

Gaining secure title to land in PDMCs is difficult because of the pervasiveness of traditional customs of land tenure and the limited development of reliable leasehold regimes (Duncan et. al. 1999). Insecurity of tenure discourages potential investors, especially those considering site-specific mining and tourism projects. In addition, land cannot be used as collateral for loans from financial institutions, which restricts private sector access to finance for investment. Economic growth and financial sector development are therefore retarded. At the same time, traditional or neotraditional land tenure systems have served to protect indigenous ownership and to provide a secure basis for subsistence living, although in places the latter is now under threat from population expansion and/or a breakdown in mechanisms allocating rights to land. Adapting land tenure systems to the needs of a market economy based on private property rights is a sensitive issue and a major challenge confronting PDMC governments. This chapter reviews the various land tenure systems and makes some recommendations aimed at facilitating adaptation of traditional arrangements to contemporary development needs.

The land ownership structures in six of the seven PDMCs under review (Fiji Islands, Kiribati, PNG, Samoa, Solomon Islands, and Vanuatu) are similar and fall into three basic categories: customary land, individually owned land, and government-owned land. In Tonga there is no customary land, and all the land is either owned by individuals or by the Government. These structures of ownership, as well as the

different kinds of property that can be used as collateral security for commercial loans, are examined below.

CUSTOMARY LAND

In six of the seven PDMCs reviewed in this report—Fiji Islands, Kiribati, PNG, Samoa, Solomon Islands, and Vanuatu—nearly all the land, some 80 to 90 percent of the total land area, is owned by indigenous people in accordance with traditional customs of land tenure. The traditional customs of these PDMCs are basically similar, in that customary land is generally owned by a group of people, usually related by kinship as descendants of the first occupier(s) of the land. In all six countries, group ownership of land under customary traditions is joint and undivided. In some PDMCs, especially Samoa, the leaders of the kinship group, *matai*, will often be spoken of as owners of the land, but the leader holds the land on behalf of all members of the group. In some other PDMCs, for example Vanuatu, chiefs are similarly described. This group ownership of land has serious implications for the leasing and mortgaging of customary land.

The constitutions and legislation in many PDMCs have been enacted and designed to protect indigenous people from unwise dispositions of their rights in their customary land. These legislative provisions also have serious implications for the leasing and mortgaging of customary land.

Boundary and Entitlement Disputes

In all PDMCs, there are disputes about the boundaries and entitlement to interests in customary land. These are particularly widespread and serious in Kiribati, PNG, Solomon Islands, and Vanuatu, but in all cases, measures need to be taken to ensure that disputes can be adjudicated promptly and correctly and that the resulting decision is accurately and permanently marked on the land.

Mortgages

In PNG, Samoa, and Solomon Islands, the law prohibits the mortgaging of customary land by the custom owners. In the Fiji Islands, mortgaging of customary land is permitted, but only the Native Land Trust Board (NLTB), in which the management and control of customary land is vested, may do so. In Kiribati, mortgages are permitted, but only to certain Kiribati institutions—the State, the Housing Corporation, and the National Loans Board—and only for certain purposes. In Vanuatu, mortgages are permitted, but are subject to the approval of the Minister of Lands; there is no provision for independent review of decisions about the mortgaging of customary land.

The fear in PNG, Samoa, and Solomon Islands is that allowing custom owners to mortgage their land would lead to unwise decisions that would ultimately result in mortgagees' acquiring ownership of customary lands by exercise of the power of sale or foreclosure. This fear could be assuaged by requiring that mortgages be given only to lending institutions approved by the state, as in the Fiji Islands and Vanuatu, and be enforced only by entry into possession, and not by sale or foreclosure.

Leasing

In all six PDMCs, customary land can be leased, but leasing is closely controlled by the state. In the Fiji Islands, leases of customary land can only be granted by the NLTB¹⁰; in Samoa, by the Minister of Lands; and in Vanuatu, where ownership is in dispute and the land is held by the Minister of Lands, by that Minister. In Kiribati, the Minister of Lands must approve leases to persons who are not i-Kiribati, or leases of areas that exceed five acres or that are for periods exceeding 21 years. In Vanuatu, the Minister of Lands must approve leases to nonindigenous persons. In Solomon Islands, customary land

¹⁰ Thirty-year leases in the sugar industry, held mostly by Fijian-born Indians, began expiring in the late 1990s and have not been renewed, because Fijian landlords want the land back. As a consequence, investment in land development has virtually ceased.

can be leased only to the national or provincial government, which can then lease it to others.

In none of the six PDMCs is there provision for an independent review of the leasing decisions made by agencies of the State, except through investigations and recommendations by the Ombudsman in the Fiji Islands, Solomon Islands, and Vanuatu.

In PNG and Solomon Islands, leasehold interests in customary land can be mortgaged without any legal restrictions. In the Fiji Islands, Kiribati, and Vanuatu, leasehold interests in customary land can be mortgaged, but are subject to legal restrictions. In the Fiji Islands, the NLTB must approve the mortgage. In Vanuatu, the Minister of Lands must approve the mortgage; and in Kiribati, customary lands can only be mortgaged to the Housing Corporation or to the National Loans Board for certain prescribed purposes that do not include business or commerce. In Samoa, the mortgaging of leasehold interest in customary lands is prohibited.

In PNG, mortgages of customary land and of leasehold interests in customary land can be enforced without legal impediment, but in other PDMCs that allow for such mortgages (the Fiji Islands, Kiribati, Solomon Islands, and Vanuatu), there are legal restrictions on enforcement. In the Fiji Islands, NLTB consent is required for a mortgagee to sell a leasehold interest or to enter into possession. In Solomon Islands and Vanuatu, the approval of the High Court or Supreme Court is required to enforce a mortgage; and in Solomon Islands, applications to the High Court for an order to enforce a mortgage cannot be made by a person who is not a Solomon Islander. In Kiribati, a leasehold interest in customary land cannot be sold to a person who is not i-Kiribati or to a body other than the State, the Housing Corporation, or the National Loans Board.

In the Fiji Islands, Kiribati, PNG, Solomon Islands, and Vanuatu, there can also be practical difficulties about enforcing a mortgage by sale or entry into possession: the entry of the mortgagee or the purchaser of the leasehold interest may be physically resisted by the mortgagor, or the family, neighbors, or friends of the custom owners.

Use and Conversion of Customary Land

Decisions by custom owners about the use of customary land, particularly about whether it should be leased or mortgaged, are frequently difficult to make, because usually there are many joint owners of the land, who must be party to the decision and who must all agree. In some PDMCs in the study, this difficulty has been overcome by authorizing an agency of the State to act for the custom owners and make decisions on their behalf, e.g., the NLTB in the Fiji Islands and the Minister of Lands in Samoa and Vanuatu. But there is no provision for independent review of the decisions of these state agencies.

In some PDMCs, the difficulty of obtaining a decision by custom owners has been addressed by providing that the custom owners can appoint some of their own members to act on their behalf. In PNG, groups of landowners may be incorporated and decisions made by committees established under the constitution of the corporation. In Solomon Islands, custom owners who register their land may nominate certain owners as the registered owners able to deal with the registered land. However, there is little clear evidence as to how these statutory agents for the custom owners are operating. Nor is there any provision for independent review of the decisions of these agents.

In Kiribati and (where land is not under dispute) in Vanuatu, there is no statutory provision for any person or body of persons to act on behalf of the custom owners. In practice, the larger landowning groups often appoint trustees or land committees to act on their behalf. There is no statutory regulation of their activities and little clear evidence of how they are functioning.

In only two of the PDMCs in the study, PNG and Solomon Islands, is there provision for the conversion of customary land into a limited form of freehold or perpetual estate. In both countries, though for different reasons, tenure conversion is not proceeding very quickly. In PNG, it is because shortages of funds and staff prevent the Land Titles Commission from dealing with all the applications made to it for tenure conversion. In Solomon Islands, there has been reluctance on the part of custom owners to apply for tenure conversion. In the Fiji Islands, Kiribati, Samoa, and Vanuatu, there is no provision for the conversion of

customary land into any form of land ownership that can be more readily mortgaged.

In the Fiji Islands, Kiribati, PNG, Samoa, and Solomon Islands, owners of customary land have often left the area or the country. This means that they do not contribute to the physical development of the land, and are difficult to contact for any decisions about the land, which all owners should consider. On the other hand, they may help to support some of the remaining owners by sending remittances and items of value from time to time. In the Fiji Islands and Kiribati, there is legal provision for the Minister of Lands to cancel the interests of absentee landowners, although this is something that a minister of an elected government is reluctant to do. In fact, these legislative provisions have very rarely been used.

Registration

There has been much debate as to whether it is desirable and useful to provide for the registration of customary land, and if so, what system of registration should be provided. The main advantages of registration of customary land are said to be that registration will provide certainty of title and boundaries, and that this will reduce the number of disputes and encourage the registered custom owners to develop the land more fully than they otherwise would. Furthermore, if a system of registration of customary land were introduced, it would provide an accurate basis for the imposition of a land tax.

The main disadvantages of registration of customary land are that it might not record accurately those entitled to the land and/or the boundaries of that land, and might lead to more rather than fewer disputes. In addition, the very initiation of registration of customary land might provoke disputes; and registration could be a very expensive process, with the cost being borne by the taxpayer and/or custom landowners. Finally, it is argued that registration is unnecessary because over large tracts of customary land there is no dispute about ownership, and no possibility of developing such lands because of their rugged or infertile terrain.

Registration could be systematically adopted throughout the whole country or a whole region or district, or adopted only in

certain circumstances or occasions. It could be either compulsory or voluntary. The advantage of systematic registration is that it enables all entitlements to land ownership in a certain area to be determined, without the possibility of their being subsequently disturbed by later determinations of adjoining or nearby land. Likewise, the advantage of compulsory registration over voluntary registration of customary land is that all entitlements would be dealt with at the same time, so that there would be no possibility of their being subsequently disturbed by later determinations of nearby or related land.

In the late 19th and early 20th centuries, the colonial administration in the Fiji Islands and the Gilbert and Ellice islands (now Kiribati and Tuvalu, respectively) undertook a compulsory, systematic registration of all the land in the two colonies. This took many decades to complete, but these two countries do have systems of compulsory systematic registration of entitlements to customary lands and boundaries. Unfortunately, in neither country was the systematic registration followed up by systematic surveys. Instead, reliance was placed upon impermanent natural features, such as rocks and trees, to delineate the boundaries. Moreover, it is now clear that there were serious errors and omissions, not only in the original registration, but also in the subsequent updating of the register.

In the Fiji Islands, PNG, Solomon Islands, and Vanuatu, a form of compulsory occasional registration of customary land has been introduced. Fixed-term leases of customary land for more than 1–3 years must be registered. In Solomon Islands, provision was made in 1978 for compulsory systematic registration of customary land in selected areas—areas designated by the Minister of Lands, usually because of their potential for development. However, this did not prove popular with custom owners, who feared that their rights to the land would be curtailed or removed, and registration has now been all but abandoned. Subsequently, provision has been made in Solomon Islands for the voluntary registration of customary land. This has provoked a deep debate as to the basis upon which ownership rights to customary land should be recorded: should they be recorded on the basis of the tribes as they existed before the arrival of the Europeans, or on the basis of the subdivisions of tribes, clans and lines that developed later? This has placed a

question mark over the voluntary registration of customary land in the Solomon Islands.

Whatever the advantages of compulsory systematic registration of customary land in theory, there are serious practical problems:

- (i) Compulsory systematic registration now of all customary land in a country would take a very long time and would be very expensive.
- (ii) Compulsory systematic registration of customary land in mountainous areas or areas that have no foreseeable potential for development is probably unnecessary.
- (iii) The registration must be accurate initially, and the register must be maintained accurately, both as to entitlements to ownership to customary land, and also as to the boundaries of that land.
- (iv) To be fully effective, the registration should be followed by a survey.

For these reasons, if systematic registration, either compulsory or voluntary, is to proceed, it would seem that it should be only in selected areas—areas selected on the basis of the usefulness of registration and of the practicality of ensuring an accurate registration of interests and determination of boundaries.

INDIVIDUALLY OWNED LAND

In all seven PDMCs, there are some areas of land that are not subject to customary land tenure arrangements and can be owned by individual persons or bodies. In the Fiji Islands, Kiribati, PNG, and Samoa, these areas constitute a small proportion of total land area: less than 15 percent. In Solomon Islands and Tonga, they are more significant. In Vanuatu, the legislation to allow for the creation of such land, which was enacted in 1994, has not been brought into effect, and so the example may be disregarded for practical purposes.

In the Fiji Islands, Kiribati, PNG, and Samoa, the form of individually owned land is the same: freehold land. In PNG,

Solomon Islands, and Tonga, there are other forms of individually owned land: converted customary land in PNG, perpetual estates and fixed estates in Solomon Islands, and hereditary estates and allotments in Tonga. Although the forms of individually owned land are different, there are some issues in common.

Except in the Fiji Islands, PNG, and Solomon Islands, there are restrictions on the power of the registered proprietor of individually owned land to mortgage such land. In Kiribati, there is no local legislation permitting such land to be mortgaged. In Samoa, mortgages of freehold land cannot be granted to overseas corporations, or to persons who are not resident citizens, without the approval of the Head of State. In Tonga, the Minister of Lands must approve the mortgage of a hereditary estate or allotment, and there are certain statutory limitations: mortgages can be only with lending institutions approved by the Government, and only for the purpose of improving the estate or allotment.

Except in the Fiji Islands and PNG, there are restrictions on the leasing of freehold land. In Kiribati, the State has the preemptive right to acquire, voluntarily or compulsorily, any freehold land that the owner is proposing to lease. In PNG, converted customary land that constitutes a form of limited freehold cannot be leased for more than 25 years without the consent of the Land Board, unless the Minister of Lands agrees to waive the limitations. In Samoa, freehold land cannot be leased for more than 20 years to an overseas corporation, or to a person who is not a resident citizen, without the consent of the Head of State.

In Solomon Islands, perpetual estates and fixed-term estates can be leased only to Solomon Islanders, or to certain bodies and institutions defined in the Lands Act as able to own perpetual estates, unless the Commissioner of Lands gives consent. In Tonga, hereditary estates and hereditary allotments may be leased, but are subject to certain statutory restrictions, and the Cabinet or the Privy Council must approve if the lease is for more than 99 years. No more than 5 percent of a hereditary estate may be leased, and no part of the estate that in the opinion of the Cabinet is likely to be required for allotments. Leases of allotments may not exceed 20 years and the allotment must not be subject to a mortgage.

Except in the Fiji Islands, PNG, and Solomon Islands, leasehold interests in individually owned land cannot be mortgaged without restriction. In Kiribati, there is no local legislation in force to permit the mortgaging of leasehold interests in individually owned land. In Samoa, mortgages of leasehold interests for more than 20 years cannot be granted to an overseas corporation, or to a person who is not a resident citizen, without the consent of the Head of State. In Tonga, mortgages of the leasehold interest in hereditary estates and hereditary allotments may be mortgaged, but only with the approval of the Minister of Lands and subject to certain statutory restrictions: the mortgage must be by way of an assignation of the lease, and for a period not exceeding the unexpired term of the lease; and only with Government-approved lending institutions.

Except in the Fiji Islands, there are significant restrictions on the enforcement of registered mortgages of freehold land, or of leasehold interests in freehold land; such mortgages can be enforced by sale and by entry into possession, or by foreclosure, subject to public advertisement and the approval of the Registrar of Lands. In Kiribati, there is no local legislation in force to empower the enforcement of such mortgages. In PNG, mortgages of freehold land and of leasehold interests in freehold land may be enforced by entry into possession and by sale. But because the Constitution provides that only citizens and citizen corporations as defined in the Land Act can acquire freehold, the enforcement of mortgages by sale of freehold is, in effect, restricted to sale to citizens and citizen corporations. Also in PNG, mortgages of converted customary land can be enforced by sale, and by entry into possession for a period exceeding 25 years, only with the approval of the Land Board, unless the Minister agrees to remove these restrictions.

In Samoa, mortgages of freehold land and of leasehold interests in freehold land may be enforced by sale and by entry into possession. But the Alienation of Freehold Act, 1972, prohibits the transfer of land, or the leasing of land for more than 20 years, to a person who is not a resident citizen or to an overseas corporation, unless the transfer is approved by the Head of State. Hence, the enforcement of such a mortgage is subject to the approval of the Head of State.

In Solomon Islands, mortgages of perpetual estates and fixed-term estates, and mortgages of leasehold interests in such estates, can be enforced by sale, by entry into possession, and by foreclosure or vesting the estate or interest into the name of the mortgagee. However, all these remedies require sanction by an order of the High Court, and such an order can only be made in respect of a Solomon Islander. A Solomon Islander is defined as a person who was born in the Solomon Islands and has two or more grandparents indigenous to Solomon Islands.

In Tonga, mortgages of hereditary estates and allotments, and of leasehold interests in hereditary estates and allotments, can be enforced only by entry into possession, not by sale or by vesting the estate or interest into the name of the mortgagee. The approval of the Minister of Lands or of the Land Court is not, however, required to exercise this enforcement.

In addition to these legal restrictions on the enforcement of mortgages on individually owned land or leasehold interests in such land, there are in some PDMCs serious practical difficulties in the way of enforcing mortgages by sale or entry into possession. Particularly in PNG and Solomon Islands, there is often physical resistance to the exercise by a mortgagee of the power of enforcement by sale or entry into possession—resistance that is manifested not only by the mortgagors and their families, but also by their friends and neighbors.

GOVERNMENT-OWNED LAND

In all seven PDMCs in the study, the government of the country owns a proportion of the land. In the Fiji Islands, Kiribati, PNG, Samoa, and the Solomon Islands, the area of land so owned is less than 15 percent of total land area. In Tonga, the Government owns a much larger proportion of the total land. Nominally, all the land in the country is owned by the Crown, but about two thirds of that land has been granted to nobles as hereditary estates that will only revert to the monarch if there is a failure in the prescribed line of succession. Realistically, therefore, it is appropriate to say that about one third of the land of Tonga is owned by the Crown. Of this total, which is called Crown land, some lands are designated as Royal Estates, for use

by the monarch for the time being; the remainder as Royal Family Estates, for use by persons nominated by the monarch.

In the Fiji Islands, land owned by the Government was called Crown Land, but is now more often called State land, as it is in Kiribati and PNG. In Samoa, Solomon Islands, and Vanuatu, this land is called Public Land.

In Kiribati and Vanuatu, there is no local legislation providing for the lease of government-owned land. In the Fiji Islands, the Minister of Lands may lease State land without restriction. In other countries, government-owned land can be leased, but the leasing is subject to some restrictions: in PNG, Samoa, and Vanuatu, it can be leased by the Minister of Lands for periods not exceeding 99 years, 20 years, and 75 years, respectively. In Solomon Islands, perpetual and fixed-term estates owned by the national Government cannot be leased, only let on a periodic tenancy. Provincial governments may grant leases of perpetual and fixed-term estates owned by them, but the consent of the Commissioner of Lands is required if the lessee is not a person born in the Solomon Islands and having two or more indigenous grandparents. In Tonga, both Royal Estates and Royal Family Estates can be leased, but only for projects of general public interest and benefit.

In Kiribati and Vanuatu, there is no local legislation providing for, or regulating, the mortgaging of leasehold interests in government-owned land. In the Fiji Islands, leases of State lands, except those that have been designated as "protected leases," may be mortgaged. In PNG, Samoa, Solomon Islands, and Vanuatu, leasehold interests in public land can similarly be mortgaged without restriction. In Tonga, leasehold interests in Royal Estates and Royal Family Estates can be mortgaged, but only with the consent of the Minister of Lands, only by way of assignment of the lease, and only to lending institutions approved by the Government.

In the Fiji Islands, registered mortgages of leasehold interests in Government-owned land can be enforced without significant restrictions—by sale, foreclosure, or entry into possession, with the approval of the Registrar of Lands. This is also the case in PNG and Vanuatu (in the latter instance, subject to the consent of the Supreme Court). In Tonga, mortgages of leaseholds can be enforced by entry into possession. In Solomon

Islands, mortgages of leasehold interests in Government-owned land may be enforced by sale of the interest, entry into possession, or foreclosure, but only with the consent of the High Court, and only in respect of a Solomon Islander.

CROPS AND LIVESTOCK AS COLLATERAL SECURITY

In the Fiji Islands and PNG, legislation permits the mortgaging of crops and/or livestock. In Kiribati, Samoa, Solomon Islands, Tonga, and Vanuatu, no such legislation exists. In Tonga, in fact, there is a statutory prohibition on the charging of crops.

Although there seems to be a general awareness of the utility of the Crop Liens Act in the Fiji Islands, the act has been in existence since 1904 and may need revising. In PNG, the Instruments Act is little known. The Commission of Inquiry into Land Matters, 1973, reported that the Instruments Act was difficult to follow and recommended that it be simplified, especially with respect to livestock.

In countries where there are significant cash crops or livestock, such as Solomon Islands, Tonga, and Vanuatu, it would seem to be advantageous to introduce legislation that permits these items of value to serve as collateral security for loans.

DISPUTES

Disputes About Customary Land

The customs relating to customary land normally provide that land is to be owned by the person who first occupied the land and the legitimate descendants of that person. The customs variously trace legitimate descent through men, through women, through both men and women, and through either men or women. In addition, customs usually provide for illegitimate descendants, adopted persons, and spouses to be regarded as part of the kinship group and to acquire some rights of ownership, although probably subject to some limitations that do not attach to other members of the group. In some communities, two or more kinship groups may be regarded by custom as forming the

landowning group, possibly as a result of original occupation by more than one person, possibly as a result of subsequent fusion of the groups.

The customs of most communities recognized, especially in earlier times, that rights of ownership of land could be lost. They could be seized in warfare by the victors; they could be voluntarily transferred, usually in consideration of some special services: either outright, or for a limited period of time, or subject to certain conditions. Rights of ownership to land could be exchanged for rights of ownership to other land, again, either outright or subject to certain conditions. Ownership rights could become dormant or extinct if the owners left the community for a period of time, and they could be extinguished as a punishment for very serious wrongdoing. In more recent times, as land has acquired a financial value, and as populations have increased, some of these customs about the alienability of ownership rights have come to be disputed.

The customs of most communities also recognize that other people who are not members of the landowning group might be allowed to use part of the land of that group for certain purposes: for example, collection of fruit, nuts, and firewood; hunting for birds, flying fox, and fish; or passing through to another area. These subsidiary rights might be allowed without conditions, or they might be subject to conditions.

The boundaries of land owned by indigenous people were neither accurately surveyed nor identified by any unique or permanent form of demarcation. Usually they were described by reference to natural landmarks, such as rivers and streams, prominent rocks, or trees. These landmarks were often referred to by names that might change, or become confused with others; and the physical landmarks themselves might be altered or destroyed by nature or by people in the course of time.

Customs relating to ownership of land and other rights to land, like other customs in Pacific Island countries, were not recorded in writing or in any other permanent form: they were held in the minds of the current generation and passed on to the next generation by word of mouth and by actions. It is only in more recent times, since the expansion of literacy among indigenous people, that the idea of recording customs has been developed, and even today the recording of customs is unusual.

Moreover, even the recording of customs, either in writing or on tape, does not remove uncertainty; often customs are recorded in terms that are very general, or ambiguous, or are stated to be subject to exceptions that are themselves expressed in general or ambiguous terms.

During colonial times in the Fiji Islands and Kiribati, several attempts were made by colonial administrators to systematically register all rights of ownership to customary land. After many years and much labor, the task of registration was completed. But the utility of what was registered is open to question. In the Fiji Islands, for example, for the sake of uniformity and simplicity, the land commissioners adopted a uniform landowning group, *mataqali*, for the whole country, whereas there was very clear evidence that there were other kinds of landowning groups in different parts of the country. In Kiribati, the results of the first registration were so disputed that they had to be abandoned, and the results of a second registration gave rise to so many disputes that legislation had to be enacted to render them indefeasible, or unchallengeable. In Solomon Islands, systematic registration in selected areas was introduced, but was not continued, and now a system of voluntary recording of customary land has been introduced. However, as already noted, there are acute differences of view as to whether the recording should be based on the traditional tribal areas that existed before the arrival of the Europeans, or on the smaller kinship groups of clans or lines that have developed since then.

It is not surprising, then, that many disputes can arise about rights of ownership and interests in land. This inevitable development has been made much more pervasive and acute as a result of two developments: first, in some areas, increases in population have made land very valuable for the maintenance and support of its owners; second, increases in the value of land for commercial development have made it a prized financial resource for those entitled to rights in it. The result is that nowadays, in all countries under review, but especially in the Fiji Islands, Kiribati, PNG, Solomon Islands, and Vanuatu, disputes about customary land, and about customary titles related to customary land, are very common. These disputes constitute a serious impediment to development of the customary land and its utilization as collateral security for commercial loans.

In the six PDMCs where there is customary ownership of land, legislation has been enacted for many years to provide bodies to adjudicate disputes about customary land (Table 7.1).

In the Fiji Islands, PNG, Samoa, and Solomon Islands, there are bodies established by law that adjudicate disputes about customary land. In Vanuatu, however, these bodies either do not operate at all or operate only in certain parts of the country. The Island Courts, which are authorized by the Island Courts Act to determine customary land disputes at first instance, operate at present in only eight of the 18 larger islands in an archipelago of 80 islands. The Supreme Court, the body authorized to hear appeals of Island Courts' decisions on matters relating to land, has heard no appeals for the last three years because of lack of judicial time. Since almost all decisions of the Island Courts about customary land are appealed to the Supreme Court, there has effectively been no adjudication of customary land disputes for the last three years. It is estimated that there are more than 6,000 appeals awaiting decision. Although the bodies authorized by law to determine disputes about customary land are operating in the Fiji Islands, Kiribati, PNG, Samoa, and Solomon Islands, there are certain deficiencies about their operation. They include the following:

Delays in Hearing Cases. The most often heard complaint about the operation of the courts and tribunals authorized to adjudicate disputes about customary land is the length of time that the hearing of cases takes. This complaint is heard in all six countries, but especially in those where the ordinary courts or reconstituted ordinary courts are the ones authorized to adjudicate disputes about customary land, that is, Kiribati, PNG, Solomon Islands, and Vanuatu.

Expense of Proceedings. There are also complaints about the cost of proceedings to adjudicate disputes about customary land. These complaints are justified in countries where the body authorized to adjudicate disputes conducts its hearings in only one or two locations (Samoa and Vanuatu); where a decision about customary land may be appealed more than once (Solomon Islands); or where an appeal from a decision of a local court on a matter relating to customary land may be taken first to a

customary land appeal court and then, on a matter of written law, to a high court and court of appeal.

Ignorance of the Customs Relevant to the Dispute. The complaint is frequently made that the bodies established to adjudicate disputes about customary lands do not have a sufficiently expert or precise knowledge of the customs applying to the land in question, or of the backgrounds of the disputing parties. In Kiribati, Solomon Islands, and Vanuatu, some members of the bodies determining land disputes at first instance are required by law to have some knowledge of custom, but there is no requirement that they must be knowledgeable about the customs relating to the land in dispute. In the Fiji Islands, two assessors elected by the provincial council must assist the Native Lands Commission, which hears disputes in the first instance, but there is no requirement that such assessors must be knowledgeable about the customs relating to the land in dispute. In Samoa and Solomon Islands, there is no requirement that the members of the Land and Titles Court or the Island Courts be knowledgeable about the customs relating to the land in dispute.

The same comment can be made of the bodies authorized to hear appeals of customary land disputes. In Kiribati, the High Court is required to sit with four magistrates drawn from the Land Magistrates' Panel, but there is no requirement that they be knowledgeable about customs relating to the land in dispute. In Vanuatu, two assessors who are knowledgeable in custom must assist the Supreme Court, but there is no requirement that they be knowledgeable in the customs relating to the land in dispute. In the Fiji Islands, PNG, Samoa, and Solomon Islands, there is no requirement that the appellate body have either members or assessors who are knowledgeable about custom, much less knowledgeable about the customs relating to the land in dispute.

Lack of Accurate Recording of Decisions. In those PDMCs where ordinary courts or reconstituted ordinary courts are authorized to determine disputes about customary land—that is, Kiribati, PNG, Solomon Islands, and Vanuatu—the decisions made by these courts are recorded by the staffs of these courts. These staffs are not required to have any special training in the

recording of decisions relating to land. For example, errors in the recording of court decisions have been very prevalent in the Magistrates' Courts (Lands) of Kiribati.

Lack of Formal Publication of Decisions. In none of the six countries reviewed is there any statutory requirement that the decisions of the bodies adjudicate disputes about customary land be published. Consequently, there is no record available to the public of the details of decisions, nor of the manner in which the bodies are performing their functions.

Lack of surveying or permanent marking of boundaries. In the Fiji Islands, the legislation requires that boundaries of adjudicated customary land must be surveyed. In Solomon Islands, if custom owners choose to register the land under the Customary Land Records Act 1994, the land must be surveyed. But a survey of the boundaries of the land as determined by the bodies authorized to do so is not required in Kiribati, PNG, Samoa, or (unless the owners choose to register the land) Solomon Islands. No doubt surveying of boundaries is not required because of the limited number of technically qualified surveyors available and the cost of undertaking a survey. However, it does leave the way open to many disputes in the future. In PNG, legislation attempting to address this problem requires that the court adjudicating disputes over customary land must visit the site of the land with the parties and, with not less than five witnesses from the same or an adjacent area, so far as is practicable walk the boundaries, and satisfy itself that the parties and the witnesses understand the decision, the scope of the land, and the boundaries. Such a process is predictably time-consuming and expensive.

Lack of power to adjudicate disputes about customary titles. In the Fiji Islands and Samoa, the tribunals authorized to adjudicate disputes about customary land are also authorized to adjudicate disputes about customary titles. In Kiribati, PNG, Solomon Islands, and Vanuatu, there is no provision for the adjudication of disputes about customary titles, although entitlements to customary land are often clearly linked with customary land.

Disputes About Individually Owned Land

In five of the six countries where there is individually owned land (the Fiji Islands, Kiribati, PNG, Samoa, and Solomon Islands), disputes about ownership are adjudicated by the High Court or Supreme Court, with appeal to the Court of Appeal and, in the case of the Fiji Islands, subject to a further appeal to the Supreme Court. In Tonga, a Land Court is authorized to hear disputes about land, and decisions by that Court are appealed to the Court of Appeal of Tonga, except for appeals relating to the estates and titles of nobles, which are determined by the Privy Council.

Disputes About Government-Owned Land

In the Fiji Islands, PNG, Samoa, and Solomon Islands, the High Court or the Supreme Court adjudicates disputes about government-owned lands, with appeal to the Court of Appeal. In the Fiji Islands, there is provision for further and final appeal to the Supreme Court. In Tonga, a Land Court is authorized to hear disputes about Government-owned land; the Court of Appeal determines appeals from the Land Court.

This chapter has explored the complexities of PDMC land tenure systems and the pressures to which they are subject as a result of growing populations and increasing monetization of subsistence economies. Reconciling the twin needs of protecting indigenous people's key asset and allowing land to be exchangeable and usable as collateral is a difficult task. But innovative solutions, mostly involving leasing through an agency acting on behalf of the owners, have been found.

Table 7.1
Legislation on Adjudicating Disputes about Customary Land

Fiji Islands	<p><i>Native Lands Commission (NLC)</i> – one or more commissioners appointed by the Minister of Fijian Affairs, who sits with the <i>Roko</i> or Fijian provincial administrator, assisted by one or more assessors elected by the provincial council: Native Lands Act.</p> <p><i>Appeals Tribunal</i> to hear appeals from NLC, i.e., three persons appointed by the Minister; the chairman must be qualified to be a judge or have academic or other qualifications, and the other members also must have academic or other qualifications and experience. Decisions of the Appeals Tribunal are final and not challengeable in a court of law: Native Lands (Amendment) (Appeals Tribunal) Act 1998.</p>
Kiribati	<p><i>Magistrates' Courts (Lands)</i> – five magistrates, at least three of whom are selected from a panel of land magistrates selected by the Chief Justice, after consultation with the chief lands officer: Magistrates' Courts. Ordinance. Decisions are to be by a majority: Magistrates' Court Ordinance.</p> <p><i>High Court</i> to hear appeals from Magistrates' Court (Lands), i.e., Chief Justice or judge sitting with four magistrates selected by the Chief Justice from the land magistrates' panel. Decisions are to be by a majority and to be final and not challengeable in a court of law: Magistrates' Court Ordinance.</p>
PNG	<p><i>Land Titles Commission</i> – Chief Commissioner and such other commissioners as Governor-General shall appoint, assisted by assessors if Commission wishes. A single Commissioner may exercise power of Commission. Jurisdiction to determine whether land is customary land, water, or reef, and also to determine claims for compensation: Land Titles Commission Act 1962.</p> <p><i>National Court</i> – Chief Justice, Deputy Chief Justice, four to six Judges, approved by the Head of State on the advice of the Judicial and Legal Services Commission, except for the Chief Justice, who is appointed on the advice of the National Executive Council. Jurisdiction to hear appeals from Land Titles Commission, Constitution of PNG.</p> <p><i>Local Land Courts</i> – Local Land Magistrate sitting with two or four land mediators to adjudicate disputes as to interests in land, after referral to mediation. Decision of Court to be by a majority: Land Disputes Settlement Act.</p> <p><i>Provincial Land Courts</i> – three Provincial Land Magistrates (i.e., senior land magistrates) Jurisdiction to hear appeals from</p>

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Table 7.1 (cont.)

Legislation on Adjudicating Disputes about Customary Land

<p>Samoa</p>	<p>decisions of Local Land Courts in the province: Land Disputes Settlement Act.</p> <p>Land and Titles Court – President (Chief Justice or Judge of the Supreme Court) Deputy Presidents (Senior Samoan Judges), Samoan Judges and Assessors, appointed on the advice of the Judicial Service Commission. Decision by a majority. Jurisdiction to determine disputes relating to Samoan names and titles and to customary land: Land and Titles Court Act 1981.</p> <p>Land and Titles Court (Appeals) – President and two Samoan Judges appointed by the President. Jurisdiction to hear appeals from Land and Titles Court: Land and Titles Court Act 1981. Decisions to be final: Land and Titles Court Act 1981.</p>
<p>Solomon Islands</p>	<p>Land Courts – President, Vice President, and two to ten members appointed by Chief Justice. Decisions by a majority. Jurisdiction to adjudicate disputes about customary land: Land Courts Act, Land and Titles Act.</p> <p>Customary Land Appeal Courts (CLAC) – President, Vice President, and at least three other members, of whom at least one is a magistrate appointed by Chief Justice. Jurisdiction to hear appeals from Land Courts relating to customary land: Land Titles Act.</p> <p>High Court – Chief Justice or judge of the High Court. Jurisdiction to determine appeals from CLAC on points of law, not including customary law, or failure to comply with procedural requirements of written law: Land and Titles Act.</p> <p>Court of Appeal – President and Judges of Appeal, and Chief Justice and Judges of Supreme Court. Jurisdiction to hear appeals from High Court, with leave, on a matter that is not a matter of fact: Land and Titles Act.</p>
<p>Vanuatu</p>	<p>Island Courts – at least three justices knowledgeable about custom, of whom at least one must be a custom chief. Jurisdiction to adjudicate disputes relating to customary land: Island Courts Act.</p> <p>Supreme Court – Chief Justice and Judges of the Supreme Court appointed by the President on the advice of the Judicial Service Commission, except the Chief Justice, who is appointed after consultation with the Prime Minister and Leader of the Opposition. Jurisdiction to hear appeals from the Island Courts on all matters concerning disputes as to the ownership of land: Island Courts Act.</p>

Box 7.1

Best Practice for Land Systems

All reform efforts in regard to land tenure must be based on an understanding of the complexities involved in each case, and must be formulated with sensitivity to the cultural issues involved.

Governments need to facilitate the leasing and mortgaging of customary land, government-owned land, and private land. They also need to facilitate the mortgaging of leasehold interests in customary, government, and private land.

Appropriate tribunals should be established to adjudicate disputes about customary land and titles in those PDMCs currently without tribunals. They should operate independently, efficiently, and economically, based on principles that are fully acceptable in the community.

Mortgaging of crops and livestock should be permitted in those PDMCs that now prohibit it.