to address the threat of land-grabs and fraud.

The international guidance encourages OECMs to be GIS-mapped for submission in the WD-OECM. Given its responsibility for international reporting, this could be a function of CEPA. CEPA could provide spatial overlays of the area to be confirmed with landowners, resource users, and other stakeholders. Noting the extensive increase of the protected

⁶³ *Climate Change (Management) Act (No. 19 of 2015)*.Section 92A(2).

⁶⁴ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 24.

area estate required to be national objectives, the OLPGLLG could be used to decentralise powers to local and provincial governments and distribute the associated burdens across various state actors.

It is argued that both protected areas and OECMs be demarcated through a similar means to encourage clarity and consistency. The Protected Areas Act could be amended to explicitly require the demarcation of boundaries for protected areas and OECMs prior to legal recognition. The geographical demarcation of an area may be done on several overlapping levels to foster clarity, such as a description of the essential environmental and geographical features coupled with sketches, spatial mapping, and GPS coordinates. Landowners and resource users could be guided to translate traditional boundaries onto maps through a participatory process that includes the documentation of agreement. This could build upon the procedures of the Land Disputes Act that encourage all parties to walk the boundaries with a mediator. As the landscape can be rugged, where this is not possible, parties may identify and record the outstanding natural features denoting the agreed-upon boundaries. This should be witnessed and certified by representatives from the same or adjacent areas with local knowledge.⁶⁵ The Local Land Court may authentic the agreement of boundaries as binding upon all parties⁶⁶ after ensuring that the terms are fully understood and agreed to by the 'substantial majority' of persons under communally held arrangements.⁶⁷ The legal frameworks could also necessitate a public notice period through a locally appropriate channel, such as a notice in a government gazette, national newspaper, radio service, or other media. The Protected Areas Act could compel the final uncontested boundaries to be incorporated into the management plan and formally declared within a provincial or national gazette.

The provisions for a Protected Area Network Registry under the Protected Areas Act could be amended to include both protected areas and OECMs to encourage transparency and connectivity. The registry could be strengthened by stipulating the provision of boundaries, either through coordinates or by physical description. This may be certified through a process that mirrors those for dispute resolution.

Although the current guidance for establishing new protected areas does not establish size limitations, it observes that larger areas may be more desirable as they have greater conservation value. The guidance also concedes that this must be balanced with other economic, social, and cultural considerations that could influence the design and boundaries of protected areas and OECMs.⁶⁸ Learning from past conservation initiatives, larger OECMs may not be conducive to PNG's communal land tenure system⁶⁹ as trust and open communication may be easier to earn within clans or other customary groups. The guidance could be updated to encourage the demarcation of boundaries may be a progressive activity undertaken with each landowning clan or group across a landscape.

⁶⁵ *Land Disputes Settlement Act 1975 (Chapter 45)*. Section 18(2).

⁶⁶ *Ibid.* Section 20(b).

⁶⁷ *Ibid.* Section 19(2).

⁶⁸ Leverington, et al. *Establishing new protected areas in PNG* (2019) 23.

⁶⁹ Van Helden *Lessons learned in community based conservation in PNG* (2005) 65-69.

Potential OECMs recognised under a conservation deed or other agreement may require the area of each landowning clan⁷⁰ to be mapped and accompanied by geographic coordinates.⁷¹ It is suggested within the literature that the boundaries of LMMAs are often dynamic which challenges the systems of demarcation to accurately reflect site-level realities.⁷² A processes to review the boundaries may encourage flexibility, recognising the potential for change under certain conditions. OECMs may also be recognised and demarcated by the LLG, ward committee, district development committee⁷³ or provincial government and integrated into the relevant sub-national planning frameworks and legislation.

6.5.3 Alignment with other strategic planning and land-use management tools

Both the Protected Area Policy⁷⁴ and a new NSLUP have identified the need to foster greater cross-government collaboration and landowner participation in developing land-use plans across a broader scope of land uses. The NSLUP seeks to establish three broad land use zones, including a development promotion zone, a conservation zone, and a rural sustainability zone. The policy document notes that these land-use zones are non-binding but could be incorporated as appropriate into lower-level development plans.⁷⁵ The NSLUP proposes to oblige all EIAs to consider sustainable land use zones established at the Ward and LLG levels.⁷⁶ These zones may be identified and described within the management plan for a site. This could encourage the capture of local values and boundaries of OECMs to reinforce their legitimacy and afford equitable representation.

It is suggested that land-use plans will assist in facilitating the demarcation of areas of high conservation value, high carbon stock areas, rare and endangered species, protected areas, and wildlife management areas, amongst others, thus aligning with the OECM criteria to support important biodiversity values.⁷⁷ The legal frameworks may compel decision makers to provide evidence that these are adequately account for with decision-making functions. Stakeholder could be provided with opportunities to appeal decisions.

The NSLUP also explicitly notes the equitable inclusion of local communities, women, and vulnerable people in the management of biodiversity.⁷⁸ The management plans for OECMs could be integrated and aligned with the national policy direction proposed by the NSLUP to inform development activities. It is suggested that the basis for all SLUPs will originate at the ward level and may be reviewed every ten years to encourage bottom-up planning that aligns with the higher levels of SLUPs.⁷⁹ The integration of management plans for OECMs could foster greater recognition and security as the land-use plans feed up into higher-level plans and sectoral plans. It may also ensure that the local values and objectives for

⁷⁰ Although a deed also may be signed by CEPA, provincial, or local-level government, it may be most likely with customary landowners as they collectively control and own the vast majority of land throughout PNG.

⁷¹ *Protected Areas Act (No. 9 of 2024)*. Schedules 3-14.

⁷² vanNimwegen, et al. *Conserving our sea of islands* (2022) 240.

⁷³ *Protected Areas Act (No. 9 of 2024)*. Section 24(3).

⁷⁴ The application of the protected area policy is explored further in Chapter 6.

⁷⁵ *GoPNG National Sustainable Land Use Policy (2022-2023)* 9.

⁷⁶ *Ibid.* 18-19.

⁷⁷ *Ibid.* 17.

⁷⁸ *Ibid.* 19.

⁷⁹ *Ibid.* 20-21.

area-based conservation are equitably represented. This new policy direction recognises the importance of alignment and integration for sustainable land use. Future legal frameworks will be responsible for translating these commitments into legal provisions.

PNG's land-use planning instruments may be strengthened as the NSLUP calls for these to be legal instruments.⁸⁰ Sectoral and provincial plans could be compelled to integrate ward and local-level land-use plans in order to align with the national planning frameworks. The undertaking of land-use plans at various levels, including the ward, LLG, district, and provincial levels, should seek to foster FPIC and employ participatory approaches.⁸¹ Community input is encouraged to define and identify various land-use areas, including those for conservation.⁸²

6.6 DEFINING THE INSTITUTIONS AND MECHANISMS TO GOVERN AND MANAGE

CEPA is mandated as the lead government body for protecting and conserving biodiversity in PNG, including protected areas, any area set aside for conservation under the conditions of a permit, and for implementing international obligations. However, the customary landowners are often the day-to-day managers and *de facto* decision-making authority for protected areas and OECMs.⁸³ The legal frameworks may seek to foster balance by defining the overarching institution and mechanisms for domestic area-based conservation, as well as affording recognition for the development of nuanced approaches at the site level. Provisions for governance and management may seek to foster collaboration and create synergies to account for the *de facto* role of local landowners.

6.6.1 Identification of the governance authority

Noting the dominance of customary land tenure throughout PNG, the equitable inclusion of landowners and other customary rightsholders in decision-making structures will likely be imperative for long-term success. The Protected Areas Act could be amended to recognise the IUCN governance types for both protected areas and OECMs, thus giving credibility to a range of decision-making structures. As some OECMs may contain overlapping tenure, resources and user rights, the law could compel co-management agreements to foster holistic good governance of the area. Past experiences suggest that local landowners may be suspicious of the state assuming a broad role as the trustee of biodiversity, thus pursuing other legal mechanisms for protection.⁸⁴ The legal frameworks could be amended to facilitate a refocusing to explicitly recognise the opportunity for OECMs to be represented through a diversity of governance and management that afford equitable recognition to the practices of customary landowners.

⁸⁰ Ibid. 25.

⁸¹ Ibid. 26.

⁸² Ibid.

⁸³ Rose "Grassroots conservation in Pacific" (2021) *Journal of South Pacific Law*.

⁸⁴ Telesetsky "Graun bilong mipela" (2001) *Georgetown International Environmental Law Review* 745.

CEPA's primary role in governance and decision-making could shift to enabling an environment that allows the equitable participation of local landowners, resource users, and local and provincial governments. As the international guidance submits that the inclusion of OECMs may seek to recognise area-based conservation measures with existing governance arrangements,⁸⁵ it may not be imperative to create new governance structures but to extend legal recognition to existing ones. Where an OECM is recognised under a local or provincial law, this could include a description of the governance authority.

As some protected areas and OECMs have utilised conservation deeds to legally recognise and regulate area-based conservation, the Protected Areas Act could be amended to give explicit recognition to these deeds. The provision of a template could establish the governance authority and covenants for management of the area. The deed template may seek to establish explicit mechanisms for dispute resolution and provide protections from the potential imbalance of power for equitable and just decision-making. Where applicable, a co-management agreement may be a precondition for legal recognition of the conservation deed. The Act may stipulate the timeframes and mechanisms to review, amend, and update these agreements.

6.6.2 Decision-making and good governance

Before addressing the individual components of decision-making and good governance, there are clear benefits for the state to first focus on supporting the enabling environment for recognising OECMs. The socio-economic and cultural context may influence the degree to which good governance can be expressed and adopted into practice. Simply imposing Western perceptions and expectations may be inappropriate. Experience in PNG has demonstrated that a failure to account for divergent perceptions of fairness and equity can negatively impact environmental governance.⁸⁶ Understanding and accounting for various drivers of decision-making may prove critical. Although the principles of good governance, particularly transparency and accountability, may require broad institutional reforms,⁸⁷ it may be advantageous for the legal frameworks canvassed within this thesis to explicitly establish a cross-cutting set of principles and priorities that all decision-makers are obliged to consider. Stakeholders could be afforded a statutory right to request a review of decisions where the principles of good governance are not given appropriate consideration.

As an OECM may afford recognition to an existing area-based conservation measure, it may be important to account for the influence of customary structures and traditional gender norms. For example, the literature describes the negotiations of a benefit-sharing agreement under REDD+ in a matrilineal society where women play a vital “behind the scenes” role in decision-making regarding land. However, it is traditional for men to participate in public forums and formal decision-making bodies.⁸⁸ Legal frameworks may balance rigour with flexibility that allows for the principles to be applied through

⁸⁵ Jonas, et al. *Site-level tool for identifying OECMs* (2023) 11-13.

⁸⁶ For detailed accounts see: West *Conservation is Our Government* (2006); Pascoe & Minnegal “Paying attention to pigs: negotiating equity and equality in global environmental governance in Suau, Papua New Guinea” (2023) *The Journal of the Royal Anthropological Institute*.

⁸⁷ Wickham, et al. *Capacity of PNG to implement UNCBD, UNCCD, and UNFCCC* (2010) 101.

⁸⁸ Pascoe & Minnegal “Paying attention to pigs” (2023) *The Journal of the Royal Anthropological Institute* 293.

locally appropriate means. Although landowners, resource users, and stakeholders may participate and benefit differently, they should all have the opportunity to participate and have access to the same information. Guidance can establish clear expectations and procedures for public participation. Applications for environmental permits under the Environment Act and other permissions may first be compelled to undertake a survey of the local social and cultural factors that could influence outcomes.

The lack of explicit reference to NPART and RPART in the Protected Areas Act could be a missed opportunity to align the legislation with the paradigm shift described within the Protected Area Policy and guidance documents. Creating Regulations under the Protected Areas Act⁸⁹ may be the most direct mechanism to give credibility and legal recognition to the NPART and RPART. Other factors associated with decision-making and good governance have been integrated throughout this chapter. Although the functions of the RPART may be described within future Regulations,⁹⁰

6.6.3 Identification of the management authority

Local landowners are often the *de facto* management authority for protected areas and potential OECMs in PNG. Although they may have rich traditional knowledge, their management may be constrained by limited access to resources and capacity to holistically implement conservation objectives.⁹¹ Similarly, CEPA faces significant capacity and resource constraints in effectively implementing its duties under the current protected areas regime. The additional stress from expanding the network of protected areas and OECMs may further frustrate these challenges.⁹² Given the limitations of the state and the *de facto* management by local landowners, co-management models may be desirable.⁹³ Although CEPA may have the statutory responsibility to manage certain national protected areas and reserved land assigned to its care,⁹⁴ developing co-management agreements with the local resource users as the day-to-day managers could improve long-term outcomes. The Protected Areas Act could be amended to explicitly state that any area set-aside for conservation is compelled to develop co-management agreements with local landowners as the *de facto* management authority. Further guidance regarding the form and inclusions of co-management agreements could be detailed within regulations developed under the Protected Areas Act.

All external partners would benefit from accounting for the common expectation in PNG for relationships to be long-term⁹⁵ and demonstrate respect for the cultural expectation of reciprocity.⁹⁶ The Protected Areas Act, Climate Change Act, and Forestry Act may compel co-management agreements to address the distribution of roles, responsibilities, duties, and expectations for management under circumstances where multiple actors are present. It may also be advantageous to

⁸⁹ *Protected Areas Act (No. 9 of 2024)*. Section 83.

⁹⁰ *Ibid.*

⁹¹ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG (2022)* 67.

⁹² Leverington, et al. *Protected area management committees in PNG* (2019) 2.

⁹³ *Ibid.* 3. Rose “Grassroots conservation in Pacific” (2021) *Journal of South Pacific Law* 5; Keppel, et al. “Conservation in tropical Pacific countries” (2012) *Conserv Lett* 257.

⁹⁴ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 8(c).

⁹⁵ Leverington, et al. *Protected area management committees in PNG* (2019) 5-6.

⁹⁶ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG (2022)* 67; Pascoe & Minnegal “Paying attention to pigs” (2023) *The Journal of the Royal Anthropological Institute*.

clarify the mechanisms for sharing costs and benefits derived from implementing the management regime.⁹⁷ The regulations could stipulate the content and that these agreements be endorsed, approved, or validated by a high-level government body or court to give full legal effect and security.⁹⁸

Where co-management agreements are employed, the regulations could outline the processes for public participation and the development of a co-management committee or board with equitable representation by the parties to support the implementation of the objectives. As women and youth are generally under-represented,⁹⁹ the regulations may explicitly afford them, and other marginalised populations, equitable opportunities to participate in management functions. Importantly, this may first require a commitment to remove any barriers to their participation to ensure they are adequately supported. Systems of land inheritance and local customs could undermine their authority to make decisions and implement certain activities associated with the management regime. Providing legal recognition to the management authority could augment the legal powers and influence to effectively implement the management regime.

The Environment Act could also stipulate the development of co-management agreements as a statutory requirement for the resource sector to address and clarify the management of the vertical dimension where overlapping tenure exists. The structure and content of these co-management agreements could mirror those developed for protected areas and OECMs to foster consistency.

6.6.4 Management regime

The Protected Areas Act does not contain significant provisions for developing and implementing a management regime. All protected areas and potential OECMs could be compelled to develop a management plan within an allocated timeframe. OECMs could adopt the protected area management template for clarity and consistency. A village magistrate could endorse the management plan as following procedures for public participation and FPIC. The Minister may be required to approval all management plans prior to reporting a protected area or OECM to the WDPA or WD-OECM. This process could be replicated for the review and renewal of management plans.

The Protected Areas Act provides for zoning to be described within the Regulations. This could include a variety of designated areas for conservation, sustainable use, village and livelihoods. It may also be advantageous to acknowledge and plan for the Melanesian management systems based on seasonal or temporary factors.¹⁰⁰ OECMs with these zones may be required to demonstrate a commitment to sustained long-term outcomes. These could be included and mapped as part of a conservation deed. A description of the specific zoning of a site should be contained in the management plan

⁹⁷ Lausche *Guidelines for Protected Area Legislation* (2011) 89-90.

⁹⁸ Ibid. 172; Techera "Legal approaches to shark conservation and management across the Indo-Pacific small island states" (2019) *Transnational Environmental Law* 566.

⁹⁹ Leverington, et al. *Protected area management committees in PNG* (2019) 2.

¹⁰⁰ Govan, et al. "Status and potential of locally-managed marine areas in the South Pacific" (2009). Mitchell "Gwala marine customary closures in PNG" (2023) *SPC Traditional Marine Resource Management and Knowledge Information Bulletin*.

with signed approval by the landowners and the authority that has given recognition to the OECM.¹⁰¹ Depending on the type of protected area or OECM, the zones may be published either in a national or provincial gazette.

Management plans and rules for area-based conservation should be accessible to the local community and stakeholders to encourage transparency and accountability. This may require written documents to be complemented by audio or visual instruments to encourage equitable inclusion and recognition of marginalised people. Notably absent from the Protected Areas Act are provisions relating to the establishment, enforcement, and compliance of rules, actions, and prohibitions to protect important values. Regulations could be developed to provide rangers, community volunteers, or other appropriate means of enforcement and monitoring the management regime with explicit powers. Landowners, resource users, and other stakeholders could be provided with an opportunity to seek remedies or appeal any decision associated with the management regime. Although a local lands court or village magistrate could be empowered to hear cases, it could be advantageous to first employ mediation strategies. Compliance with the management regime may be linked with access to incentives to encourage a sustained, long-term commitment to area-based conservation objectives.¹⁰²

6.6.5 Equity

Although PNG's constitution addresses the dimensions of distributional, recognition, and procedural equity, these are generally discretionary with legal frameworks. The legal frameworks canvassed within this thesis could be amended to include explicit provisions that support the equitable participation and representation of women, youth, and other marginalised people within all statutory bodies. As social mapping is a tool required by several conservation and environment legal frameworks, it is recommended to define and create guidance under the Environment Act. The Act could also be amended to compel the outcomes of social mapping for inclusion within an EIS with all decision-makers given the explicit duty to consider the impacts on equity as a result of all permissions and permits granted. The legal frameworks that stipulate provisions of benefit-sharing agreements may also cross-reference the guidance to inform the development of equitable provisions.

6.6.6 Integration for holistic management

Once a management plan for an OECM has been developed, the legal framework could compel it to align with other relevant planning frameworks. As this would be advantageous for both protected areas and OECMs, the Protected Areas Act could be amended to explicitly require the management authority to submit the management plan to the relevant LLG President and the District and Provincial Administrators as the JPPBPC and JDPBPC play a key role in the identification of development needs and distribution of government funding.¹⁰³ An OECM may adopt a five-year planning cycle, with clear provisions and timelines for monitoring and review, that aligns with the five-year planning cycle established by the

¹⁰¹ For example, this could be an LLG, provincial government, or CEPA.

¹⁰² See section 6.7.4 of this text.

¹⁰³ Section 25(3). An LLG may also have ward development committees which feed up into the district and provincial levels. The powers of these committees are provided for in the *Local-level Governments Administration Act* (No. 33 of 1997). As any act by the ward development committee is non-binding unless approved by the local-level government, it may be considered more advisory with decision making powers held by the local-level government.

OLPGLLG. This could foster not only inclusion into government planning mechanisms but also open potential funding opportunities to support management activities and institutions. The LLG Administration Act could be amended to create a statutory standing committee¹⁰⁴ made up of representatives from the protected area and OECM management authorities within its jurisdiction. Formal recognition of OECMs by local or provincial level governments, as per the powers granted by the OLGPLL, can provide access to mechanisms such as village magistrates and local courts to enhance the local community's authority and power to enforce the management rules against violations from outside of the community or custom.¹⁰⁵

PNG's sectoral legislation could be amended to compel the various sectoral and development plans to account for and integrate the management plans of any overlapping protected area or OECM. The Environment Act and Protected Areas Act could be amended to oblige any area set-aside for conservation in regard to a permit under the Environment Act or Forestry Act to develop co-management agreements with the relevant authorities and local landowners where appropriate. The essential covenants of a co-management agreement may be described within Regulations. The legislation may establish criteria to validate the agreements.

6.7 ENSURING THE AREA ACHIEVES POSITIVE AND SUSTAINED LONG-TERM OUTCOMES

As Target 3 of the KMGBF aligns protected areas and OECMs to encourage global action,¹⁰⁶ ensuring OECMs achieve positive and sustained long-term outcomes will be critical to foster credibility. Aligning protected areas and OECMs within PNG's domestic legal frameworks may reduce the risk of overlap and ensure the tools remain comparable. The Protected Areas Act could be strengthened with minimal criteria to assess positive and sustained long-term outcomes. As 99-years is a standard measure for leases in PNG, this could be applied to all protected areas and OECMs.

Regulations under the Protected Areas Act could be developed to serve as guidance for the employment of conservation deeds. Although a duration of five to ten years has been suggested within the literature,¹⁰⁷ this likely will not satisfy the criterion of an OECM as being long-term. A conservation deed may be required to reflect a multi-generational time frame that equitably accounts for current and future generations. Although a conservation deed could be reviewed every five to ten years, the criteria could explicitly state that the terms of the deed will continue to apply until the customary landowners consent to the withdrawal from the agreement. Such a provisions should have mechanisms for validating consent. A conservation deed may contain monitoring and reporting activities that support the OECM in perpetuity.

¹⁰⁴ Ibid. Section 25.

¹⁰⁵ The OLPGLLG empowers the provincial government to make laws relating to village, urban, and/or community courts. A LLG may establish laws that apply consultation, mediation, arbitration, and community forums to facilitate dispute resolutions. *The Organic Law on Provincial Governments and Local-level Governments* (1995). Sections 42(1)(i), 47, and 44(1)(h).

¹⁰⁶ CBD COP 15 Decision 15/4: Kunming-Montreal Global Biodiversity Framework (2022) Annex, Section H, Target 3.

¹⁰⁷ Van Helden *Lessons learned in community based conservation in PNG* (2005) 57.

6.7.1 What to monitor

The Minister could compel CEPA to undertake a review of actions to be implemented under the four phases of monitoring: preparatory, conceptual, implementation, and re-evaluation. As CEPA has the mandate for all protected and conserved areas, it is recommended for the development of a monitoring program to apply holistically. This could also facilitate the integration of multi-dimensional aspects of monitoring. CEPA may be required to consult various plans, including the NBSAP, site-level management plans, and sectoral plans. Consultation could encompass a range of landowners, resource users, state and non-state actors. The output of this exercise could be a policy document for monitoring or incorporated into the Protected Area Regulations as it may apply to adaptive management. This could inform decisions as to what to monitor and how to monitor.

As the Protected Areas Act requires CEPA to establish targets in compliance with the CBD, it may also be advantageous to amend the Act to provide CEPA with the statutory duty to undertake monitoring activities relevant to the targets. CEPA could undertake a review of the KMGBF monitoring framework¹⁰⁸ and adopt the relevant indicators for domestic use. These could be described within regulations under the protected areas act. Importantly, monitoring requires baseline documentation to accurately measure change. This applies broadly to the activities associated with monitoring important biodiversity values, expanding the protected area network, and assessing effectiveness, consent, and compliance, amongst others.

Notably the what to monitor at a site-level may be informed by the management plan. CEPA's management plan template for protected areas encourages the inclusion of a monitoring plan.¹⁰⁹ This could feasibly extend to encompass OECMs without the need to develop a new mechanism. Protected Area Regulations could provide more holistic guidance for landowners, communities, and other stakeholders to develop a monitoring plan. This could include monitoring the quality of values, commitment and support of landowners, threats, elements of good governance, and socio-economic factors that create the enabling environment for the implementation of the management regime. The management authority may be given a degree of flexibility to ensure the monitoring plan aligns with the management objectives and values of the OECM.

As positive and sustained long-term outcomes are central to an OECM, these will be essential for monitoring. The Protected Areas Act could be amended to provide clear definitions for effective, sustained, and long-term. Further guidance could be described within the regulations.

The Environment Act could be amended to include explicit provisions for monitoring compliance with various permits, permissions, and conditions attached to EIA approvals. Although CEPA may have a lead role in monitoring, the local communities could be engaged to enhance community ownership and future compliance.¹¹⁰ All renewals and extensions

¹⁰⁸ CBD COP 15 Decision 15/5: *Monitoring framework for the Kunming-Montreal Global Biodiversity Framework* (2022).

¹⁰⁹ Leverington, et al. *PNG protected areas: Living management plans template* (2019) 26.

¹¹⁰ Jupiter, et al. "Conservation of Biodiversity in the Pacific Islands of Oceania: Challenges and Opportunities" (2014) *Pacific Conservation Biology* 210-211.

could be required to have documentation of compliance and continued consent from the local landowners and other stakeholders.

6.7.2 How to monitor

PNG's legal frameworks of conservation and the environment mandate CEPA as the authority to implement and coordinate domestic monitoring programs. As CEPA staff are generally "confined" to their office in the capital, they may have limited capacity to undertake on-site monitoring. Some provincial officials have assumed this role given their proximity to the area.¹¹¹ The legislation, including the Environment Act and Protected Areas Act, could explicitly recognise the role of the local and provincial government in undertaking monitoring activities for both regional protected areas and OECMs. The RPARTs could be established to serve as the intermediary for a clear line of communication.¹¹² Protected Area regulations could be developed to describe the monitoring framework with clear reporting measures to inform state and non-state actors of progress toward indicators. OECMs established through customary or traditional means may be empowered to prescribe appropriate indicators. Various monitoring methods and tools could be utilised to collect qualitative and quantitative data to provide a holistic assessment.¹¹³ The Environment Act and Protected Areas Act could compel monitoring activities to engage a range of stakeholders and rightsholders, including management authorities, local landowners, state authorities, non-state actors, technical experts, and various partnerships.¹¹⁴ Although timeframes for monitoring may be adapted to reflect the specific monitoring activities, these could be described within the regulations to foster accountability. The alignment of timeframes with other reporting cycles would support clarity and consistency.

The Protected Areas Regulations could compel the replication of the METT-PNG assessment across protected and conserved areas to facilitate the analysis of progress toward management effectiveness. This could be complemented by the SAGE tool to account for governance and equity of protected and conserved areas. The local and provincial government authorities, in collaboration with the site-level governance authority, could be trained to implement the assessment. CEPA's role could shift to focus on creating the enabling environment and collating information for domestic and international reporting. The monitoring of certain values may require external assistance and could draw on the expertise provided by non-state partners such as NGOs, universities, researchers, and funding organisations. CEPA could assume responsibility at a strategic level for coordination and oversight of the monitoring strategy across the network of protected and conserved areas.¹¹⁵

The UN and development partners in PNG have developed several domestic tools to facilitate community engagement in management and monitoring activities, including the Lukim Gather mobile data collection application to assist protected

¹¹¹ Filer "PNG's forests back in the spotlight" (2022) *Development Policy Centre Discussion Paper* 103 26.

¹¹² Wolnicki, et al. *Sharing governance* (2019) 6.

¹¹³ Day, et al. "Marine protected area management" in *Protected Area Governance and Management* (2015) 643; Coad, et al. "Measuring impact of protected area management interventions" (2015) *Philosophical Transactions of the Royal Society B: Biological Sciences* 9.

¹¹⁴ Maini, et al. "Value and limits of OECMs for marine conservation" (2023) *Mar Policy* 4-5.

¹¹⁵ *Conservation and Environment Protection Authority Act (No. 9 of 2014)*. Section 8(b).

area communities in mapping and monitoring their environment; the PNG Biodiversity library of resources for establishing and monitoring protected areas; the National Forest Monitoring System for REDD+ and Forest Monitoring projects; and the Biodiversity and Climate Fund which aims to assist communities, NGOs and community-based organisations in funding activities related to the preservation of environmental resources across PNG.¹¹⁶ Notably, communities may also have traditional mechanisms for monitoring local values.

Sub-national, local landowners, communities, and other stakeholders could be engaged in compliance monitoring of environmental permits. The Environment Act could compel the outcomes of public consultation as part of the decision-making criteria for amendments or renewal of environmental permits. The developer may be given the onus to engage an external assessor, with approval by CEPA, to undertake site-level monitoring activities. The conditions of the permit may establish the indicators for monitoring as appropriate for each site and development activities. These could reflect the important biodiversity values of the present protected and conserved areas.

6.7.3 Reporting

To foster the alignment of OECMs within PNG's domestic legal frameworks, the CEPA Act could mandate CEPA to recognise and report OECMs at the national level, including the reporting requirements for international obligations under the CBD and to the WD-OECMs. Noting the financial and resource constraints of the national government, it is recommended to foster collaboration with provincial and local-level governments, as well as non-state partners such as NGOs, for bottom-up reporting. Importantly, reporting could be shared with the governance and management authorities for transparency and to promote adaptive management and informed decision-making. It may also be helpful for information to flow back to the customary landowners where appropriate. The Protected Areas Act could explicitly provide for RPART to be used to facilitate communication and reporting between OECMs, provincial government, and CEPA. The Protected Areas Act, or any local or provincial law recognising an OECM, could compel OECMs to provide an annual report as a mechanism to hold the management authority accountable. Reports could be shared with CEPA and the Minister for Environment and Conservation to inform policy development and international reporting. CEPA could develop a reporting template within the regulations to facilitate consistency across the network of protected areas and OECMs.

6.7.4 Outcomes of monitoring and reporting

Importantly, providing legal recognition to OECMs should not simply be an easier route than that afforded to protected areas. Outcomes could be improved through appropriate management of the risks associated with a focus on quantity over quality.¹¹⁷ Monitoring and reporting may be used to foster accountability and identify barriers and constraints, such

¹¹⁶ *UNDP Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) xiii.

¹¹⁷ Lemieux, et al. "The Race to Achieve Aichi Target 11 Could Jeopardize Effective Conservation " (2019) *Mar Policy*; Lemieux, et al. "Running to stand still: The application of substandard OECMs " (2022) *Biol Conserv*; Claudet, et al. "Avoiding misuse of OECMs in the blue economy" (2022) *One Earth*.

as those associated with resources, finances, and capacity. CEPA could utilise this information to develop and implement more effective policies for area-based conservation.

The legal frameworks that afford recognition to an OECM, which may include the Protected Areas Act as well as local and provincial laws, could provide for the process of delisting where an OECM may no longer meet the prescribed criteria. This may first include a written notice of a probationary period to be given to the governance authority with details of the measures that are required and time-period for review. For transparency, the process may compel the written notice to be read aloud during a public meeting within the landowning communities. Where the terms of probationary period are not met, the process of delisting may mirror that for PADDD and be described within the Regulations.

As local landowners are often the day-to-day managers, it may be impossible to remove them due to mismanagement. However, these areas could be flagged to review the capacity and resource needs that could facilitate improvements. The RPART could be engaged in compiling monitoring data¹¹⁸ for reporting to CEPA and the local and provincial government authorities to identify opportunities to integrate into planning and budgeting mechanisms.¹¹⁹ The terms of any co-management agreements may integrate measures of accountability.

The monitoring and reporting program could be linked with a program to provide incentives.¹²⁰ These should reflect the community's interests and motivations for conserving the area. There is a submission within the literature that the misalignment of incentives may have contributed to the failure of some protected and conserved areas to produce effective long-term outcomes for biodiversity.¹²¹ As the Protected Areas Act and Climate Change Act provide for PNG Biodiversity and Climate Fund and Small Grants Programme, these Acts could compel a process of public participation to adopt appropriate incentives that could be financed through the funds. The Protected Areas Act also provides for livelihood incentives, including capacity development and training, that could be made available to both protected areas and OECMs.

6.8 IMPLICATIONS AND OUTLOOK FOR OECMS

The Constitution NGDP draws attention to “Papua New Guinean ways”. As PNG endeavours to meet goals and international obligations for area-based *in-situ* conservation, the recognition of OECMs could provide an opportunity to support and strengthen measures that have demonstrated effectiveness within the domestic context. Notably, a wide degree of variance exists throughout PNG regarding customary law and practices. This thesis does not have the capacity to provide a case-by-case analysis of opportunities to recognise and regulate OECMs. However, it has sought to address

¹¹⁸ See section 6.7.2 of this text.

¹¹⁹ See section 6.7.3 of this text.

¹²⁰ See section 6.7.4 of this text.

¹²¹ Beehler & Kirkman *Lessons Learned from the Field* (2013) 16.

factors that may enable the expression and inclusion of a diversity of area-based measures that may exist within various sources of the law.

In the context of PNG, it is argued not to present OECMs as a new mechanism but rather to identify current domestic measures that could be legally strengthened and reported as part of international commitments. Legal frameworks may seek to balance inclusivity and flexibility, with provisions to encourage sufficient rigour. Too much flexibility could leave OECMs exposed to greenwashing, while too much regulation may discourage the governance and management authorities from pursuing recognition. Within the PNG context, the alignment of protected areas and OECMs could lead to improved outcomes by managing confusion and overlap, as well as providing OECMs with enhanced credibility. The provisions of the Protected Areas Act and Environment Act are sufficiently broad to be amended to also include OECMs. It may benefit both protected areas and OECMs to strengthen the legal protection provided to these areas. The development of regulations may add clarity and consistency by prescribing relevant processes and forms.

PNG's social, legal, and geographical context may be conducive to a system of decentralisation. The powers granted by the OLPGLLG could recognise and regulate OECMs under local and provincial laws. The reforms identified within this chapter suggests that the role of CEPA could shift to facilitate the enabling environment through investments in building capacity, institutional development, and providing access to resources. As the state body mandated to oversee conservation and the environment, the legal frameworks could be amended to clearly prescribe CEPA's role and expectations for monitoring and reporting. Local and provincial governments could also be explicitly engaged in planning, monitoring, and reporting through local channels.

Although this chapter has sought to provide insights to strengthen and reform PNG's legal frameworks to enable the recognition, regulation, and reporting of OECMs, it will be advantageous to observe that the social, cultural, and political influences may hinder the actual implementation of the law.¹²² Over the past 50 years, conservation in PNG has been constrained by a mismatch in the written law and the *de facto* systems of governance and management.¹²³ Should PNG decide to pursue formal recognition and regulation of OECMs, public participation and community engagement could provide a key for fostering effective implementation of the legal regime.

¹²² Novotny & Toko "Ecological research in Papua New Guinean rainforests: insects, plants and people" in Bryan&Shearman (eds) *The State of the Forests of Papua New Guinea 2014: Measuring change over period 2002-2014* (2015) 83; West *Conservation is Our Government* (2006).

¹²³ Woods 'Beautiful legislation' fails to protect PNG (accessed November 2024).

Chapter 7 Conclusion

The KMGBF signals the global community's commitment to take collective action to address the escalating threats facing biodiversity. Although a central message of the KMGBF has been to conserve at least 30% of terrestrial, inland water, coastal, and marine areas by 2030,¹ coverage alone does not translate into effective biodiversity conservation.² States will also need to address the qualitative elements, such as being effectively managed, ecologically representative, well-connected, and equitably governed. The sole use of protected areas to meet the KMGBF target may not be effective or appropriate. Rather, a range of tools will be required to holistically protect and conserve biodiversity.³ The explicit inclusion of OECMs into the CBD's Aichi Targets and current KMGBF has secured their place within the international environmental legal frameworks as a complementary mechanism to protected areas. As OECMs are not limited to sites where conservation is the primary management objective, they may provide a tool to broaden conservation thinking and address the issues associated with equity, representation, and connectivity. As states assess opportunities to afford recognition and develop domestic guidance, urgent attention is required to clearly describe the role of law to foster a clear and consistent interpretation of OECMs across the international community. Broadly, this thesis has sought to address the void of legal guidance and explore potential opportunities and reforms required for states to recognise, regulate, and report OECMs to strengthen domestic *in-situ* area-based conservation and meet international obligations.

Since its origins in the 19th century, the modern conservation movement has been evolving to reflect advancements in conservation science, socio-economic development, equitable representation, and the recognition of the rights of IPLCs. Chapter 2 sought to canvas the evolution that has contributed to the inclusion of OECMs within international legal frameworks. This shifting discourse of *in-situ* conservation, and more specifically that surrounding protected areas and OECMs, is critical to understanding the distinct form and nature of OECMs that informs the role of law in supporting and strengthening in-situ conservation.

The law will play an essential role in enabling or hindering the recognition, regulation, and reporting of OECMs. However, little global guidance exists to support the integration of OECMs into domestic legal frameworks. Chapter 3 primarily addressed the subsidiary research question of what the role of law is in supporting and strengthening OECMs.⁴ The development of the theoretical legal framework sought first to understand the role of law and then create connections to the criteria drawn from the international guidance for recognising OECMs, namely securing consent, distinguishing an OECM from a protected area, supporting important biodiversity values, demarcating the area, assessing the institutions and mechanisms to govern and manage, and monitoring and reporting to foster positive and sustained long-term outcomes

¹ CBD COP 15 *Decision 15/4: Kunming-Montreal Global Biodiversity Framework* (2022) 9.

² Geldmann, et al. "Effectiveness of protected areas at resisting anthropogenic pressures" (2019) *Proceedings of the National Academy of Sciences*; Montesino Pouzols, et al. "Global Protected Area Expansion is Compromised" (2014) *Nature*.

³ Gurney, et al. "Biodiversity needs every tool in the box" (2021) *Nature* 646-647.

⁴ See section 1.3 of this text.

for biodiversity. This is built upon the lessons learned from the shifting discourse (Chapter 2) and integrates the good practices described within the most recent OECM guidance.⁵ The development of the theoretical legal framework set the structure that enabled a critical review of a domestic legal framework.

Chapter 4 sought to answer the question of what the policy and legal frameworks are relevant to OECMs in PNG. This chapter identified and described the legal frameworks relevant to the potential OECMs that will inform the application of the theoretical legal framework within the domestic context of PNG. Although PNG's Constitution imparts a duty to protect and conserve the nation's valued biodiversity for current and future generations, the protected areas system remains one of the weakest in the world.⁶ The state justifies this as a consequence of the dominance of customary land tenure, including the challenges of manoeuvring through the intricacies of identifying the legitimate landowners and rightsholders, which limits the state's decision-making powers for expanding the protected area network.⁷ However, optimistically, the literature highlights strong local values toward biodiversity protection.⁸ PNG's system of legal pluralism couples Western-influenced statutory laws with Constitutionally recognised customary law. Given this context, this thesis proposes that PNG provides an interesting and valuable case study within which to develop a deeper understanding of the role of law in facilitating and regulating the recognition and implementation of OECMs.

As PNG is set to celebrate 50 years of independence, the legal frameworks may require review to align with the evolution of the modern conservation movement (Chapter 2). Chapter 5 and Chapter 6 addressed the subsidiary research question of what opportunities and reforms could facilitate the recognition, regulation, and reporting of OECMs in PNG. Chapter 5 provided a critical review of the legal frameworks with relevance to OECMs. This highlighted provisions that could both enable and constrain the recognition, regulation, and reporting of OECMs. As OECMs are not explicitly included within the legal frameworks, this chapter noted opportunities where current legal frameworks could be reformed. The main points of reform included aspects associated with evidence and validation, clear mechanisms and thresholds for FPIC, improved issues of good governance, alignment and integration of OECMs with the broader policy and legal frameworks, clear powers and functions of actors, and undertaking monitoring and reporting to support informed decision-making and protecting important values.

Within the domestic context, it is argued not to present OECMs as a new mechanism but rather to identify current domestic measures that could be legally strengthened and reported as part of international commitments. Chapter 6 proposed broad reforms that could support and strengthen PNG's legal frameworks. This was informed by the analysis of Chapter 5 and the theoretical legal framework of Chapter 3. Key reforms included the alignment of protected areas and OECMs under a single legal framework, amending the Environment Act to foster the protection of values, and shifting CEPA's role to one that fosters the enabling environment for OECMs and undertakes monitoring and reporting. Importantly, given the

⁵ Jonas, et al. *Guidance on OECMs* (2024).

⁶ Laurance, et al. "Defeating the 'resource curse'" (2012) *Biol Conserv* 38.

⁷ Keppel, et al. "Conservation in tropical Pacific countries" (2012) *Conserv Lett*; Melick, et al. "Biodiversity Targets Risk Becoming Counterproductive" (2012) *Conserv Soc* 347; Beehler & Kirkman *Lessons Learned from the Field* (2013) 14.

⁸ Leverington, et al. *Assessment of Management Effectiveness for PNG's Protected Areas* (2017) 14.

nature of OECMs to provide recognition to a broad scope of area-based conservation measures, the legal mechanisms may maintain a degree of flexibility yet be robust enough to assess and monitor a commitment to long-term effective conservation.

This thesis has sought to advance guidance and insights into the role of law to support and strengthen *in-situ* conservation through the recognition, regulation, and reporting of OECMs within PNG's domestic context. Despite a focus on strengthening the legal provisions, the broader implementation challenges could pose constraints. PNG has faced criticism of fraud, corruption, and misrepresentation.⁹ This, coupled with the inadequate access to the rights to public participation, information, and justice, hinders the implementation and enforcement of legal frameworks.¹⁰ A holistic approach that addresses the implementation challenges will be critical to effectively support the enabling environment for OECMs.

Although the international community continues to produce a growing body of literature and research relevant to OECMs, few studies have been related to the recognition and regulation of OECMs within PNG and across the broader Pacific community.¹¹ Across this region, area-based conservation would benefit from a more thorough investigation and future research of several factors that will likely contribute to the enabling environment of OECMs. First, given the breadth of potential OECMs, understanding the challenges, nuances, and influences of land and communal tenure will impact the long-term security of OECMs. Second, it is submitted that a thorough exploration of the socially and culturally appropriate mechanisms for obtaining, measuring, and validating FPIC would be constructive. Third, fostering positive and sustained long-term outcomes will depend on identifying suitable compensation that reflects the motivations of the local landowners and communities. This thesis provides a building block for deeper research to support and strengthen in-situ conservation through the recognition of OECMs in PNG through robust reform of the current legislative frameworks.

⁹ UNDP *Environment-Climate Analysis for UN Common Country Assessment, PNG* (2022) 18.

¹⁰ UNEP *Environmental Rule of Law and Human Rights in Asia Pacific: Supporting the Protection of Environmental Human Rights Defenders* (2023) 15.

¹¹ Cook "Progress developing the concept of OECMs" (2024) *Conservation biology* 6-7.

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