PACIFIC ISLANDS FORUM SECRETARIAT

PIFS(02)FEMV.06

FORUM ECONOMIC MINISTERS MEETING

Port Vila, Vanuatu

3-4 July 2002

SESSION 3 PAPER

LAND ISSUES

The attached paper, prepared by the Forum Secretariat, addresses issues raised for further examination by Ministers at FEMM 2001. For the consideration of Ministers.

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Purpose

This paper examines the issues surrounding land leasing processes, dispute resolution systems and the use of land as collateral or for commercial purposes, as raised at FEMM 2001 for further consideration.

Background

2. Access to land plays a vital role in promoting investment and development of the private sector. Land acts as both an input to production and as a source of collateral and security. Insecurity over land tenure and limited access to, and high prices of, this fixed factor input can be a serious constraint on economic growth and may also be adding to the inequitable wealth and income distribution in Pacific nations.

3. While Pacific nations are tackling macroeconomic stability and trade policies in an effort to promote economic growth, these must be supported by factor market reform, particularly land reform, to be fully effective.

4. At FEMM 2001, in Rarotonga Cook Islands:

> Ministers engaged in an open and wide ranging discussion of country experiences in addressing land issues, building upon a recognition by FEMM 2000 of the important role of land in enhancing political and economic stability, a crucial precondition of sustainable development. While recognising differing national concerns among Forum members, Ministers…
>
> (b) requested detailed examination of issues surrounding leasing processes, dispute resolution systems and the use of land as collateral or for commercial purposes with emphasis on safeguarding both alienated and customary lands…

5. This paper addresses the request from Ministers for the examination of a number of issues. It presents ways the issues surrounding leasing processes, dispute resolution systems and the use of land as collateral or for commercial purposes are being addressed in the Pacific. The practices described all have a focus which emphasises protecting alienated and/or customary lands. The need to reach some form of compromise between

traditional and modern tenure systems, so that the requirements of both indigenous peoples and potential investors are met, is recognised.

6. The Pacific region has a number of specific characteristics which influence the costs of addressing land issues and the demand for such changes. Each Forum island country has features and issues pertaining to land that are unique to their respective situations, thus the mechanisms used in any one country for improving access to land would need adaptations to better suit them to other Forum island countries. The examples presented are not solutions but may point the way towards finding imaginative country-specific strategies.

Issues

7. The paper considers leasing processes which safeguard both alienated and customary lands. The historical concern which has supported the limitations placed on leasing of land in FICs has been to protect landowners from entering into inappropriate land deals or making unwise decisions which may result in the shift of land control out of domestic (indigenous) hands. Common concerns in leasing are noted to be determining an appropriate length of lease, dealing with the end of lease, difficulties encountered in negotiating leases, lack of review of leasing decisions and enforcement of lease contracts.

8. Mechanisms to allow the use of land as collateral are considered. Land is often the owners' most valuable resource and freeing its use as collateral for a loan will open up large amounts of capital for private sector use. The concern has been the alienation of land from domestic/indigenous hands if loans are defaulted on. Examples where such concerns have been addressed while still allowing access to capital include the mortgaging of land leases, or the mortgaging of crops and livestock instead of the land itself.

9. Typical problems encountered in land dispute resolution include the expense of the dispute resolution process, lack of understanding of the process, and ineffective outcomes. Various examples are given of the integration of customary dispute resolution procedures with the western legal system in an effort to address these concerns.

Recommendation

10. Ministers are invited to **note** the practices outlined in the attached paper.

Forum Secretariat
Suva
24 May 2002

MECHANISMS USED TO ADDRESS LAND ISSUES

LEASING PROCESSES

In the Pacific it is extremely difficult to buy land, particularly for foreign investors, however land is essential for business, particularly site specific operations such as tourism or mining. Leasing can provide a viable option to access the land necessary for private sector growth – it provides a mechanism of separating land ownership and the rights to use land. Ideally leasing allows the use of land without alienating it from traditional owners.

2. Pacific governments are increasingly using leases in order to gain access to the land required for public purposes (roads, power-line rights of way, dams, schools, health facilities, government administration buildings, police stations and sporting facilities) rather than outright resumption. This can be more cost effective than resumption of land and avoids some of the potential problems associated with compensation payments.

3. Typically in the Pacific leasing of customary land is closely controlled by a state authority. This can be through direct involvement in lease negotiations such as in Fiji where leases can only be granted by the Native Land Trust Board (or the Minister for Lands in the case of state-owned land). Leases can also be controlled by government involvement in the approval process, for example in Samoa the Minister of Lands must approve leases and in the Cook Islands the Land Court must approve these.

4. The strongest form of state control occurs in cases where only the government can lease land. For example, in Solomon Islands land can only be leased to the Government and through them is available on periodic tenancy to others, including the private sector. Throughout the Pacific government authorities are commonly responsible for leasing alienated land.

5. The reasons behind state involvement in land leasing is twofold: firstly, to protect landowners from entering into inappropriate land deals or making unwise decisions and, secondly, to prevent alienation of land.

6. However, the form that this state involvement has taken has engendered a number of problems which make leasing of land difficult. Indeed, in several countries, such controls are being circumvented by disguised transactions. In Fiji, extra-legal leases, 'vakavanua leases', have been used to get around overly cumbersome official systems. These have been recognised as quite effective, if illegal, market mechanisms that involve land transactions between tenants and the 'effective' land owners (Eaton 1988, Overton 1987, 1989, Ward and Kingdon 1995). Naturally the illegality of some of these leasing arrangement introduces an element of risk: the 'leassor' could refuse to renew the lease to accept a more lucrative offer or the 'lessee' could fail to renew the lease after running down the value of the land.

7. Common concerns in leasing land are outlined below, as well as solutions used to address these specific problems. While the land market needs to be made more transparent for the purposes of efficiency, this is not to say that there should be no restrictions, but the rationale for those in place should be justifiable.

- **Length of leases**

8. The adequacy of the length of government determined leases for large capital investments has been questioned, particularly in the tourism sector which requires substantially longer term leases. On agricultural land, short lease terms do not provide tenants with security of tenure necessary to shift to permanent cropping systems or invest in improvements, as they could be evicted at any time. The reason frequently given for shorter lease length is to protect the interests of future generations. Leases of longer than 20-30 years impact upon access to the land by future generations.

9. Table 1 shows the range of upper limits on lease lengths in the Pacific. Terms of less than 30 years are particularly detrimental to attracting investment as they frequently do not allow sufficient time for investors to realise an adequate or competitive return on investment.

Table 1: Upper lease length in Forum island countries, years

Country	Maximum length of lease (years)	Country	Maximum length of lease (years)
Tonga	99+	Federated States of Micronesia	25-50
Papua New Guinea	99	Fiji	30 - 99
Solomon Islands	75	Kiribati	21
Vanuatu	50-75	Samoa	20
Cook Islands	60	Tuvalu	15
Palau	50-99	Nauru	-
Republic of Marshall Islands	50	Niue	-

10. Countries with longer lease lengths manage to avoid such concerns by ensuring that when lease access to land is given the needs of future generations are considered. Countries such as Palau, Solomon Islands, Tonga and Vanuatu which have longer lease lengths, and still maintain their commitment to the maintenance of customary land, could provide a legislative example for other Pacific nations.

- **End of lease**

11. An essential element of allowing successful leasing of land is a clear end of lease process, which ideally allows easy lease renewal by the current landholder and recognition of the need for compensation for capital improvements to land in the event of non-renewal. Such a process can be an alternative to long lease periods.

12. Many leases issued do not have any option for new negotiations, renewal or extension. This, combined with relatively short lease period such as 30 years, downgrades the lease value. Unless some provision is made for the renewal of leases well before their expiry, security of lease declines, values fall and this will be reflected in reduced interest in land-based investment.

13. The common requirement of offering up vacant possession of the land at the end of the lease with no compensation for improvements, for example, in Vanuatu on expiry of the lease all improvements revert to the lessor, is problematic. This has the effect of driving down the rental value of the lease. This will occur in an effort by lessees to gain compensation for the value of any improvements they make over the life of the lease. This is similar to the situation in Fiji where no compensation is payable, and agricultural land and improvements have become neglected as leases draw to a close.

14. As land is increasingly zoned as rural residential, it becomes subject to improvement and development. Farran (2002) notes this raises very serious questions of compensation for the increased value of land when the lease comes to an end - how is such compensation is to be calculated? who is to pay it? if the custom owners have to pay this money where are they to get it from? If compensation is payable and cannot be afforded then the likelihood is that custom owners will have no choice but to renew the lease. Effectively the land becomes permanently alienated (Farran 2002).

- **Difficulty in lease negotiation**

15. Leasing land typically involves negotiation between the lessor and the lessee. There are a number of common problems in this process in the Pacific. The most basic concern is ensuring land ownership is undisputed before entering into negotiations. The issue of land registration (be that individual or communal) is not considered any further here, but recognition of undisputed ownership is basic to successful leasing.

16. ***Overseas ownership*** makes lease negotiation difficult as often the landowners are difficult to locate or may not be able to reach agreement with the resident landowners due to differing outlooks. Fiji and Kiribati have a potential solution available through legal provision for the Minister of Lands to cancel the interests of absentee landowners, although elected Ministers are often reluctant to do this. In the longer term the need to do this may not be able to be avoided.

17. When there are ***many joint owners*** of custom land it is difficult to reach a decision as to whether the land should be available for leasing. There is potential for the issue of multiple owners to become even more problematic. For example, one characteristic of the Tuvaluan land tenure system is the growing desire of landowners to directly take part in discussions regarding their plots of land rather than leaving this to village leaders. The increasing numbers of landowners will slow discussions regarding the future uses of land holdings, particularly with the growth in absentee landowners.

18. The most common way of reducing this as an issue involves a nominated representative making the decisions. One country which has chosen to move towards greater government involvement is Samoa. The 2002 Strategy for Development of Samoa provides for the establishment of an agency to lease customary land on behalf of investors. The box below indicates how the use of a statutory authority as representative of the landowners has been formalised in Fiji.

Fiji: Centralised representation of landowners

Fiji's experience with the Native Land Trust Board (NLTB) is one of the earliest and longest running attempts to ensure the interests of landowners are adequately represented in negotiations involving land. This has been attempted through centralisation of native land administration.

NLTB was established under the Native Land Trust Act of 1940 with the primary role of administering native land for the benefit of the indigenous landowner. The NLTB is, in law, the only allowable means for Fijians to lease out communal land. Its role includes approving new leases and renewal of leases.

Some concerns regarding the effects of NLTB operations include:

- the creation of an imbalance in negotiating power when it comes to small farmers seeking access to land;
- the continuance of a complex and lengthy process for accessing lands which may inhibit even large investors and the associated high administrative costs (up to 25 percent of revenue from leases);
- "political" activity by NLTB officials;
- the tendency for standardisation of leases and use of formulas for rent setting which may not be to the greatest benefit of landowners; and
- the lack of direct consultation with landowners regarding their wishes in specific cases.

19. In the Republic of the Marshall Islands a statutory authority is also to be involved in facilitating the leasing of land. The Marshall Islands Development Land Registration Authority will facilitate the registration of land whose owners are willing to lease it for development by investors. A database of land that is available for lease and that has clear and free title is to be created and administered by the Authority.

20. However, it difficult to tell how representative are the decisions made on behalf of a group. State-led measures to protect landowners may, through an overprotective approach, remove and alienate landowners from participation in management of their lands and in the economic benefits from the use of their lands. Lal and Reddy (2002) noted that giving Fiji's NLTB the sole responsibility over matters related to native land by the Colonial government effectively took all control out of the hands of the landowners and has been a major source of discontent amongst the landowners.

21. Indeed, landowners have been requesting the right to directly determine the use of their own land, as they feel they are not getting the full benefits that should be accruing to them. This issue of returns on land is an important one – particularly as commercial development has resulted in strong profits and land is seen as a significant input. Systems, such as in Fiji, where there is a cap placed on lease payments, reduce the incentive to use land for its most productive purpose and can be a source of discontent when the return on investments is high but unable to accrue to the landowners to the full extent (this concern is raised in Vesikula 2002). In Fiji this problem is accentuated because of the costs of land administration. Interestingly, in the same country, lessees, particularly in urban areas, are complaining that rents are too high (Vesikula 2002).

22. In practice many landowning groups are appointing trustees or land committees to act on their behalf. Such mechanisms minimise the chain of intermediaries between the landowner and potential lessor, so ensure clarity of negotiations and maximum transfer of funds to the landowner.

23. Such direct involvement also increases the likelihood of landowners being involved as active partners in the development of their resources as shareholders in profitable investment projects, especially when their 'land contribution' to the venture is accepted by partners as equivalent to some arbitrary level of shareholding. It may be that allowing companies to negotiate from the start with the landowners could be a constructive opportunity to establish a sound basis for an ongoing relationship. This suggestion has been put forward for the Fiji sugar industry by Lal and Reddy (2002).

24. Below are two examples of direct involvement in leasing by landowner representatives.

Landowner involvement in leasing

In Papua New Guinea groups of landowners may be incorporated (Incorporated Land Group - ILG) using the Land Groups Incorporation Act of 1974. This gives the group both a legal and a commercial identity. Committees established under the constitution of the ILG have the right to make decisions concerning use land for a business or even offer land as security for a bank loan, as long as the titles are registered under an act that is made for the purpose.

The ILG can continue to act as a customary group but, for particular purposes, also act as a modern legal entity. ILGs can join together to become shareholders in a representative landowner company for the purposes such as large scale forestry or agriculture projects. The development of ILGs has incorporated traditional flexibility into customary law (Holzknecht 2002).

One of the problems with ILGs is that they were to be supported by the Land (Registration of Group Titles) Act which was never passed (Togolo 2001). This Act would have provided the basis for identifying whether the landowners in the group were in fact the owners of the land they wanted to register. Recent abuses of the system have occurred because of the ease of registering groups with the Registrar of Titles without due process and effective checks and balances (Togolo 2001).

A further need for this process to work effectively, and in a manner which is sustainable in the long term, is trained ILG facilitators to assist communities through the process and to avoid exploitation by large companies who may wish to rush the process.

The concept, however, is good. Even the process of incorporation is beneficial as it helps members of the clan to learn to merge custom with modern management. But it would seem that internal conflicts are expressing themselves in the form of new ILGs, which are seen as a new way of conducting politics (Togolo 2001).

In Solomon Islands custom owners who register their lands may nominate certain owners as the registered owners able to deal with the registered land. However, only 12 percent of land is registered and it is only this land which can be leased. Such registered land is rarely in urban areas. In practice this has had little benefits in terms of opening up land access for investment.

25. The role of government in such circumstances becomes one of ensuring landowners have the capacity to contribute. The ability of the landowners to negotiate effectively with potential investors and take into account the full financial and even environmental impacts of what they are entering into has been questioned. This involves education on the meaning and consequences of their decision to enter or break a contract, as well as issues regarding land value, reversion of the land and the status of assets built on it at the end of the lease.

26. Other issues to be potentially tackled by government include ensuring an equitable form of representation of communal landholders in lease negotiations, the option of statutory regulation of such activities, and how to review the decisions such bodies make.

- **Review of decisions**

27. In the interests of transparency and accountability, as well as justice, there needs to be a mechanism for the independent review of the leasing decisions made by agencies of the state. This occurs through investigations and recommendations of the Ombudsman in Fiji, the Solomon Islands and Vanuatu. However the adequacy of such is determined by the financial and human resources allocated to the Ombudsman's Office as well as the existence of requirements for Government to respond to Ombudsman's reports.

28. The politicising of decisions regarding land leases, for example the involvement of Ministers for Land in lease approval (such as in Samoa, Kiribati and Vanuatu) or in the case of the Cook Islands, the politically appointed Leases Approval Committee, has proved less than transparent. Indeed the more removed the decision-maker is from the landowners the less likely are they to concur on decisions. Farran (2002) notes the questions of transparency and accountability which have arisen in Vanuatu regarding leases granted by Ministers and others who are essentially in a position of trust as regards the custom owners. In Vanuatu there have been three Ombudsman Reports raising issues concerning the exercise of ministerial powers in regard to leases. This points to the importance of reviews of decisions.

- **Enforcing contracts**

29. Insecurity of contracts due to landowners disputing contract terms, or poor enforcement of contracts by the courts, add to the difficulties of leasing land. In the Republic of Marshall Islands and the Federated Sates of Micronesia poor judicial enforcement of contracts appears to be a major problem.

30. When land is leased it is typically for a particular purpose. To ensure this, some guidelines regarding land access need to be put in place in the contract or enforced through legislation, for example time limits within which leased land is to be used for the purpose it was acquired for. In Vanuatu undeveloped land must be improved within the first five years of a lease and the Land Leases Selection Committee requires a description of the proposed development and proof of financial resources. This requirement is aimed at stopping property lease speculation. Similarly in Tonga there is a requirement to use

the leased land within three years of the approval of the lease or it will be cancelled. A further restriction often used to the same intent is a cap on the size of lease holdings.

31. Lease contracts can also make clear access rights to the land by the customary owners in cases where the uses are not conflicting. Customary landowners may well be able to collect firewood, fish, collect fruits from trees already existing on the land prior to the lease and so forth. Naturally such decisions would need to be made on a case by case basis and, ideally, as a result of negotiations between the landowner and the potential lessee.

- **The way forward**

32. While there is no one successful approach to the issue of leasing in the Pacific there are a number of factors that appear important in ensuring leases are not used as a mechanism to alienate land, rather as an aid to economic development. These are:

- reviews of leasing decisions to ensure accountability and transparency;
- ensuring whoever negotiates on behalf of landowners is truly representative of their interests;
- minimisation of administrative costs so as to maximise the return to landowners;
- an understanding by all parties of the agreements contained in the lease and the implications of these; and
- consideration of an equitable approach to ease renewal and compensation in cases of non-renewal.

33. There is a clear role for government to facilitate leasing by setting conditions that protect both lessors and lessees, without necessarily taking over the whole system. This middle way is noted in Melmed-Sanjak and Lastarria-Cornhiel (1998) which favours approaches that mix some minimal regulation of lease contracts with non-regulatory measures. This proposes that regulations that severely restrict landowners' rights and those that outlaw certain tenancy arrangements should be avoided. Rather regulations that protect tenants from some practices and that encourage long-term investment in the land should be considered. With regard to land rights of landlord and tenant, appropriate measures would include those that assure long-term contracts and fair conditions for tenants, but that also, with timely notice and with full compensation to the tenant for land improvements, permit the landlord to take back the land.

USE OF LAND AS COLLATERAL

34. For many landowners the land itself is the most valuable asset they own. Financial institutions frequently prefer land as collateral for credit operations because, among other reasons, land is immobile, it is less open to destruction and abuse than other property such as machinery or livestock, its depreciation is small, and its value is not eroded by inflation. In the Pacific the inability to sell the user rights, hence use the land as

collateral, or restrictions on this makes individual access to credit, and so their business progress, more difficult.

35. The factor behind limits on the use of land as capital is the understandable concern about an enforced sale of land, and its potential alienation, in the case of default on debt.

36. Ways need to be found to make it possible to use land as security for loans from financial institutions and thus unlock the potential value that can be derived from land when land becomes part of the formal property portfolio. This will release large amounts of capital for use for private sector development. The extent to which land can be leveraged and mortgaged is important for increasing productive activity and incomes. Access to credit is a problem in most countries because of the connection between the lack of individual security of title to land and the poor development of the credit market.

37. Legislative provisions and even the constitutions of Pacific nations, which are designed to protect indigenous people from unwise dispositions of their rights in customary lands, also have implications for mortgaging. In the Pacific there have been restrictions placed on the mortgaging of land and the mortgaging of leaseholds on land. For example, land cannot be mortgaged by customary owners in Papua New Guinea, Samoa, and Solomon Islands; and leaseholds on customary land cannot be mortgaged in Samoa.

- **Approval of mortgages**

38. Even where mortgaging is allowed there are frequently other administrative restrictions placed on these which increase the difficulty of accessing the capital tied up in land. For example, in Vanuatu mortgages of custom land and of leaseholds on customary land must be approved by the Minister of Lands, in Tonga by the Minister of Lands, and in the Republic of Marshall Islands the clear support and agreement of the three senior land interest holders – the *iroij*, *alab* and *drijerbal* – is required.

39. In Kiribati mortgages of custom land and of leaseholds on customary land are permitted only for certain purposes, which interestingly exclude business and commerce. Similarly, in Tonga mortgages can only be for the purpose of improving the estate or allotment.

- **Controls on institutions able to accept mortgages**

40. The fear associated with the use of land as collateral is that mortgagees would acquire ownership by exercise of the power of sale or foreclosure. This has resulted in requirements that mortgages be given only by lending institutions approved by the state – as is done in Tonga and Vanuatu – with the tacit understanding that these will not push the issue of enforcing mortgages in cases of default.

41. Examples of the types of approved institutions include the Housing Corporation and the National Loans Board in Kiribati; the FSM Development Bank and housing

authorities in the Federated States of Micronesia. A common situation is that of the Federated States of Micronesia, where foreign commercial banks are not permitted to own land and so cannot arrange mortgage secured lending. In Fiji mortgages of customary land and of leaseholds on customary land have to be through the Native Land Trust Board.

42. Such restriction on institutions which can provide mortgage financing limits the choice of landowners. In Samoa's 2002 Strategy for Development the government commits to continue to investigate ways for commercial banks to use customary land as collateral. Indeed, ideally all financial institutions (banks, credit unions, insurance companies etc) should be able to accept land as security for loans, with alternate approaches being taken to address fears of alienation of land.

- **Difficulty in enforcing mortgages**

43. Mortgages are only valuable insofar as they can be enforced. To accept land as collateral, lending institutions need to be able to easily dispose of it to recoup the loan in the event of default. This requires two things – a clear title over land or a land lease and the ability to act freely with that land (ability to evict and the willingness of others then to buy or rent this land) or the lease over it. Lack of ability to enforce mortgages shifts the risk burden to the shoulders of the lending institution and so makes mortgage lending on customary land financially unattractive.

44. To make mortgages on land leases more attractive to commercial lending institutions, consideration could be given to allowing the institution to take over more than the management of the assets for the remainder of the leasehold period in the case of default. Other principles of development banking can be employed, in which the enterprise itself, rather than the land, is accepted as security (Ward 1999).

45. To prevent loss of ownership legal controls have been placed on enforcement of mortgages in many Pacific nations, Papua New Guinea is an exception. In the Solomon Islands enforcing the mortgage requires High Court approval and can only be gained by Solomon Islanders. In Fiji the NLTB is responsible for approving enforcement of mortgages, while in Vanuatu Supreme Court approval is required for enforcement. In the Cook Islands the power to take control of defaulted land held under occupation rights is only accorded to government lending institutions. In Kiribati there are restrictions on enforcement of mortgages, and mortgages of leaseholds, of custom land. The land tenure system in the Republic of Marshall Islands does not allow land to be seized and sold to recover debt, without the clear support and agreement of the three senior land interest holders – the *iroij*, *alab* and *drijerbal*. Such agreement is hard to obtain.

46. There are also practical problems in enforcing mortgages – the mortgagee may be physically resisted from entry into possession by family, friends and neighbours of the custom owners. Government may also be sending out the wrong signals about the responsibilities associated with taking on a loan – for example in the Cook Islands the government has tended to prove reluctant to act on mortgage defaulters. The ADB (2001) has suggested that mortgages should require sponsorship by family and neighbours to

demonstrate their understanding of the ability of banks to enter into possession in cases of default.

- **A way forward**

47. In looking at addressing the availability of mortgages it is essential to recognise what lending institutions are seeking to achieve in enforcing mortgages. Mortgages are an investment and, through enforcement, institutions are trying to reclaim their lost investment. The institutions do not, on the most part, wish to become landowners. Thus there are alternate forms of mortgages which can meet the needs of both parties – providing access to capital for landowners and ensuring the lender will get a return on investment.

48. Custom landowner concerns could be assuaged by requiring that mortgages be enforced only by entry into possession and not by sale or foreclosure. The rights of the secured lender could stop short of ownership, provided they are able to recover the debt by 'statutory leasehold' use of the land. Legislation could provide for the secured lender to be able in the event of a default on the loan to enter, exclusively occupy and use (including sub-leasing) the mortgaged property, receiving all income from the property until such a time as the loan is paid off or the lease expires, whichever comes first, and then to be required to return possession of the property to the lessor or owners. Such an approach would remove the need to restrict the institutions able to provide mortgages.

49. In Papua New Guinea the Lease – Lease-back Scheme (see box below) was designed to facilitate lending for small scale enterprises and, although facing difficulties in practice, provides an interesting framework for providing access to the capital tied up in land.

Lease – Lease-back Scheme

The Lease – Lease-back Scheme used during the late 1970s and early 1980s by the, then, Papua New Guinea Development Bank was designed to facilitate customary landowners' access to loans for cash cropping by providing them with a registered title. The process described below is necessary as only the government can lease land from owners, thereby creating a legal title.

The Lease – Lease-back Scheme operated under the Land (Tenure Conversion) Act. Under an agreement between the bank and the landowners, customary land was surveyed and, if approved, was leased to the state. The state would then lease the land back to a corporate entity owned by the customary owners, typically an 'Incorporated Land Group'. The period of the lease was based on the pay back period of the loan. At the expiry of the lease the land went back to being customary land and continued to be owned and used by the customary landowners. If the enterprise failed the bank could lease or sell the rights to the land to someone else (even outside the clan), but only for the balance of the lease period.

The scheme was also a likely avenue for any land-based joint ventures involving a non-citizen partner as the landowner was then able to sub-lease directly to a developer.

In practice, although the mechanism proved useful for a time, default rates were high (frequently because of lack of management capacity) and often the land could not be leased to anyone else. This was partly due to social pressures where those taking up the lease felt a need for the approval of the customary landowners. There were also difficulties in arranging the initial lease by government as many people are involved in any plot of customary land and, as in any tenure conversion process, the land rights need to be distinguished from all other rights and relationships. This process can create tensions and even disputes where there were none before.

Source: Holzknecht (2002) and Togolo (2001).

50. Another option to address mortgage lending constraints for foreign banks is that currently practiced in the Commonwealth of the Northern Marianna Islands. Here foreign banks are permitted to take back land in foreclosure, and to own it for up to 10 years before being required to sell it to a citizen to permit loan recovery.

51. It must be recognised that land is only one form of capital asset that can be used to leverage investment funds. There are other ways to free up access to credit which should be done concurrently with addressing land concerns, or as an alternative in countries unwilling to address problems relating to the ability to mortgage land, and leases on land. This includes liberalisation of the financial sector, development of microcredit schemes (this is particularly important as often banks will not be interested in providing small amounts of credit on the basis of allotments of limited value), and the provision of education in business planning so as to lift the success rate of loan applications while simultaneously reducing the default rate.

52. One mechanism for improving access to credit, which is closely related to the mortgaging of land, is to broaden the assets that can be used as collateral. For example, in Fiji and Papua New Guinea legislation permits the mortgaging of crops and/or livestock. In countries where there are significant cash crops or livestock it would seem advantageous to introduce legislation that permits these items to serve as collateral security for loans (ADB 2001).

DISPUTE RESOLUTION SYSTEMS

53. Causes of land conflicts often are very complex but in many instances, the use of inappropriate information and misuse of information are often at the core of many conflicts (Lal, Rita and Tuivanuavou 2002). Many disputes can arise about the rights of ownership and interest in land. These disputes have become more common because of two developments: first, increases in population in some areas have made the 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.

54. In most Pacific countries the decisions of the land registry are subject to adjudication by a quasi-judicial entity such as a Land Court or land arbitration council. Such systems are designed for the cases of determining issues concerned with state or

privately owned land. Often a separate set of bodies are required to deal with the very specific and often complex questions arising from disputes involving communal land. In a wholly modern system problems can arise by forcing communal land disputes through a system which is not designed for such cases.

55. Lack of land dispute resolution mechanisms, or slow, cumbersome or costly mechanisms will discourage private investment, as it increases the costs and risk of that investment, as well as hampering the use of land as collateral security for commercial loans.

56. In recognition of the importance of dispute resolution on land issues in the Pacific, the South Pacific Land Tenure Conflict Symposium was organised by FAO, USP, and RICS Foundation and held in Suva, Fiji, 10-12 April 2002. This regional Symposium brought together over 100 practitioners, researchers and academics from eight pacific island nations, Australia, New Zealand, UK and USA. The outcomes of this symposium are attached in Annex 1.

- **Cost of dispute resolution**

57. High costs, either in terms of finances or time, of using disputes resolution process for land conflicts will limit the disputes that are brought forward for legal/administrative solutions, increase costs to disputants and reduce returns to landowners.

58. The costs of court cases are particularly high when the courts hear cases in limited locations (Samoa and Vanuatu) and where decisions may be appealed more than once (Solomon Islands). Court fees and transportation costs may limit participation by potential users. In Vanuatu the Island Courts determine customary land disputes but are only operational in eight of the islands.

59. Delays in dispute resolution may be due to insufficient courts or lawyers and judges. Delays are frequent in countries where ordinary courts or reconstituted ordinary courts are the ones authorised to adjudicate disputes about customary land, such as in Kiribati, Papua New Guinea and Solomon Islands. In Vanuatu the Supreme Court which hears appeals on matters relating to land has heard no appeals for the last three years because of lack of judicial time (ADB 2001).

60. Delays and high costs lead to a bypass or circumvention of the law, meaning that many disputes are resolved informally (with the potential to resurface) or are not resolved (so limiting land access and value).

61. The institutions involved in interpretation of land laws need adequate financial resources to ensure that these activities can be undertaken with minimum delay for users and without access costs restricting their use.

- **Lack of knowledge of dispute resolution processes**

62. A lack of information on, or understanding of, dispute resolution processes, and of the fundamental concepts for the processes, acts to limit their effectiveness. Typically more economically and politically powerful individuals will have a strong understanding of processes and use them, however less powerful individuals may not have knowledge of how to initiate dispute resolution processes.

63. Understanding of broad legal concepts which are outside traditional culture such as 'justice', 'legal equality', or 'individual freedom' may be lacking. This is also the case for 'imported' concepts like (private) property, possession or leasing.

64. Bringing the dispute resolution process to the site of the dispute is one approach being used to improve understanding of the process and decisions made. In Papua New Guinea legislation has been implemented which requires the court adjudicating disputes over customary land to 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. While this is time consuming and expensive it is hoped that it will alleviate further disputes about the same piece of land.

- **Ignorance of the customs, particularly relevant to the dispute**

65. Where ordinary courts or reconstituted ordinary courts determine disputes about land, while the decisions are recorded this if often not without error as no specialist knowledge of land is required. In Kiribati, Solomon Islands and Vanuatu some members of the bodies determining land disputes are required by law to have some knowledge of custom, but there is not requirement that they must be knowledgeable about the customs relating to the land in dispute.

66. In Vanuatu adjudication of land disputes is managed by Island Courts, which are a permanent arm of the judiciary. Their decisions are based in custom as it relates to the land in dispute, and must clearly establish ownership of land. The training of adequate staff has limited the ability of the Courts to deal with the number of cases before them.

67. The difficulty in making judgements based on customary law is highlighted by the case of Samoa (Schmidt 1994). The Samoan Lands and Titles Court was created in the Constitution to have jurisdiction over customary land. Traditionally such decisions would have been made by the *matai*. This Court enables *matai* themselves to be challenged. The Court most commonly examines disputes over control of land and boundaries, confirmation of registered ownership and banishment from usage of land. The Act setting out the procedures of the Court give it some flexibility as "in all matters before it, the Court shall apply (a) customs and usage, (b) the law relating to customs and usage". However, with no written body of law or even legal opinions relating to customary tenure and usage and the recognition that there are significant variations between islands, districts and even villages, the Court is unable to make allowances for practices outside

the generally accepted customs and traditions. Appeals decisions are final and not reviewable in any other Court.

68. It is vital to ensure the judiciary, or those responsible for dispute resolution, have the necessary capacity to undertake the tasks asked of them and are highly competent. Judges and other legal agents need adequate education to ensure they have a sound understanding of land laws. Where traditional land laws form part of the formal laws judges need the ability and sensitivity to consider indigenous legal systems in framing formal legal judgements.

69. In virtually all FICs there is no requirement to formally publish decisions concerning land disputes. Publication of decisions would, at minimum, build up a basis for future decisions and improve the consistency of decisions. A related concern needing addressing are the errors made in recording of decisions (ADB 2001).

- **Ineffective dispute resolution**

70. The failure to sufficiently implement the model of the rule of law and the separation of powers in many countries limits the effectiveness of land dispute resolution processes. In these countries the lawyer or advocates work is hindered and governmental influence on Court judgments continues. The administration may randomly expropriate the land to benefit their own individual interests, or only become active when money has been paid and "award" the land under massive pressure to solvent urban investors or political followers. Correspondingly, the people's trust may be low, and the path to the Courts is avoided.

71. Dispute resolution at the local or village level based on negotiated solutions and consensus can be similarly problematic when village authorities functioning as the decision makers have misused their positions or are seen to show favouritism or act on the basis of personal interests and so do not have the respect required to ensure their decisions are accepted.

72. Power relationships also influence whether dispute resolution processes will be used or whether they will achieve an equitable outcome. People may be unwilling to challenge the decisions of local chiefs or leaders or government authorities because of a perceived inability to win.

73. Review of decisions on land disputes is one path to improving transparency, and increasing trust, in land disputes settlement systems.

- **The way forward**

74. Alternative dispute resolution (ADR) or mediation can be promoted as a first step in addressing land disputes and can be influential in avoiding the escalation of disputes and unnecessary costs being incurred. Various mechanisms for defusing, limiting and resolving conflicts by "efficient mediators" are available.

75. ADR has become widely popular for the settlement of commercial and civil disputes because of its perceived advantages in terms of efficiency, cost, choice of mediator, privacy, party autonomy, and the flexibility to reach decisions based on the interests of the parties rather than their legal rights and obligations. It also has the advantage of allowing the parties to maintain a viable commercial relationship. ADR may be applicable to resolving some forms of land disputes in Forum island countries.

76. Dispute resolution involves referees/mediators attempting to bring the parties to an agreed settlement. It is the responsibility of this independent third party to facilitate a clear understanding of the issues, clarify the causes of the dispute and explore options for resolving it. Typically if the parties to a dispute agree to settle their dispute privately using ADR, there are no limitations on types of technique that they may agree on.

77. The relationship between the ADR settlement and the traditional legal system needs to be carefully considered. The use of ADR tends to be voluntary but the Courts could require parties to first attempt settlement by ADR. The ability to register and enforce settlements is also an issue for further consideration, for example whether this would be enforced by the Courts under legislation or subject to the normal laws of contract. The role and procedures of referee/mediator is quasi-legal and can be developed through experience and set down in voluntary codes.

78. Mediation is being tried with varying levels of success in some Pacific nations. For example, in Samoa a system of mediation by staff of the Court has developed in an effort to reduce the cases before Court. The aim is to get parties to openly discuss their differences and reach an agreement, however it is not often successful particularly as regards disputed control of land. Such mediation is also likely to occur at the village level also. A case study of mediation in land disputes in Palau is presented in the box below.

Mediation in Palau

In Palau a highly successful dispute resolution system has been put in place through a 1999 amendment to the *Land Claims Reorganization Act (1996)*. The Land Court is responsible for hearing claims surrounding land ownership in Palau. The 1999 amendment to the Act has set in place a structured process of mediation preceding any court hearing.

The Land Court automatically schedules a Monumentation and Mediation Session not less than 45 days before the date of each Land Court hearing. The mediation session relies on a mediator who is selected by the claimants from a list provided by the Senior Judge. Mediators must meet certain criteria which ensure they are well respected and knowledgeable on legal/customary matters.

As part of these sessions the claimants meet near or on the land in dispute with Registration Officers and the mediator. Registration Officers will firstly encourage claimants to talk among themselves and attempt to resolve their disputes informally. Claimants are then reminded that if they are unable to resolve their disputes through this session a hearing will take place. Importantly they are also reminded of the disadvantages to a hearing process, using terms such as:

- The hearing process can be time consuming for claimants and witnesses in preparation and attendance.

- The hearing process can be expensive, the option of using an attorney is expensive and court costs may need to be paid.
- There is no guarantee of winning, some parties may end up with nothing even if strongly believing in their claim to ownership of the land.
- Hearings can involve very heated arguments that can damage friendships and other relationships.

The mediation session involves each claimant (or their attorney of they choose to be represented by one) having not less than 20 minutes to explain their position to the other claimants, with at least a 10 minute period for each claimant to then respond and ask questions. The mediator controls this process. After this the mediator meets privately with each of the claimants to discuss the matter and to encourage settlement of all claims. Statements made by the mediator and claimants during the mediation session are regarded as settlement negotiations and are not able to be used as evidence in any subsequent court hearings.

Within 10 days of the session the mediator prepares a written summary of all positions, and a final recommendation to determine ownership which is given to each claimant. The claimants are also told that if they would like to settle they should contact the mediator. The mediator will continue to work with all claimants until the hearing date to reach a settlement.

Recognition has been paid to the need for education as to the dispute resolution process. Publicly available brochures, in both Palauan and English, explain the procedures of the Land Court, with emphasis on the procedures of the Monumentation and Mediation session. Mediators and Registration Officers are also educated, attending no less than 20 hours of mediation training.

Source: Government of Palau (1999)

79. There are two other areas which need to be addressed in improving dispute resolution – accountability and capacity building.

80. For the decisions in dispute resolution to be respected and implemented there needs to be an accountability path in decision making processes. In ensuring this the law should not grant discretionary powers to members of the land management system. Accountability requirements place controls on the dealings of administrative bodies and help fight corruption.

81. Capacity should be built within both judicial and non-judicial authorities (formal and informal) for appeal and procedures for providing legal security and for strengthening the arbitration of land conflicts. At the local level linking traditional rules and traditional advocacy associations with the judicial system is important.

Annex 1



FAO, USP and RICS Foundation

The South Pacific Land Tenure Conflict Symposium

Suva, Fiji, 10-12 April 2002

Declaration

D1. We aim for peaceful and constructive transformation of land tenure conflict.

D2. We live in a broader world; we acknowledge the clash between indigenous values and capitalism.

D3. We recognise that there are many stakeholders that should be acknowledged and consulted regarding land.

D4. We are committed to sustainable long-term solutions that are fair to all, including equitable apportionment of returns from land.

D5. We respect the different value system of indigenous peoples.

D6. We acknowledge that indigenous people see their relationship as coming from the land rather than owning it as a commodity.

D7. We acknowledge and respect the customary nature of land ownership and control in the Pacific:

a. It does not prevent optimum use or development (in its many forms).

D8. We are committed to good governance in terms of land use and land tenure systems, incorporating:

a. Wide participation, at appropriate levels in both the private and public sectors;

b. Equal recognition and empowerment.

D9. We recognise the need for solutions at appropriate levels:

a. Local solutions for local problems, with the need for local acceptance and ownership of solutions.

D10. We recognise the need to have processes that focus on building relationships and ensuring positive outcomes.

D11. We accept the existence and possible value of non-violent conflict.

D12. We recognise the need for goodwill between people.

D13. We are committed to finding long-term solutions.

Resolutions:

A formal expression of opinion or intention agreed on.

Vision Statement for the future

V1. Strive for land reform that is both based on and sensitive to the reality of continuing customary ownership.

V2. Adopt a stakeholder approach to land management at local, community, provincial and national levels.

V3. Respect and incorporate the best of customary and western values in the process of land tenure conflict transformation.

V4. Aspire to a productive interface between indigenous and western information to ensure sustainable land use.

V5. Share the insights and understanding gained though the Symposium and subsequent initiatives with ordinary people/citizens.

V6. Aim for equitable (just) distribution of land rent.

Specific Strategies to move on

S1. Explore and reach consensus on where people/citizens want to be located between the extremes of traditional customary ways and Western materialism.

S2. As a starting point for further developments/considerations, baseline studies of the current situation in each [of the] South Pacific country/ies need to be assembled, setting out the legal context of current tenure systems (both customary and introduced), current customary systems (including informal/extra-legal land dealings) and what options there are for each country and the consequences and implications of each of those options.

S3. Build capacity in landowners to take an active part in decisions regarding their own land, with mechanisms for more people (both landlords and tenants) to be able to express their views (at various levels) with:

a. Need for on-going meetings of ordinary people to talk more about solutions;
b. Networking to improve inter-group relationships
    i. Improve landlord/tenant relationship
    ii. Review the role, place and responsibilities of intermediaries;
c. Open transmission of information to explain issues/proposals to people, where possible in their own language.

S4. Explore more efficient/effective market institutions:

a. To provide an honest and fair return to all parties;
b. Establish an appellate body at an appropriate level to facilitate equity and social justice in resolving land disputes;
c. Revise customary structures that are no longer working;
d. Redistribution timing – manage the transition to develop other activities.

S5. Invite a neutral or third party to review issues and mediate where consensus cannot be equitably obtained.

S6. Identify good land management practice and establish methods to share best practice.

S7. Explore equity of compensation issues regarding infrastructure.

S8. Remove provincialism from the dialogue.

S9. Devise a more effective rental valuation methodology to:

a. Review allocation of rents aimed at equitable distribution (distributive justice);
b. Avoid costly mechanisms.

S10. Optimise contemporary land/geographic information systems and find ways of ensuring that the public will have access to these LIS/GIS databases.

S11. Facilitate impartial scientific research to better understand:
a. Land use and tenancy;
b. The role and responsibility of absentee landowners.

S12. Educate both lessors and lessees to create better understanding of lease terms, obligations and responsibilities, and covenants:
a. Especially termination/reversion issues;
b. Ensuring equity irrespective of gender and ethnicity.

S13. The language used should be appropriate/effective:
a. Adopt '*plain English*' style leases, officially translated into the local language of all signatories;
b. Train facilitators/mediators sensitive to language and culture;
c. Adopt a positive attitude.

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