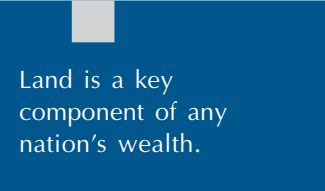


# VII. Land Issues

Land is a key component of any nation's wealth. Since the beginning of humanity, civilizations have spent considerable time and energy defining land rights and establishing institutions to administer such rights. Records to document land ownership, assign rights, and indicate transfers of land, were among history's first written documents. Thus, from the beginning of human history, society has had a critical role in securing property rights, facilitating access to land, resolving conflicts, and setting the parameters of land use.

## The Importance of Land Rights

In merely physical terms, most land is used as an input to agricultural production, that in many developing countries, including those of the Pacific, continues to be a key sector that provides the backbone of economic sustenance for the majority of the people. The rights enjoyed by those using land will have an impact on the welfare of the rural population, the amount of output obtained, the level of investment undertaken, the scope of rural-urban migration, and the emergence of a vibrant off-farm economy.



Land is a key component of any nation's wealth.

The impact of giving people property rights to the land they cultivate is demonstrated most clearly by the People's Republic of China. Introduction of more secure property rights has led to impressive output gains as property rights are successively strengthened to facilitate investment and greater transactions in markets. In other words, rural households are less inclined to invest in land they do not securely own. In addition, the ability to use land as collateral in credit markets is usually a precondition for obtaining credit that can then be invested in the rural nonfarm economy. Secure land rights are also critical for the ability to exchange land, and in a broader context, property rights to land and the associated ability to trade land, provides a pre-condition for the emergence of financial markets. In all developed economies, mortgages, and other sources of credit that depend on land as collateral, are the paramount sources of credit. This situation would not be possible without well-defined, secure, and transferable rights to land.

In all developed economies, mortgages, and other sources of credit that depend on land as collateral, are the paramount sources of credit.

Secure ownership and the ability to exchange land are critical for the investment climate for small entrepreneurs, in addition to being a precondition for the emergence of financial markets. It is for this reason that countries where property rights to land are not secure have much lower rates of investment, and eventually, growth, than they might otherwise have. In most developed countries, most small businesses have started using loans backed by land. Property rights are no less important for the welfare of the poor. Indeed, the lack of formal property rights prevents poor people from turning their latent assets into live capital—one reason why the entrepreneurial spirit that is so visible in virtually the entire developing world is not translated into a more inclusive pattern of growth (De Soto 2000). Several empirical studies have related land registration to improved productivity through access to capital (Byamugisha 1998).

Land is important in the lives of the Pacific peoples and plays a role somewhat different from that found in other cultures (Boydell 2001). In addition to its function as the basis for subsistence, it has functions of power and status, spirituality, and cultural identity. Land is inalienable—it cannot be transferred. In truth, land holds a special place in almost all societies of the world.<sup>40</sup> What differs is the nature of tenure. The Pacific countries have encountered difficulties with land because traditional systems have run headlong into modern ones. Land conflicts are often an expression of political nationhood versus tribal organization. Nationhood implies delegating certain responsibilities to the state over communal and individual preferences. Achieving development justifies government primacy in social and economic infrastructure, and part of that is land management and land reform.

Efficient land tenure systems are a necessary foundation for a growing private sector in the Pacific.<sup>41</sup> Some countries in the Pacific are cautiously reexamining their land institutions and laws to see how they can be revamped to meet current needs. They are searching for ways to integrate communal/traditional land tenure systems into national economies in ways compatible with both tradition and a modern (liberal) economy. It is a challenging task made more difficult by the fact that basic institutions have to be in place, before those

<sup>40</sup> Even in developed market economies, one does not have to question commercial farmers much to discover deeply held spiritual views of stewardship and farmer as caretaker of the land.

<sup>41</sup> Land tenure is defined as the rules of possession, use, and conveyance of land.

members of society who need them the most, feel the benefits of changes in property rights. It is hard enough to draft a good property law, but it is even more difficult to create local official land registries and local court systems that serve all citizens. In addition, there is the difficulty of finding the professional skills needed for mortgages, property deeds, land surveys, property valuation, and other institutional services that form part of a land management system. All these factors must be in place before a land market can be expected to play a full role in the development of the private sector and the economy.

The clear assumption from the analysis is that what governments do, and what funding agencies advise and support, really matters to the outcome of land tenure, because these organizations influence the nature of solutions to the problem of land in the Pacific.

Efficient land tenure systems are a necessary foundation for a growing private sector in the Pacific.

## Features of Land Tenure in the Pacific

The vast majority—averaging over 90%—of land in the Pacific is customary land, meaning owned by persons entitled to hold it under their respective customs. Most customs allow land to be held jointly by all members of a kinship group who are descendants of the original occupant or who have acquired, under custom, the rights to the ownership of the land. Some customs allow only ownership by male descendancy, others only female, and still others allow both. All living descendants, regardless of generation, usually have equal ownership rights in the land, and by custom, may participate in decisions on land use. In addition, customary rules of decision making in the Pacific usually require agreement of all persons present—a considerably time-consuming process. Moreover, by law, virtually no land can be alienated from its customary owners.

Often, people other than the custom owners may have secondary rights to the land, such as rights of occupation or passage. Thus, wives, sisters, and daughters of male landowners are permitted to occupy land belonging to husbands, fathers, and uncles. Neighbors are normally allowed passage. Finally, in many Pacific societies, tribal or clan chiefs, big men, and other leaders, by virtue of their status, may assert the right to participate in decisions on the management and use of land in which they have no ownership rights.

Another feature of land tenure is the enormous variation in practice across and even within the countries of the Pacific. There are enormous variations on the

themes, which have arisen from the historical separation of countries and tribes/clans.

The customary tenures in the Pacific were designed in precolonial times for self-sufficient communities with limited mobility and trade that produce most of their own needs. They worked well at that time, but these conditions no longer exist, and customary forms of ownership are no longer serving these societies well. The forms of tenure, which are sustainable for subsistence agriculture, are not ideal for commercial farming in a modern economy. While land conflicts within and between kinship groups were common in earlier times, increasing “Westernization” has raised disputes over customary practices, which appear to be less useful to Pacific society as it transforms. In fact, land disputes appear to be a constant feature of land ownership in the Pacific.

There are many reasons for disputes and conflicts in a customary system where rules are not written and customs evolve:

- identification of customary land owners;
- identification of persons with secondary customary land rights;
- identification of the location, boundaries, and areas of customary land;
- inability to reach a decision on the management or use of land (often because some landowners cannot be found or refuse to participate);
- unauthorized persons making decisions on land (e.g., when male relatives make decisions in a matrilineal system or when decisions are made in the absence of some owners);
- decisions that are misunderstood and later give rise to disputes;
- decision makers later changing their mind, for any reason, in a customary society where agreements have no permanence or finality; and
- distribution of the benefits from land use.

## Land Reform

The process of land reform is a complicated technical and political subject that boasts a huge literature and best left to experts. Yet, efforts to reform land ownership throughout the world have failed more often than they have succeeded. Since customary land tenure does represent a severe constraint on the development of both the private sector and financial markets in the Pacific, it will be discussed here from a secured transactions framework perspective. The issue is how to design a system that unlocks the value of land while preserving its associated traditional values. These possibilities in general, are covered in the following section, while acknowledging the vast variations in the customary

land ownership throughout the region. The discussion below couches arguments in generalities or principle without being country-specific.

## The Problem

The most valuable, and sometimes, the only asset owned by individuals in the Pacific is their customary share of clan, tribal, or family land. Since the vast majority of land remains under customary ownership (i.e., without formal ownership), this situation precludes using land as collateral for credit as lenders cannot take possession of the asset in the event of a loan default. In addition, lack of clarity in the definition of land use rights presents problems for many investors, particularly foreign investors who wish to exercise clear control over land use for the lifetime of their investment. Governments are, therefore, faced with the task of reconciling the conflict between social norms and formal, market-based law, if development is to occur in rural areas.

The mismatch between customary land tenure and imported institutions for dealing with land creates high costs and ties up large amounts of land. As a recent World Bank report notes

The current land law specifies that customary land should be used only for customary purposes, mainly agriculture and communally held housing facilities rather than individually owned homes. While customary law does not recognize the principle of permanent land ownership passing to an individual interest, urban growth is taking place on customary land where customary owners and developers have reached direct agreements. Such agreements should be acceptable and recognized. . . (World Bank 1995b).

The issue is how to design a system that unlocks the value of land while preserving its associated traditional values.

The impact of these problems on private sector development is considerable and immediate, amounting to large costs in time and money.

While land tenure is widely recognized as an issue for most Pacific nations, much criticism is misdirected toward individual freehold ownership.<sup>42</sup> However, the impossibility of freehold land ownership is not critical for private sector development in the Pacific. In fact, much land in industrial countries is held outside freehold ownership and managed by leasing.<sup>43</sup> Leasing, cooperative

<sup>42</sup> The Heads of Government of the Pacific Islands Forum have discussed the issue at every annual meeting from 1995 to 2002.

<sup>43</sup> Large portions of many Western states of the US are owned by the Government, which leases different rights to those lands to different users. Much of the state of Hawaii cannot be alienated and is leased to the present users and developers.

ownership, and condominium tenure are alternatives to outright ownership. Rather, the problems in land tenure throughout the Pacific lie in the following key areas:

Leasing, cooperative ownership, and condominium tenure are alternatives to outright ownership.

- unclear ownership and unclear boundaries, mostly from lack of official recording;
- overly restrictive rules on the transferability of land, mandated because of unclear ownership;
- unclear definition of different land tenure rights;
- weak and unrecorded dispute resolution practices; and
- problems of enforcement.

Questions of land tenure and possible reforms are highly contentious in the Pacific. As noted, much of the controversy lies in the traditional elites' potential loss of power to a national sovereign. Often, land issues appear to be intractable, to the point that politicians and funding agencies are unwilling to tackle them. But land tenure issues will eventually be largely resolved because the desire to raise income by mobilizing the inherent value of land will become an overwhelming imperative that overrides the vested interests of chiefs and other local elites.

Land tenure systems, whether customary or western, are social constructs modified over time to accommodate society's particular needs. When they are no longer useful, they are modified or replaced. Indeed, most countries in the Pacific have modified their land laws over time, but have yet to find a structure that satisfies both the traditional and modern aspects. Given these precedents, a process can be started that takes a series of small, systematic, and conclusive steps toward solving the identified shortcomings of the existing system.<sup>44</sup> The objective is to put in place a mechanism that will gradually lead to a robust land tenure system providing very similar economic incentives and legal backing as those found in the western ownership model, yet will preserve the feature of joint ownership and inalienability.

In designing solutions to land issues, several principles need to be observed to gain the confidence and acceptance of customary landowners.

- Governments need to specify the fundamental problems to be addressed and articulate the goals/outcomes of each step as well as the ultimate objective.

<sup>44</sup> Land disputes have the potential to explode into tribal or ethnic violence. A slow, step-wise process, where each step is resolved, prior to taking the next step, would minimize the probability of aggression.

- A policy framework for reform must be designed and agreed upon.
- The process should be logically progressive and deliberate.
- The process should be participatory and inclusive, based on the community (clan, family, tribe, or village), and will require extensive discussion through a political awareness campaign.
- Existing accepted community organizations, such as councils of chiefs, should play a central role.
- National political institutions should only provide a framework, as well as facilitation, and recording.
- Robust dispute resolution and appeal mechanisms based on local practice, such as the customary reconciliation council, should be put in place.
- Steps should follow a defined process, and agreements reached should be recorded and considered final.<sup>45</sup>
- The Government should announce at the outset that constitutional protections on land would not be altered.
- Ultimately, the choice on whether to opt into the system or stay out should be optional for individual landholding groups.

Under customary ownership, there is neither one landlord/owner, nor often a well-defined set of owners. There are frequently ill-defined boundaries between communal holdings, and there are various traditional ways to manage community land, many of which are disputed within the family of owners. To deal with these problems, the steps in the land restructuring process might be undertaken in the following order.

- Identify rightful claimants to a roughly defined piece of land and record those claimants as common owners in a defined and agreed process.
- Define and record the boundaries to each plot of kinship land with local and adjacent landowners.
- Put in place a formal family/clan governance structure agreed to and operated by the owners to manage that piece of land.

The steps are simple; the process is not. As Box 10 indicates, complications are manifold.

There are many constructive systems and design specifications being developed for land reform within the region, as well as considerable international experience on aspects of tenure that can be combined and tailored for each country to

---

<sup>45</sup> In Vanuatu, people do not necessarily accept decisions as final, but expect to be able to renegotiate signed agreements. Publicity campaigns can assist in modifying this attitude and clarifying Government's intent on land restructuring.

**Box 10. Who Owns the Land? Who is Chief?**

The process of clarifying a piece of land's customary owners is fraught with difficulties that must be resolved before recording can begin. In Vanuatu, for instance, ownership is usually defined by kinship and often, the chief manages individual land use. In many areas, coastal landowners provided inland families with land when they were attracted to coastal missionary settlements in the 19<sup>th</sup> century. In the intervening years, other occupants moved onto land vacated by the migrant inland families. In resolving ownership, what time frame should be observed? The migrant coastal families may claim that they only "loaned" land to the incoming inland families. On the other hand, "new" inland families claim they have been both in possession and use of inland areas for over 100 years and should not have to surrender ownership to claims of former inland families. Adverse possession is not part of the legal code, so a method of reconciliation must be found to resolve such issues fairly.

Chiefs play a prominent role in decisions concerning the use and disposition of land and in settling disputes within and between families or clans. Chiefly status is established in different ways, including both heredity and popularity. The role of chiefs will be central in the success of land restructuring. There is therefore considerable value in chieftainship. In the past, some chiefs were deposed by missionaries and replaced by others more receptive to missionary views. The legitimacy of such actions may be subject to challenge as the value of being a chief is realized. It must be remembered that statutes of limitation hold little value as a means of settlement in a society where reconciliation, rather than legal recourse, is the customary solution.

form a workable land system.<sup>46</sup> Critical issues that need to be addressed are identified here. The important point is that governments need to start a systematic, transparent, and participatory land identification and recording system that will be embraced by the large majority of landowners, thereby leading to increased income opportunities for the owners. It may take many years to complete the process, especially with the considerable preparatory work needed, but the point is that a process must begin if countries in the region are to grow. And once success is demonstrated in one area of one country, it will spread over the whole country, and from there, to other countries. The following issues need to be addressed in developing a good land tenure system.

<sup>46</sup> A recent symposium on South Pacific land tenure provided some suggestions (see [www.usp.ac.fj/landmgmt/symposium](http://www.usp.ac.fj/landmgmt/symposium)). Also see Holden 1999b for complementary approaches in Peru, and Paterson 2002, which has also proposed innovative mechanisms for formalizing land tenure.

### ***Recording/Registration***

While it is possible to record and register land under limited conditions, in most Pacific countries, it is cumbersome, difficult, and largely restricted to urban land. Land leases are frequently arranged and sanctioned by a government ministry, but these are neither registered nor transferable.

Registries as well as registration laws and regulations need to be established for they set the foundation for secured transactions. Owners and renters may be given the option to register land and leases, and the market would then determine who did and who did not find it valuable to register. Modern notice-filing registry laws provide for inexpensive and more secured registration systems. Notice-filing registry laws guarantee the filing of information as provided by the parties, and enter it into a secured database. Thus, the registry becomes more secure and less expensive to operate. Such an approach narrows the duties and responsibilities of the registry, so that the system costs less, yet still provides a better secured filing system. The possibility that the registry be administered competitively by the private sector (instead of the present public monopoly) should also be examined.

### ***Transferability and Use of Land***

Another factor that provides market value is the ability to freely transfer a land right. In the Pacific countries, there are restrictions on the transferability of land and land use. Complex and nondurable negotiations to obtain access to land are the norm outside urban areas and land held by custom owners cannot be mortgaged. Some law restrictions, such as limiting people from holding land they do not use may bring benefits to a country, but arrangements that are more flexible need to be designed. Separating ownership rights from use rights as well as defining different use rights, would greatly facilitate a market in land use.

### ***Uncertainty of Land Tenure Rights***

Property rights can only be granted by public law or by the community at large. Therefore, to know the qualities of a land right, people will turn to the law, either statutory or customary. In the Pacific, land rights are based on custom. This gives rise to uncertainty about land use rights. Custom principles are often not publicly known to all interested parties because they are not written and recorded. This lack of publicity is a key difference between statutory law and custom—statutory law is forced to be consistent by the act of publication.

But customs are not written and, therefore, are flexible depending on the circumstances. A party to an agreement cannot know

- when actions of a community's representative become binding on the community;
- when a leader can sign a valid lease; and
- whether the person claiming to represent the community is the authorized community representative.

Customs differ among various groups, but in most cases, customs do not seem to address legal issues (e.g., mortgaging land as security for loans to purchase agricultural inputs). In the Pacific, customs deal primarily with subsistence agriculture issues (Crocombe 1997a) that are a context for uncertainty. Many reports argue that bringing customary law into a statute makes that framework rigid and not adaptable to changes (Crocombe 1995).<sup>47</sup> These concerns, however, are really about the poor operation of a parliamentary system that allows laws to become obsolete, whether reflecting customs or endorsing international conventions. Options for improving how the legislative body operates, rather than excluding customary laws from statutes, may produce a preferable outcome.

### *The Cost of Disputes*

Finally, land market value will be influenced by the costs of resolving land disputes including

- actual process fees
- processing time
- the uncertainty in predicting the outcome of a land dispute
- the uncertainty of a legal resolution being enforced

Ironically, land has become a vehicle for undermining the traditional system. This paradox arises because land disputes in many Pacific countries can be appealed outside the customary jurisdiction of customary authorities (Government of Vanuatu 2001). Often, custom defines land ownership and use. But custom is generally undefined, it changes over time and from island to island. Also, it is not defined and "static" like a legal system.

A land dispute procedure established by law needs to be clear and inexpensive. It must be comprehensive so that it covers all cases. Considerable thought and work by experts in this field is needed to create a fully satisfactory procedure.

---

<sup>47</sup> It might also be possible to use the technology of computers and connectivity to post and update customs. Such a "registry" would add some certainty but would not have the force of law.

---

## Conclusions

Two major constraints on private sector development are unclear land rights and the difficulty in using land as collateral for loans. The land right system requires careful analysis to determine exactly how to build a chain of rights that serves key economic ends. Simply imposing conventional western industrial land tenure patterns cannot solve this problem. Existing studies of land rights, although often thoughtful, have not focused clearly on these two objectives. Diagnostic and prescriptive studies are needed for each country in the region where the government appears willing to address the issue. Part of the prescription would be a step-by-step action plan for the government to follow.

In addition, the legal framework for secured lending needs to be clarified and updated.<sup>48</sup> The new system must incorporate the customary system of land rights, yet permit more land to serve as collateral. This arrangement requires a diagnostic study and the preparation of a draft law to focus discussion on the issues. Developing a consensus is necessary for the process, but will take time.<sup>49</sup> The process must begin now.

---

<sup>48</sup> The desiderata for such systems are set out in several publications available, for instance, at [www.ceal.org](http://www.ceal.org).

<sup>49</sup> An important caveat in undertaking such work is to build a drafting team that includes economists, technical experts, and lawyers, to ensure that the draft meets its economic objectives and is consistent with best technical practice. Similarly, local attorneys should be paired with foreign experts so that the complexities of modern laws governing security in industrial countries can be incorporated.