

Conflict Management Processes for Land-related conflict

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Land Management and Conflict Minimisation Sub-Project 4.1

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Preface

The Land Management and Conflict Minimisation Project (LMCM) is an initiative of the Pacific Islands Forum Secretariat (PIFS) that was endorsed by the Forum Regional Security Committee and the Forum Officials Committee in 2006. The project focuses on the interlinkages between land management and conflict minimisation, and approaches land issues in the Pacific from a holistic point of view, combining both economic development and conflict prevention perspectives. The recognition of the centrality of customary land tenure in the lives of the people of the Pacific is the key underlying principle upon which the LMCM project is founded.

The first phase of the LMCM project has comprised a review of national, regional and international literature. This review has resulted in ten sub-project reports. In 2008, these reports were drawn together into a synthesis report *Improving Access to Customary Land and Maintaining Social Harmony in the Pacific*, including 12 Guiding Principles and a suggested Implementation Framework to provide guidance to Pacific Island Forum states in land management whilst ensuring the minimising of land-related conflict.

The 2008 Annual Leaders meeting endorsed the importance of addressing these issues, and endorsed the Principles and Framework where appropriate. Whilst stressing the fact that land management is a national issue, Leaders instructed the Secretariat of the Pacific Community (SPC) and the Pacific Islands Forum Secretariat to develop a regional initiative under the Pacific Plan to support members to progress land management and conflict minimisation efforts.

Summary of Terms of Reference of Sub Project 4.1: Review of Conflict Management Processes, Models, Mechanisms and Tools and Their Relevance to the Management of Land Related Conflict in the Pacific

Objective of the consultancy

To undertake a detailed desk review of conflict management processes, models, mechanisms and tools and their relevance to the management of land related conflict in the Pacific.

Specific tasks

The consultant is expected to undertake the following tasks:

- undertake a critical review of published and unpublished literature on formal and informal dispute and conflict resolution models, approaches, methods, mechanisms, and processes available, including those recently used in the Pacific, with particular focus on methods, etc used in relation to resolving disputes and conflicts over land;
- identify lessons learned from the recent dispute and conflict resolution methods used in the Pacific and countries with similar communal land ownership systems, including how successful they are in terms of accessibility, cost, timeliness, and respect for and implementation of the agreements or decisions;

When assessing alternative formal and informal dispute and conflict resolution models, approaches, methods, mechanisms and processes, focus on their effectiveness in providing a platform

- for encouraging dialogue, discussion and common understanding of issues;
- for providing cost effective, transparent and accountable decision-making;
- for arriving at an acceptable decisions.

- Undertake detailed case studies, covering three countries in total (to be determined in consultation with PIFS) to provide a detailed understanding of the formal and informal dispute and conflict resolution models, approaches, methods, mechanisms and processes and lessons learned. As this is primarily a desk review, in conducting the case studies, the consultant may conduct select interviews in addition to the desk studies with:
 - national and provincial government officials (including departments dealing with customary and other land administration);
 - non-state actors, civil society including women’s organisations, and development partners;
 - traditional leaders and land owning communities;
 - commercial (including agricultural) land use actors.

Recommend dispute and conflict resolution models, approaches, methods, mechanisms and processes taking into account the customs and traditions, existing structures, and resource constraints of the region.

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1. Introduction

This project is a critical review of published and unpublished literature on formal and informal, indigenous and non-indigenous, conflict prevention, management and dispute resolution processes in the Pacific, with a particular focus on the prevention and resolution of conflicts and disputes over land. Particular focus was given to customary dispute resolution processes and disputes over land held under customary land tenure.

The effects that these conflicts have on society, the economy and development are severe. In Fiji, for example, 70% of the agricultural leases for sugarcane farming have not been renewed because customary owners want to take up commercial farming themselves and want to increase their rental income. Many landowners distrust the Native Lands Trust Board which administers the leases on their behalf. Both landlords and tenants are portrayed as losers and the situation poses an impending crisis for the sugarcane industry in the country. (Boydell 2001: 25; Clarke 2006: 132). The Bougainville crisis in PNG can at least partially be attributed to customary landowner dissatisfaction in respect to royalties from the Panguna mine. The closure of the mine resulted in a 17% reduction in revenue for the PNG government. The fighting killed approximately 20,000 of the 175,000 inhabitants of Bougainville (Boydell 2001: 25). Land-related conflict also contributed to the period of so-called 'ethnic tension' in Solomon Islands which led to the intervention by the Australian led Regional Assistance Mission to Solomon Islands (RAMSI).¹

In response to resource extraction and land loss, customary owners have started fighting back. This in turn has led to governments relying on the use of force to control access to the disputed land and has sparked cycles of repression, conflict and further militarisation. There is considerable tension between patterns of customary land use and the use of land for investment and commercial development. This also impacts on development in the region, as many development projects fail due to the lack of understanding of local relationships between people and land. The need for effective and efficient land-related conflict resolution and transformation is greater than ever, as land is central both to questions of development and also of security for Pacific people (Brown, MA 2007).

1.1 Terms of reference

According to the terms of reference for the project, ACPACS was expected to undertake a critical review of published and unpublished literature on formal and informal dispute and conflict resolution models, approaches, methods, mechanisms and processes available, including those recently used in the Pacific, with particular focus on methods used in relation to resolving disputes and conflicts over land. This involved a critical review of different indigenous and non-indigenous conflict prevention, management and dispute resolution processes and a discussion of advantages and disadvantages in relation to land disputes. Furthermore the terms of reference specify the need for lessons to be learned from processes used in the Pacific and recommended elements for inclusion in the proposed Regional Land Management and Conflict Minimisation Framework, as well as three detailed case studies covering Samoa, Solomon Islands and Vanuatu attached as annexes to the overview paper.

A desk review with such a broad brief, covering the whole of the Pacific region as well as Western conflict resolution literature and examples from other regions, undoubtedly suffers from many generalisations and omissions. Although much has been written about the pros and cons of customary land tenure in the Pacific, there is little documentation on the processes and procedures of, for example, land courts or land committees. Even less literature is available on why certain processes are more or less effective than others. Descriptions of customary dispute resolution processes for land disputes in the Pacific, where available at all, have often been published many years ago, and a desk study cannot ascertain whether the processes described are still in existence or have changed over time. For the case studies knowledgeable individuals in Samoa, Solomon Islands and Vanuatu have been contacted to confirm the literature. It should also be noted that many of the sources reviewed for this paper have been compiled by Western researchers or legal officers trained in the Western adversarial system. Therefore the underlying theories and views may sometimes replicate a Western approach to conflict resolution, which can be difficult to reconcile with indigenous views on the importance of land and the appropriate customary resolution of land-related conflict.

This overview paper should be taken as a starting point for further research and consultation with stakeholders in the Pacific Islands countries. Before any definite conclusions can be

drawn and improvements be implemented the people on the ground need to be heard. Emeritus Professor W.E.H. Stanner has pointed out, in relation to research into indigenous land dispute resolution in Australia, that there is a need to study particular processes rather than to make assumptions about the ‘process-in-general’ (Bauman & Williams 2004: 15). Therefore this paper attempts, where possible, to give specific examples of processes and draw conclusions from them.

1.2 Definition of Terms

1.2.1 The difference between ‘conflict’ and ‘dispute’

This review paper differentiates between conflict as a much larger, often not necessarily obvious, phenomenon common to all human societies, and disputes as more focused, articulated expressions of difference over particular resources, needs and interests. *Conflict* often involves at least two parties who disagree over the distribution of material or symbolic resources or perceive their underlying cultural values and beliefs to be different. The origins of conflict can also lie in the social and political make-up and structure of society (Reimann 2004). *Disputes* arise where two or more people or groups who perceive their needs, interests or goals to be incompatible, communicate their view to the other person or group. Disputes lead to a variety of responses, some *interest-based* (e.g. negotiation, mediation), some *rights-based* (e.g. litigation), and some *power-based* (e.g. use of force, threats, violence) (Boulle 2005: 108; Condliffe 2002: 9; Tillett 1999: 7; Ury, Brett & Goldberg 1993: 9). When disputes are not addressed properly the chance for escalatory responses increases which can ultimately lead to violence and long-term fission of society.

The regular occurrence of disputes (for example over certain areas of land) can be a symptom of a much deeper conflict in which individuals or groups are embroiled. Intervention processes can be targeted at different levels: some aim at resolving or settling the particular dispute (for example through adjudication or mediation of the claims of two different families over a particular garden), other intervention processes aim to address the often much larger underlying conflict (for example dialogue processes which involve the whole community or even a number of communities and which aim at airing grievances and inequalities which are

perceived by different groups in the area). Restorative processes attempt to heal the damage that was caused by the conflicting parties.

Conflict is dynamic, interactive and constantly changing. Commonly identified stages of conflict escalation and de-escalation include: formation, escalation, crisis and endurance, improvement and de-escalation, settlement or resolution, and finally reconstruction and reconciliation (International Alert 1996b: 12). Particularly in the escalation and crisis stages of conflict violent responses may be encountered.

1.2.2 Conflict and dispute resolution processes

Invariably the resolution of conflict requires communication between the conflicting parties and sometimes the intervention of third parties. There are many processes for dispute settlement, conflict resolution and conflict transformation, appropriate to particular stages of the conflict. Where conflict is systemic and relationships are oppressive, however, dispute resolution processes alone might do little to improve the overall situation.

The conflict resolution literature identifies the following common processes to deal with conflict: ‘lumping it’, avoidance, coercion, negotiation, mediation, conciliation, arbitration and adjudication (Condliffe 2002: 27). Generally interest-based processes are more time and cost efficient, provide more satisfaction to the disputing parties, are less destructive for the relationship of the parties than processes like adversarial litigation, and often result in more durable solutions to which disputants stay committed, therefore lessening the possibility of appeal, future conflict or dishonouring of the agreement (Ury, Brett & Goldberg 1993: 12).

Power- and rights-based processes both lead to results in which one side loses and the other side wins. This is not conducive to ongoing relationships and can lead to resistance, violence and revolt. Although rights-based dispute resolution feels fairer and less arbitrary than power-based processes, it still results in a zero-sum game in which one side wins and the other loses. Interest-based processes, on the other hand, can lead to win-win outcomes, in that they explore the real interests, goals and motivations of disputants and aim to develop a solution which satisfies those needs. Interest-based processes are also more efficient at maintaining a balance between content gains, process fairness and relationship improvement, all important needs for people who undergo a conflict resolution process (Cloke 2001: 141).

Conflict prevention processes are designed to anticipate problems and create structures for dealing with them before they escalate into disputes (Boulle 2005: 108). Examples include early-warning systems which collect and receive information regarding national minority issues from parties directly involved, the media and non-governmental organisations. These systems are being used to monitor regional and internal conflicts with a particular focus on preventing violence (Jeong 2000: 202).

Small-scale non-Western societies often employ a range of means for handling interpersonal conflict and for managing contentious issues. Formal courts often play only a minor role in these processes if they are present at all. Most of these practices focus on some form of dialogue, from gossip to informal village meetings to highly ritualised ceremonial activities. Sometimes Western observers perceive this as a blurring of processes (White & Watson-Gegeo 1990: 6).

1.2.3 'Formal' and 'informal' vs. 'local' and 'introduced' processes

Conflict management and dispute resolution processes can be classified in regards to their 'formality' and 'reliance upon substantive norms' such as statutory law or custom. Informal processes that rely little on substantive norms, for example, can be thought of as 'normal' everyday negotiations, while court proceedings in the Western adversarial court system sit at the other end of the scale and are both highly formal and reliant on substantive law (Condliffe 2002: 57). An examination of dispute resolution processes in the Pacific, however, shows that this differentiation is of little help in distinguishing methods that are practiced 'on the ground'.

For example, the name 'land litigation' in the Trobriand Islands assumes a 'formal' court process, but in reality the process does not follow formal written court rules in the Western sense.² The disappearance and diminution of authority and customary ways of dispute resolution have also led to the establishment of new processes that attempt to harness the strengths of both local and introduced systems. The Vanuatu Customary Land Tribunal is an example of this new breed of hybrid system.³

It is difficult to find appropriate terms to discuss dispute resolution processes that have their roots in local culture and custom. The expression 'traditional dispute resolution', for example, can carry with it a connotation of static and unchanging practices that have

difficulty adapting to modern problems such as foreign investment and increasing population pressures. To speak of ‘local’ and ‘introduced’ processes is equally problematic, since processes such as ordinary courts, originally introduced by European colonial powers, have undergone many changes and have adapted to their Pacific environment and to the people who use them. Many Local, Island or Magistrates’ Courts in the Pacific make their decisions based on customary law or at least take customary law into account during the decision-making process. Special land courts often employ more inquisitorial approaches to evidence than would be allowed in courts that follow the ‘traditional’ adversarial system. At the same time local processes, such as determination or conciliation by the local chiefs or clan elders have undergone significant changes (Boege 2006: 6). In many areas the powers of the chiefs or big men in relation to land disputes were taken away by the colonial administrators, and today, particularly in urban areas, it is often impossible to determine who the chief and potential dispute resolver is (Farran & Paterson 2004: 234).

This paper refers to processes which draw heavily on the resources of custom and usage as *customary dispute resolution* and differentiates these from processes which originated from Western colonial societies. These will be referred to as *introduced processes*.

1.2.4 Categories of land in the Pacific

Today there are three categories of land which are encountered in Pacific Islands countries. They are *customary*, *freehold* and *government* land.

Before European colonisation Pacific Islanders’ relations to land were governed by different *customary tenure systems*. Although diverse they often shared some common elements. All evolved to facilitate the allocation of rights of access for subsistence, seafoods, hunting, foraging and to conduct ceremonial acts. In all cases land rights were multiple, conditional and negotiable. What was owned was not the land or water so much as rights to its use, few of which were absolute. No one person held all rights to any one plot, individual rights were nested with extended families, lineages, clans and tribes. Rights to land were normally acquired as a consequence of membership in a group. Without mapping or writing, rights and boundaries often relied on the memory of group members (Crocombe 2001: 296). Although customary land tenure is enshrined in many Pacific constitutions and the majority of land is still held under this system, what is perceived as customary land tenure today may differ

significantly from the land tenure arrangements that were in place before colonisation. Current customary tenure systems are often greatly simplified or modified models of systems in place before the early nineteenth century (Ward & Kingdon 1995: 36).

European settlement in the Pacific brought with it models of land tenure which were foreign to many Pacific societies, such as the common law model in which all land is vested in the Crown and estates are held in *freehold* or fee simple. It also established the idea of *government land* used for infrastructure such as roads, government buildings, national parks or mining sites. Freehold and government lands have been alienated from the customary tenure system and, although many people still claim customary rights to them, are generally governed by statutory and common law.

2. Major Sources of Land-Related Conflict

2.1 The importance of land

Land is of paramount importance to most people in the Pacific region. Michael Morgan has summed up this connection to land in a submission to the Australian Senate Committee (*A Pacific Engaged - Australia's Relations with Papua New Guinea and the Islands States of the South-West Pacific* 2003: 58):

“Land is more than just land. It has cosmological significance; genealogies are written on the landscape. It also is a major point of independence. There is a political and moral economy attached to this, but also a real economy. This is where people grow their subsistence crops. This is what allows them independence from more powerful, richer people. They have land and they hope that they will always have land.”

Disputes over land and land-related conflict are common throughout history, not just in the Pacific but in most other human societies. Disputes arise whether the underlying land tenure system is based on legislation, as is common in Europe, or whether it is based on custom, as are many Pacific Island land tenure systems.

What makes land disputes in the Pacific Islands special is that disputes not only arise within the customary or the Western-introduced systems of tenure but also in the interaction of both systems. There are thus two kinds of conflict occurring simultaneously. One is the original

grievance and the second has to do with the question which system is best equipped to handle such concerns. Both of these dynamics can fuel escalatory dynamics and cause additional confusion and conflict (Fonmanu, Ting & Williamson 2003).

Many countries in the region have incorporated Western law and land registration systems to regulate government and freehold land. Generally disputes over these (often minor) areas of land can be handled by the introduced Western court system. It is the disputes over customary land and the areas where customary and other interests collide that have proven challenging for land courts and customary dispute resolvers alike.

2.2 Types of land disputes

Land disputes have different causes and can be grouped into different types in relation to the substantive issues and the people who are involved. These types are: land administration disputes, land tenure and ownership disputes and disputes over boundaries (Fonmanu, Ting & Williamson 2003). Land disputes can be located *between customary owners, between customary owners and the government, or between customary owners and foreign or local investors.*

Land administration disputes generally take place between customary landowners and the government and may reflect a customary anxiety about the legitimacy of formal institutions; the transfer of land, which often produces no written records or other evidence recognised as such by the formal institutions; a lack of coordination between administrative bodies; and the expiration of statutory lease agreements. Commonly the status of customary land is itself being disputed between customary owners, government and foreign investors. After disputes have been adjudicated further disagreements can develop over the propriety of the decision of a court or other government body relating to customary land, or even the constitutionality of a court relating to customary land.⁴ Compulsory acquisition of land by the government to foster urban development, build roads or improve transportation, and for agricultural development or mining and logging projects often leads to fierce conflict with customary landowners, whether over the acquisition itself, or over the amount of compensation that needs to be paid, as well as the nature of the obligation to compensate. These disputes can go back to colonial times when many traditional lands were alienated by the colonial powers.⁵

Land tenure disputes can involve the use and the denial of use of communally owned land to individuals, rivalries over membership or influence in land owning groups (for example, disputes as to the *matai* with *pule* over customary land in Samoa) and the distribution of lease revenues for community owned land. In addition, customary tenure leases can clash with Western legal requirements and create further conflict. Disagreements can also arise over the use of village or town land by the community or kinship groups and also over customary inheritance laws. Other land tenure disputes arise when the principles of tenure, such as priority to older people over younger, senior to junior lines, or males over females, become incompatible. Such is the case when an older person is from a junior line, or when a female has worked more on the land and is older than her brother (Crocombe 1988: 114).

Disputes over land boundaries include the definitions of boundaries, particularly where boundary markers were traditionally made by using stone heaps or signs on trees which can be easily shifted, as well as transitions from customary to Western areas or overlapping claims and conflicts. These arise when community members seek to fulfil their needs for more exclusive demarcation of their rights in land by fencing in properties on customary land. Often customary rules of tenure and boundaries were recorded solely by memory by people whose task it was to recall long and complex lineage and tenure arrangements. One increasing problem that is encountered in many PIF countries is the loss of customary knowledge pertaining to boundaries as the older community members pass away and younger people often show less interest in the old ways or migrate away from rural areas in search of employment.

In Vanuatu, customary owners are permitted to lease land to foreigners. Rural leases are usually for 75 years, and urban leases for 30 to 50 years. Customary owners are required to compensate the tenant for any improvements to the land at the end of the lease. Many customary owners are unable to pay the compensation and could lose their land permanently. The use of 'strata title' to subdivide the leased plots has aggravated the situation even more. This has led to a flood of land disputes in recent years as more and more foreign developers have leased land to build beach side resorts and residential estates. It is estimated that more than 50% of the main island of Efate is leased out this way and disputes on Espiritu Santo have become increasingly common (Jowitt 2004; SBS 2006). Disputes between customary

landowners and *private sector or foreign investors* therefore will require some special consideration.⁶

Land-related conflict has also become increasingly common where *population increases* rapidly, through birth rates or migration, and land is scarce. An example of this is the migration of Malaitans to Guadalcanal in Solomon Islands (Sofield 2006: 185) which was a significant factor in the civil violence in that country.⁷ The island nation of Tuvalu is threatened by the loss of land due to the rise of sea levels caused by climate change (Barnett & Adger 2003: 324). Rising numbers in the population have made it impossible for the Tongan government to give every entitled member of the community access to their statutory land entitlement (Powles 1993: 333).

Land disputes also often occur where the land is used for *resource extraction* such as logging or mining. Corporate investors often treat the land as a commodity and do not recognise the depth of its cultural and spiritual significance. Disputes arise not only over access to land or environmental degradation but also over the perceived inequality in distributing the royalties to the communities involved. Sometimes customary landowners or their descendants want to review the amount of compensation in later years as they feel that the land was given away too cheaply.⁸ The example of Bougainville shows that these disputes can lead to violence and a complete destabilisation of the country (Clarke 2006: 133).

3. Conflict Resolution Processes in the Pacific Region

3.1 Diversity and duality of land tenure systems and conflict management processes

Systems of land tenure and land-related conflict in the Pacific are highly localised, and customary practices, cultural backgrounds and history vary greatly between countries (Crocombe 1995: 10).⁹ Most PIF member countries differentiate between customary land, freehold, and government land. Often land may also be leased for use for a limited duration. Customary land is normally subject to customary land tenure. Freehold, leasehold and government land are subject to statutory law such as the various land acts in Pacific Islands countries. Dispute resolution in relation to the latter is in accordance with statutory and

common law principles of real estate and land tenure law. Land registers serve to assist in determining rights and obligations for non-customary land. The following overview will focus on disputes involving customary land.

3.2 Customary processes

Societies in the Pacific had ways of dealing with disputes and infractions of social norms long before their encounter with the modern world and the impositions of the first colonial states. Methods varied from society to society and changed significantly over time (Dinnen 2006: 404). The literature on customary dispute resolution processes is just as diverse and nomenclature can often be misleading.

3.2.1 Customary debate

Customary debate refers to a process of discussion or negotiation between disputants “in order to produce true or ‘straight’ talk” (Lindstrom 1990: 373). Customary debate is often found in egalitarian Melanesian societies and aims to generate reconciliation and consensus. Typically no participant has the authority to adjudicate the issue and therefore some form of consensus needs to be achieved. People are disinclined to speak for others who are their social coevals. Public debates can include hundreds of people from different social groups that are in some way tied to the conflict.

Lindstrom has observed the use of public debate during *kava*-drinking meetings on the island of Tanna, which is part of Vanuatu. The types of disputes debated include land disputes (Lindstrom 1990: 378). Meetings are held at the local *kava*-drinking clearings. In addition to the disputants, who sit at either end of the clearing, ‘witnesses’ are summoned from neighbouring *kava*-drinking groups. Men attending the debate sit along the periphery of the circular clearing. Women have no right to public speech and sit behind men on the periphery. After preliminary discussion of side issues the main problem is brought up. Men who want to speak stand in the middle of the clearing. The debate continues until 4pm when the *kava*-drinking group needs to begin the day’s *kava* preparation. People presume that a decision will be found before this time and the dispute will be settled (Lindstrom 1990: 379).

Customary debates are easily convened and can be held at any time without incurring costs or significant delays. They are highly participatory and can serve as group decision-making processes. On the other hand, Lindstrom observes that speech is never-ending and that the result of many meetings, although consensual, frequently has little effect on the behaviour of consenters in the following days. No participant has the executive powers to enforce decisions against unwilling disputants (Lindstrom 1990: 381). Another disadvantage obvious in Lindstrom's description is the exclusion of women from the decision-making process. He notes that on Tanna the powerful can enunciate the truth of statements and the sense of debates. However, the consensual decisions made in front of witnesses become facts that must be taken into account in future meetings that address the same, or similar issues (Lindstrom 1990: 395). Particularly when there is a risk of escalating emotions, witnesses also serve an important function as conciliators.

3.2.2 Customary conciliation

Conciliation refers to processes in which a negotiation is facilitated by third parties. They can be chiefs, elders or witnesses. Although the conciliators sometimes advise on custom or make suggestions they only facilitate the negotiation process and do not make binding decisions on the parties. Conciliation often results in compromises thereby not producing clear winners and losers (Farran & Paterson 2004: 237).

The *Land Dispute Settlement Act* of Papua New Guinea (PNG) established Land Courts to resolve disputes according to customary law. The act requires conciliation by appointed land mediators, who are normally village elders. If this mediation fails, the dispute is then referred to the Local Land Court, where a second attempt at mediation, this time by the Local Court magistrate, is performed. Only if this fails again will the court render a judgment (Nonggorr 1993a: 218).

Warren (1988) describes a conciliation process in Kumara, PNG: Local big men will readily go to the scene of a dispute and try to move disputants to the assembly ground. There, more big men from other villages gather as well as spectators. This provides for a public arena in which violence is less likely. Customary conciliation is the only conflict resolution process available. A determination of the dispute by third parties would only incite more anger in the disputants. Procedures are decided upon ad hoc. If things go well, a self-appointed chairman

facilitates discussion and the parties take turns to make speeches. If no settlement is reached, the process continues until bystanders and parties tire and slip away from the meeting. Then final speeches are made exhorting the parties not to fight and arrangements are made for further meetings (Warren 1988: 103). These conflict management processes are quite different from the formal court procedure in the Village Court. There is a tension between the traditional role of the big men and the function of the Village Court. Warren points out that the court is most effective in dealings with complete strangers or in disputes where the authority and formality of procedure increases the commitment of disputants to pay compensation and fines. The village court has not necessarily replaced or legitimised the informal conflict management processes, as it was envisaged at its creation (Warren 1988: 105).

Conciliation is also encouraged by s35 of the Magistrates Court Ordinance of Kiribati, which provides that the Magistrates' Court shall, as far as there is opportunity, promote reconciliation among persons subject to its jurisdiction and encourage and facilitate settlement in an amicable way and without recourse to litigation. Similar provisions can also be found in the Magistrates Courts Acts of Solomon Islands and Tuvalu (Farran & Paterson 2004: 237).

Advantages of conciliation lie in the possibility of win-win situations in which all claimants can gain satisfaction of at least some of their interests and needs. If true reconciliation can be achieved a permanent peaceful resolution of the underlying conflict is possible. In addition to this, conciliation is almost always cheaper, quicker and less public than judicial determination. White and Watson-Gegeo (1990: 29) highlight the multiple voices that are part of an interactive dialogue in many customary dispute resolution processes. The processes are inclusive and allow for input by many stakeholders.¹⁰

When compared to third party determination of the dispute, parties to a conciliation process have more input into and control over the process. On the other hand personal negotiating power may influence the outcome in favour of one party. This can lead to agreements, which are repealed later by the affected party or their relative and can lead to perceptions of bias and unfairness of the system. Moreover since conciliation works on the basis of interests and not necessarily (introduced) 'rights' agreements, it can potentially be a breach of statutory law

(Farran & Paterson 2004: 238). In theory this in turn could weaken the acceptance of state systems and the rule of law.

Finally it needs to be recognised that there exist many different processes of customary conciliation in the Pacific. White and Watson-Gegeo differentiate in relation to the hierarchy and equality in the process (whether the process is controlled by a customary leader or is relatively egalitarian), the social organisation and discourse mode (degree of formality; direct or indirect discourse), the politics of participation, and whether the dispute is discussed privately or in public. They also point out variations within and across event types (White & Watson-Gegeo 1990). Processes are culturally specific, and although many similarities or patterns can be observed, what is successful in one area of the Pacific might not work in another area.

3.2.3 Determination by chiefs or elders¹¹

Before the advent of European control of Pacific Islands countries, many land disputes were decided by local customary leaders, often after listening to rival claimants and after consulting other leading figures in the community. Decision-making processes varied from extensive consultation on the one hand to unilateral arbitrary decision-making on the other (Farran & Paterson 2004: 233).

Although the power of customary leaders to determine land disputes has been greatly diminished under the influence of colonial powers and the availability of other forums for land dispute resolution, recent initiatives in many countries of the South Pacific point to a renaissance of the role of chiefs as dispute resolvers in land matters (White & Lindstrom 1997: 240). Examples can be found in the *Local Courts Amendment Act* 1985 of Solomon Islands, which requires that all disputes be submitted first to customary chiefs for determination, before they are submitted to the local courts (Farran & Paterson 2004: 234). Although originally approved on a broad basis, this amendment is not without problems itself, as it is often difficult to determine who the local chiefs are, or what procedures can be used if there is disagreement over who should decide the dispute (Takoia & Freeman 1988: 75).

There are appointed chiefs, hereditary chiefs (and sometimes this distinction has become blurred over time, leading to disputes about who really has the right to be a chief) as well as

leaders with high status, though not hereditary chief status. In some areas there are people referred to as government-established village chiefs, clan chiefs and land chiefs (Gegeo & Watson-Gegeo 1996: 298). This can lead to confusion and disagreement on behalf of the disputing parties on whom should decide the dispute.

Chiefs are also recognised as decision-makers in Samoa according to the *Village Fono Act* 1990. Again this is not without problems. Although the act recognises the village *fono* as the rightful body to make decisions in regards to land disputes, its powers are undermined by a lack of sanctions at its disposal. The example of the village *fono* also serves to illustrate the problem of legal pluralism, which is often encountered by local and introduced systems of dispute resolution alike. Corrin Care points out that the Supreme Court of Samoa has found that the procedure to give notice of proceedings of the village *fono* conflicts with the constitutional guarantee of the right to a fair trial.¹²

Many claimants expect the dispute to be decided according to local custom. Here lies an advantage of customary determination systems. Chiefs are normally knowledgeable about the customs and histories of the area and should be able to decide in accordance with accepted norms of their society. They are also, at least where the chiefly system is still working, respected by their communities and their decisions may carry greater weight than the determinations of what are often considered ‘Western’ institutions. Chiefly decision-making can be more cost-effective and timely than other processes since chiefs normally provide their services for free and do not need to convene tribunals or travel to the area where they are needed.

Problems arise when chiefs are expected to determine disputes for areas which are not directly under their authority. Particularly in countries where custom differs from area to area or even from village to village, the major advantage of chiefly determination can be lost. Other cases that are difficult for chiefs to decide are inter-village disputes, where opposing chiefs may be the spokesmen for their villages and the parties disagree who should have the authority to decide the dispute. While customary leaders rarely display bias towards or against a disputant, they may have connections and relations with the disputing parties. This can impact on their impartiality and can also affect the respect which the disputants have for the decisions of the chiefs. Questions of respect are also raised when chiefs are asked to determine disputes in communities which are not their own or act in inter-village disputes,

particularly where members of different ethnic communities are concerned (Farran & Paterson 2004: 234).

3.2.4 Reconciliation ceremonies

Customary dispute resolution processes can include elaborate reconciliation ceremonies and apologies. These processes can be more powerful than the dispute resolution process itself. Howard refers to the practice of *faksoro*, which can be translated as “to entreat, beseech; to apologise; to beg to be excused.” It is practiced by the inhabitants of the island of Rotuma and provides for the most powerful conflict resolution mechanism available. Rotumans differentiate five gradations of apology, starting with a verbal apology in private, and progressing to public apologies, presentations of a *koua* (pig cooked in an earthen oven), presentations of a *koua* and presentations of *kava* and/or the giving of a fine white mat. The strongest form of *faksoro* occurs when the person apologising essentially offers his or her life in a plea for forgiveness. This is only performed under the gravest of circumstances. When done properly, *faksoro* is such a powerful custom, that acceptance is virtually mandatory. Rejection of *faksoro* invokes intense criticism from the peer group, while the apologising offender might be socially exonerated (Howard 1990: 273).

Another example of the practice of apology and subsequent reconciliation was observed during a dispute resolution simulation enacted by people from Chuuk in Micronesia. The reconciliation ritual, as used to resolve disputes over land or more serious manslaughter cases, involved initial contact through a traditional leader (*itang*) from the offender’s family. The *itang* requested permission to enter the house of the victim’s family, and then the women of the offender’s family entered first, moving across the floor on their knees and presented a special leaf to signal the request for reconciliation. The ceremony also involved the sewing together of two large ‘elephant ear’ leaves as a symbol of reconciliation and the presentation of a bag of money to the victim’s family (Wolff & Braman 1999: 47).

These rituals reflect the high level of collectivism in Micronesian culture as well as the importance of context in interpersonal communication. However, the authors recognise that the social change brought on by globalisation could make these processes less meaningful in the future. In societies where local systems of authority and dispute resolution are still well established, these processes provide more cultural meaning than other introduced or local

models. They also allow disputants and their kinship groups to start the reconciliation process according to their needs and provide the necessary flexibility and affordability to make the process effective.

Customary dispute resolution processes using reconciliation ceremonies are in danger of being abandoned due to the social changes that all countries in the region experience. Already the cultural meaning that people attach to customary dispute resolution has changed. This has also put chiefly roles under strain. The fact that chiefs are not just dispute resolvers, but that they also dominate the main policy-making and fiscal management of communities has raised perceptions of bias and ineffectiveness. In addition to these challenges to customary reconciliation processes, the use of mass media such as newspapers by disputants to attack their opponents threatens informal and formal rituals of apology. Often they cannot undo the damage that was done through announcements in the press (Howard 1990: 288).

One example of such distortion is the manipulation of Solomon Islands compensation customs to rebalance relationships that have ruptured in conflict of one type or another. During the 'ethnic tensions' from 1998 to 2003, provincial governments and militant groups demanded compensation of the government as a way to diffuse the tensions and to compensate for destroyed properties. The national government committed to using the Melanesian way, however it amounted to 'justice' before peace. Many beneficiaries of the compensation were militia leaders and politicians rather than the displaced people and this approach to compensation plundered government coffers to the point of insolvency (Fraenkel 2004: 11).

3.3 Introduced Processes

3.3.1 Land commissions

Apart from direct decision-making by colonial administrators, land commissions were one of the earliest forms of introduced dispute resolution mechanisms for land disputes in the Pacific. Commissions were set up by the colonial powers to investigate and determine claims to land, especially customary land, because they were more flexible, cheap and mobile than courts. Today, land commissions are still in use in Fiji and Papua New Guinea.

The Native Lands and Fisheries Commission (NLFC) of Fiji consists of the *roko* (administrator) of the province in which the land is situated, as well as one or more commissioners appointed by the Minister of Fijian Affairs, and also one or more assessors elected by the council of that province. Customary land is held under a system of land tenure which was originally established by the colonial authorities. Ownership is vested in *mataqali*, or kinship groups. Today virtually all of the customary land is registered as being owned by a *mataqali* in communal title. The commission can also determine disputes over the leadership of a *mataqali*. Appeal rights are to an appeal tribunal, which consists of a chairman and two members, which are all appointed by the minister. The Fiji Constitution prohibits a review by the courts, and the courts have generally been reluctant to intervene in determining disputes over customary land (Paterson & Zorn 1993: 57).

The advantages of commissions lie in their simplicity and flexibility when compared to adversarial courts. The process before the commission is also normally free of charge or at least less expensive than the court system. However, flexibility and lack of strict procedure can lead to inconsistency of process and to a (perceived) lack of fair procedure (Farran & Paterson 2004: 241). Commissions are also considered remnants of the colonial era and may invoke distrust and rejection from customary landowners.

3.3.2 Land registration and recording

Many colonial governments introduced codification and registration of customary and other lands. Registration was introduced to avoid inter-group disputes, identify individual and collective owners who might later be the appropriate people for land transfer negotiations, and also to define the limits of state land and what was designated as vacant land. Furthermore land registration was thought to establish the interests of indigenous peoples, and to protect those interests (Ward & Kingdon 1995: 51).

Most systems of land registration use variations of the Torrens Title System which was originally implemented in Australia in 1858. Under the Torrens system a register is kept in which all records of all parcels of land falling under the scheme, and of the persons holding interests in the parcels, are recorded (Bradbrook, Moore & MacCallum 2002: 114). Legal rights such as ownership of land are conferred upon registration at the land titles office and not upon the signing or execution of the contract. The correctness of the register is

guaranteed by the state (Bradbrook, Moore & MacCallum 2002: 108). Necessary institutional preconditions for successful land registration are: a relative absence of fraud, corruption and incompetence in land titles offices; a relatively settled and dispute-free system of underlying tenure; public confidence in the system and relatively low barriers to entry; a relatively competent judiciary which ensures the reliability of the register; and a compensation fund to ensure that those who lose their land through fraudulent registration can receive a remedy other than land restoration (Fitzpatrick 2000: 156). Because of the lack of judicial infrastructure and the flexibility of customary tenure these prerequisites may be hard to meet in the contemporary Pacific.

Land registration is regarded with considerable hostility by many Pacific Islanders. Registration schemes often serve to incite further disputes and can lead to violent responses. An example is the 2001 protest against a World Bank draft agreement with references to land registration in PNG which led to the deaths of three protesters in violent clashes with the police in Port Moresby. The registration scheme was perceived as a ploy to marginalise customary values (Boydell 2001: 28).

Surveying, which normally precedes registration, often takes at least decades to complete, is expensive and requires well-resourced and well-trained surveyors. During the survey and registration process there is still need for other dispute resolution processes to determine the rights of claimants. Although there are several cases of matrilineal succession in the Pacific, a global bi-product of land registration is that title tends to be vested in men (Boydell 2001: 32). The success of land registration depends on the quality, character and capacity of the state, in other words on good governance. Critical factors include transparency, the basis of law, participation and the taking of responsibility (Holzknecht 2002: 10).¹³

Land registration should be differentiated from ‘land recording’, which involves writing down and preserving a historical record of the oral knowledge relating to an area of land and people’s rights over that land under either informal or formal guidelines. Recording is also often an important prerequisite of land registration.¹⁴

Land registration can be useful in situations where land is used for business purposes. If this is not the case the cost effectiveness of registering large areas of customary land remains uncertain (Crocombe 1988: 119). In the past the general result of land registration attempts was to produce legally recognised models of land tenure which often showed little

resemblance to the actual practices of customary land tenure followed by islanders prior to colonisation (Ward & Kingdon 1995: 51). The surveyed literature indicates that most of the examples of land recording and registration in the Pacific region did little to prevent or resolve disputes over land.

3.3.3 Land boards

Similar to land registration schemes, land boards are also less concerned with dispute resolution than with land administration and conflict prevention. The most prominent example of a land board can be found in Fiji. In 2004 approximately 8% of Fijian land was held under freehold, 3.8% was government held land and 84.2% was customary land. Of these native lands approximately 24.1% was leased through the Native Lands Trust Board (NLTB) (Native Lands Trust Board 2004). Customary land cannot be alienated, except to the state, and is controlled through the Native Lands Trust Board, which is obliged to act for the benefit of Fijian owners. Recently the lease administration through the NLTB has come under criticism, and Fijian landowners have opted not to renew leases. Ward points out that the introduction of the *mataqali* system and the NLTB have eroded the customary basis of control over land by native Fijians. They were first removed from a level of individual, family or *tokatoka* control of land to the level of control by the *mataqali*, and then, with the establishment of the NLTB control was further removed from the indigenous people and given to the NLTB as a government agency. This has caused considerable discontent among Fijians (Ward 1995: 246). Many leases to Indo-Fijian sugar farmers have expired over the last few years and landowners are reluctant to renew leases. Disputes are increasingly common in this area.

3.3.4 Ordinary courts

Jurisdiction over land disputes often falls to the general courts which have been established in all countries of the region and which are also used to determine other civil and criminal cases. Original jurisdiction is mostly given to subordinate courts, such as Local, Village, Island or Magistrates' Courts. Appeals are heard by superior courts such as Supreme Courts, High Court, Court of Appeal or Privy Council. Some countries have systems that include a second level of appellate courts.

Subordinate courts handle claims to ownership of non-customary land, such as freehold land and government land in most countries in the region (Farran & Paterson 2004: 244). They also have jurisdiction over customary land disputes in Kiribati (Powles & Pulea 1988: 315), Papua New Guinea (Nonggorr 1993a: 218) and Solomon Islands (Nonggorr 1993b: 286). Currently there are 40 Local Courts accounted for in Solomon Islands (Krone 2007: 8). Customary land cases make up the most important part of the Local Courts' work. Their jurisdiction is exclusive for all proceedings of a civil nature affecting or arising in connection with customary land, except where the matters are expressly excluded by the *Land and Titles Act* or in questions as to whether land is or is not customary land (Corrin Care 1999: 109). The court procedure is based on the Western adversarial system. This raised criticism in the past. It was argued that the Western court system discouraged Solomon Islanders from using more traditional means of settlement, such as decision-making by local chiefs. Moreover a lack of respect for decisions of the Local Courts was identified. These criticisms led to the *Local Courts (Amendment) Act 1985*, which introduced mandatory settlement attempts by local chiefs before court action could be filed.¹⁵

Hutchins has observed the process of a Village Court in land related disputes (Hutchins 1990: 412). In the Trobriand Islands, which are part of PNG, in 1975 and 1976 the Village Court decided a number of disputes regarding usage rights to garden plots. The court consisted of a magistrate (the village chief) and a group of 'bailiffs'. Since Trobriand Islands society was non-literate, land rights were not subject to written records and needed to be secured by agreement in the community. Hutchins explains land rights as a completely social construction, requiring defence in public to change or maintain the status quo. The dispute resolution process itself was mainly managed by the bailiffs. The history of the garden needed to be brought into the public eye without opening old wounds or adversely affecting social politics. Land litigation cases were heard in the central clearing of the village, and combined the traditional village airing of disputes with a hearing protocol and authority structure derived from British and Australian colonial rule. The court was presided over by the *guyau* or chief of the local district. The *guyau* not only had the authority to back up court decisions with effective sanctions, he also possessed sacred knowledge needed to evaluate group claims. Cases began with position statements from the litigants, followed by the testimony of specific witnesses. After that one or more of the bailiffs offered their opinion on the matter. The *guyau* then made a decision, often guided by the bailiffs. Decisions were to

be public and culturally appropriate to transform the social reality of the village and to garner acceptance. At the end of the hearing the public was invited to express their approval of the decision. During the procedure tempers often flared, as land disputes were considered to be very sensitive. However, the procedure served to avert hostilities and allowed the parties to have their 'history of the garden' aired and contemplated by the village authorities. Hutchins highlights the consensual nature of the event as a social gathering and the scripted structure overseen and controlled by the bailiffs as important features (Hutchins 1990: 439).

Ordinary courts share a number of advantages. While members of subordinate courts often do not possess formal legal training or experience, they are often regarded as being worthy members of the community. Judges of superior and appellate courts have extensive knowledge of written and common law and experience in assessing the testimony of witnesses. Judges also tend to be impartial and independent and the decisions of superior courts are often well respected. Courts are in existence in all countries of the region and often have access to at least some resources for travel, record keeping, equipment and staff.

On the other hand, court procedures, because of the need to provide a fair hearing and to comply with constitutional requirements, tend to be slow, expensive and adversarial. Legal practitioners are often unfamiliar with the ways of customary land tenure and culturally acceptable ways of dispute resolution. Ordinary courts often have to deal with a variety of disputes, not just land disputes and may give preference to criminal matters, which are considered more urgent.

In Vanuatu before 2001 the determination of customary land disputes fell under the jurisdiction of the Island Courts, including the right of appeal to the Supreme Court (Paterson 1993: 384). Although these courts existed on paper since 1983, they failed to materialise in practice. At the same time 'village courts' operated at an informal level, composed of members of the land committee and knowledgeable chiefs (Bakeo 1988: 128). Island Courts were supposed to determine disputes according to custom, however, there was no guidance on what the definition of custom was or by what method custom was to be ascertained and applied (Weisbrot 1989: 78). This led to an appeal rate of almost 100% and an inundation of the Supreme Court with land related matters, for which even the doubling of filing fees did not provide relief (Weisbrot 1989: 81). In 1997 the Supreme Court refused to hear appeals in land dispute matters.¹⁶

3.3.5 Modified ordinary courts

In modified ordinary courts the panel of adjudicators that hears a dispute is drawn from particularly knowledgeable individuals. The court uses the infrastructure available from the ordinary court system and modifies it to achieve more appropriate determinations in land matters.

In the Cook Islands, disputes over land are determined by the Land Division of the High Court, which investigates titles and determines the relative interests of owners of customary title. If the court makes an order in favour of a person or persons that results in the vesting of an estate in the person or persons, the land then ceases to be customary land and becomes native freehold land (Adzornornu 1993: 19). Central to the acquisition of land rights is the requirement to attain consensus and recognition amongst the members of the group claiming title to the land. This requirement has also found its way into the proceedings before the High Court. Applicants, seeking title or estate in land of which they are tenants in common with others, must obtain consent from all co-owners to the application. Before the statutory changes in 1970 this normally required meetings with the other co-owners. Now, according to the *Land (Facilitation of Dealings) Act 1970*, meetings can be ordered by the High Court and decisions can be made if the owners present constitute at least 25% of the beneficial freehold interest in the land (Manarangi 1988: 215). A specialised land division of the High Court is also used in Niue to determine land disputes. In Kiribati, a specially constituted Magistrates' Court has jurisdiction in land matters. The court consists of five magistrates, three of which are selected from a panel of lands magistrates. Appeals are decided by a special panel of the High Court, constituted by one judge and four lands magistrates who decide by majority vote (Farran & Paterson 2004: 245).

In the Republic of Marshall Islands any party to land proceedings can apply for a stay of proceedings to have questions relating to titles or to land rights determined by the Traditional Rights Court. The court is a court of record, which acts as an advisory tribunal. Judges of the Traditional Rights Court represent the different classes of rights holders in the Marshall Islands, the *iroijs* (chiefs), *alabs* (persons who lead lineages and are in administrative charge of land) and *dri jerbals* (persons who actively work or use the land). In addition to this general jurisdiction the court also has particular jurisdiction over the assessment of compensation in cases of land alienation by the government (Lynch 1988: 137).

The benefits of using modified ordinary courts instead of ordinary courts lie in cost savings, as the infrastructure is often already available. Modified ordinary courts can also draw on more knowledge of customary land tenure than ordinary courts and can combine legal expertise, independence and impartiality with special knowledge about custom and usage. Although these are important benefits, these types of courts also share the drawbacks of ordinary courts. Court procedure is based on introduced Western models which can alienate disputants. Modified ordinary courts can be too expensive for 'grass-roots level' litigants and the procedure can be much slower than less formal forms of dispute resolution. This makes them less accessible than customary dispute resolution. Increased use of modified ordinary courts instead of customary processes may also change the way in which communities resolve land-related conflict (Farran & Paterson 2004: 246).

3.3.6 Land courts

In Kosrae State of the Federated States of Micronesia, Papua New Guinea, Samoa, Solomon Islands, Tonga and Tuvalu special land courts have been established. In some countries, such as PNG, Samoa or Kosrae State these courts are courts of first instance, which often have exclusive jurisdiction in land matters. Other countries such as Solomon Islands have established land courts as appellate bodies which hear appeals from the local court level.

In Samoa the Land and Titles Court is seen as one of the most important institutions of Samoan society and is considered vital for the stability of the country (Anesi & Enari 1988: 111). Since the early descriptions by Anesi and Enari the court procedure has changed. Although the court is authorised to do so, it does not apply the Supreme Court Rules for its procedure. Apart from its usage of an inquisitorial approach, little is known as to the practice and procedure of the court. Contrary to traditional Western legal procedure which focuses on written rules and rigid application of those rules to the case, the Land and Titles Court relies on oral statements and unwritten custom. It is argued that the use of lawyers would unduly increase the costs and time of the procedure, and that Western lawyers often consider custom less important than written or common law (Anesi & Enari 1988: 110). The court applies custom, usage and law relating to the application of custom and usage. The uncertainty and lack of transparency of procedure has led to criticism of the Land and Titles Court. It has also

been plagued by significant delays. This problem has been addressed recently by the appointment of a full-time president. Waiting time for a hearing is now six months.¹⁷

Anesi and Enari observed in 1988 that the number of disputes before the Land and Titles Court was steadily increasing. In regards to land-related conflict they attributed this phenomenon to the opening up of land through extensive road building on or next to plantation land and villages; the increasing desire of families to split into branches and sub-branches; and the growing awareness of rights which are in conflict with custom and the tendency of young educated people not to accept traditional ways (Anesi & Enari 1988: 108).

3.3.6.1 Appellate Land Courts

Appellate Land Courts can be plagued by systemic problems. The Customary Land Appeal Courts in Solomon Islands often need to rehear cases afresh, because recording from lower courts rarely is up to a satisfactory standard and makes the appeal procedure time-consuming and expensive (Takoa & Freeman 1988: 76). Furthermore, many decisions of the Customary Land Appeal Courts are appealed again to the High Court. Parties often rely on numerous points of customary law to justify their appeals. These are not valid grounds, and the registrar often strikes out appeals. Other appeals contain complaints against members of the Customary Land Appeal Courts, which, although often found to be groundless, need to be investigated by the High Court. These can be seen as signs of a lack of respect for the Customary Land Appeal Courts.

Another problem lies in the uncertainty around which institution has the right to hear a case. In *Nelson Lauringi and Others v Lagwaeno Sawmilling and Logging Limited and Others* (*Nelson Lauringi and Others v Lagwaeno Sawmilling and Logging Limited and Others* 1997) the High Court effectively permitted questions of customary law and practice to be decided outside of customary tribunals. It determined that whether the Marodo Council of Chiefs, which had determined that the plaintiffs were the customary landowners, had the jurisdiction to make this decision had to be decided on the basis of proper evidence and full submissions on the law at trial. Corrin Care argues that the appeal should have been heard by the Customary Land Appeal Court instead and that the approach taken by the High Court defeated the purpose of the *Local Courts (Amendment) Act* 1985 which was supposed to

strengthen the power of local chiefs. This case highlights the tension that often exists between the Western style court system and customary dispute resolution. It also emphasises the systemic problems that 'customary courts' face in terms of lack of acceptance (Corrin Care 1999: 110).

On the other hand the example of the Land and Titles Court of Samoa indicates that the integration of customary practice and introduced court system is possible and that it can gain the necessary acceptance to become an important part of the local dispute resolution system. The establishment of special land courts raises the issue of resources and infrastructure again. Since these courts are separate from the normal justice system, they need to be funded accordingly to support the expertise of its decision-makers with the necessary administrative system and the necessary infrastructure. The question whether land courts are more timely in their case management than other courts is difficult to answer. Although not burdened with other disputes like ordinary courts, the literature points out that land disputes are possibly the most common category of disputes and land-related conflict is evident everywhere in the Pacific Islands. Therefore land courts can easily be inundated with a large number of disputes, resulting in slow procedures and frustration on behalf of disputants and court staff.

3.3.7 Land Tribunals

Tribunals are bodies to determine a matter in a judicial manner. Tribunal members are expected to be impartial and independent and rely on evidence to make decisions. Although tribunals are expected to follow certain procedures, these are often not as elaborate as court procedures and allow more flexibility (Farran & Paterson 2004: 247).

Tribunals are used in Fiji, to hear appeals from the Native Lands and Fisheries Commission and in tenancy matters, and in Vanuatu since 2001, in the form of the Customary Land Tribunal (CLT). The establishment of the CLT was preceded by consultations with the ni-Vanuatu people. Customary Land Tribunals were established to return the decision-making power in land disputes to the villages and provinces.¹⁸ Neutrality was not considered to be of paramount importance and tribunal members often had connections with the disputing parties (Paterson 2005: 11). There are no formal rules of evidence and no legal representation is permitted. Participants are allowed to tell their stories and vent their emotions (Jowitt 2004).

Simo reports that some ni-Vanuatu expected the CLT to stop all problems relating to land disputes. Often these high expectations lead to great disappointment, particularly when the CLT makes a decision that produces a clear winner and loser (Simo 2006: 26). Better information of communities, chiefs, disputants and land tribunal members was one of the main recommendations of the CLT review in Vanuatu.¹⁹ The procedure is also more formal than typical meetings of the councils of chiefs. The prescribed procedure reminds disputants of the procedures used in the island court system. Recent criticisms mention a number of problems associated with the CLTs, such as the range of appeals, from village level to district level, and then finally to island level. Appellate tribunals often lack the connection to the particular plot of land, to the disputants and to their custom. It has also been observed that the Customary Land Tribunal slowly erodes the powers of chiefs and elders to preside over land disputes and therefore marginalises their roles. People from rural areas often lack the resources to prepare a successful case before the tribunal (Simo 2006: 33). There are complaints that the Customary Land Tribunal system fails to deal adequately with disputes in which landowners want to lease out their land to foreign developers and that it therefore furthers the alienation of land and the problems of unfair lease agreements (although it was never envisioned to deal with these cases). The procedure, although reminiscent of customary dispute settlement, is considered the approach of a ‘white man’s court’. CLT decisions favour only one party and produce a winner and a loser. In a land where no one is supposed to be landless this leads to results that are inconsistent with custom and identity. Finally many chiefs mentioned that there was not enough training provided and the procedures were difficult to understand for chiefs, tribunal members and communities. In some areas it was complained that the chiefs refused to appoint the tribunals because they or their families had some interest that might be threatened by the decision, or in which members of the tribunal were considered biased (Paterson 2005: 15).

Tribunals draw on the particular wisdom of experienced and respected members of the communities to make decisions in regards to customary land tenure. They also provide more flexibility and may seem less alien than modified ordinary courts or land courts. However, the criticism towards the CLTs in Vanuatu suggests, that the establishment of a new institution, that draws on *kastom*, but does not fully embrace it, provokes similar feelings of distrust and rejection as have been reported from other introduced systems. It suggests that particular importance needs to be paid to the needs and concerns of community members

when dispute resolution systems for land disputes are designed. It also suggests that notions of independence and impartiality, that were, according to Paterson (2005), at least partially responsible for the design of the CLTs, need to be re-evaluated in light of customary governance and dispute resolution practices.

Although seen as a disadvantage in Vanuatu, it can be argued that the procedural rules of tribunals add consistency and fairness to decision-making which might be important to communities. Because tribunals are appointed from the local community, notions of bias and conflicts of interest can severely hamper the decision-making process and lead to appeals when disputants feel that they have been treated unfairly (Farran & Paterson 2004: 248). Finally it remains questionable if tribunals provide the necessary safeguards for customary landowners to resolve disputes where foreign investment is involved or where disputes are the outflow of deep-rooted social or political problems which are encountered more and more often in the region. Although well versed in custom, tribunal members may lack the capacities to address these issues or equalise power imbalances between rural landowners and more powerful (foreign) investors.

4. Alternative Dispute Resolution (ADR) and Other Western Processes

Definitions of ADR processes vary greatly, not only from country to country, but also from program to program, and many processes are based on opposing schools of thought. Sourdin differentiates processes according to the level of third-party intervention. At the top end of the scale lies negotiation, as a process without third party intervention, where the resolution of the dispute is left entirely to the disputing parties. This is followed by *facilitative* processes, in which the third party only facilitates the discussion and negotiation and has little influence on the decision-making of the disputants. These processes include facilitative mediation, facilitation, conferencing and certain types of conciliation. In *advisory* processes the third party intervener can make recommendations and/or give advice about legal, technical or other issues but does not decide the dispute. Common processes include conciliation and case appraisal. Finally *determinative* processes allow the third party to make a decision that is binding for the parties. Party control over the outcome is low. Arbitration

and expert determination are the most well-known examples of determinative processes (Sourdin 2002: 18).

ADR has its roots in the 'Access-to-Justice' movement, which argued that a broader approach to access to justice was needed, resulting in the adaptation of dispute resolution and conflict management processes to the particular case and type of dispute (Cappelletti & Bryant 1978: 225). Goldberg et al. point out that the critical distinguishing factor between processes is whether a neutral third party is engaged, and if so, whether the third party has the power to impose a solution or is simply there, to assist the disputants in arriving at their own solution. They refer to the three primary processes of negotiation, mediation and adjudication (Goldberg, Sander & Rogers 1992: 3).

4.1 Negotiation

Negotiation is one of the most common forms of conflict management and permeates much of human existence. It is the most simple and least interventionist conflict management process, in which the disputing parties communicate in order to fulfil their needs, wants and goals. It takes place against a background of rules, cultural, social and sometimes legal, and is often the first option of a variety of processes chosen by disputing parties before they engage in more formal procedures. The majority of disputes are resolved by negotiation between the parties (Astor & Chinkin 2002: 82; Condliffe 2002: 111; Goldberg, Sander & Rogers 1992: 3).

Moore contends that informal discussions and negotiations can be unsuccessful due to the degree of emotional and substantive polarisation. Here lies the strength of third party intervention, such as mediation or adjudication (Moore 1996: 8). Land disputes can fall into this category and therefore some form of multilateral dispute resolution (including customary dispute resolution) may be useful. Ury affirms that conflict does not exist in a vacuum, and that the prevention of destructive conflict almost always requires the intervention of a third party (Fisher, Ury & Patton 1999).

4.2 Mediation²⁰

Mediation eludes easy and quick definition and categorisation. There is no single analytical model of mediation; on the contrary, mediation processes vary greatly in and between societies (Boulle 2005: 3; Folberg & Taylor 1984: 7). Moore has documented that mediation exists in virtually every culture and is one of the oldest forms of dispute resolution known to humanity (Moore 2003: 21).

Western ADR literature generally describes mediation as a structured process involving an impartial third party and who strives to remain as neutral as possible. The process is designed to discover the nature of disputed issues, consider options and assist the parties in making decisions on how to resolve their dispute (Astor & Chinkin 2002: 135; Brown, HJ & Marriott 1999: 19; Moore 2003: 15; National Alternative Dispute Resolution Advisory Council (Australia) 2002: 9). Mediation emphasises a non-adversarial approach to conflict, responsiveness to participants' needs, flexibility of the process, self-determination and party autonomy. Mediators do not make decisions for the parties, which brings a democratic quality to the process. This is appreciated by many disputants (Boulle 2005: 65). Mediation is particularly useful where the matter is complex or likely to be lengthy or involves more than two parties. It helps maintain continuing relationships and can lead to creative and flexible outcomes. Many disputants value the confidentiality of mediation (Sourdin 2002: 109).

Negative indicators for the suitability of mediation in Western ADR literature are: a history or the potential for violence between the parties; where a party is unwilling to honour basic guidelines of mediation; where a party lacks the capacity to make informed decisions, because of either an information or a power imbalance between the parties; where a party tries to abuse the process, for example to gather information for a later court hearing; where counselling or therapy may be required; and where the parties may reach an illegal agreement or an agreement that severely disadvantages an unsuspecting third party (Sourdin 2002: 109). Although some scholars have pronounced mediation a more 'female' way of resolving disputes, others argue that where mediation is used by women because of a lack of resources or a perception of powerlessness in relation to formal litigation, it can become a sort of second-class justice, which in effect perpetrates the problem (Astor & Chinkin 2002: 165; Boulle 2005: 68).

With regards to the cultural appropriateness of Western-style mediation, Avruch argues that principled or interest-based negotiation, the basis of mediation, reflects a middle-class white American approach which fails to deal appropriately with the emotional content of conflict (Avruch 1998: 79). Brigg and Bagshaw argue that Western style mediation and conflict resolution often fail to provide cultural meaning for people from non-Western cultures and that the use of these processes may further marginalise indigenous cultures. The insistence on structured problem-solving techniques instead of culturally relevant processes such as shouting, name-calling or regulated uses of violence during the conflict resolution process, can lead to the perception, that the process is lacking seriousness and authenticity (Astor & Chinkin 2002: 297; Bagshaw 2003; Brigg 2003).

4.3 Adjudication/arbitration

Arbitration has been an alternative to litigation in Europe for hundreds of years. Commercial arbitration can be followed back to English merchants of the 13th century (Goldberg, Sander & Rogers 1992: 199). It is often less formal and less expensive than court proceedings, but often just as adversarial. Adjudicators or arbitrators listen to the disputants' perspectives, review evidence and make an enforceable or non-enforceable decision (Druckman, Cheldelin & Fast 2003: 235). Arbitration is the dispute resolution technique that most closely resembles litigation. Unless the parties have agreed otherwise, the basis of the award is the law. Arbitration is normally based on an agreement between the parties (Astor & Chinkin 2002: 297). It is sometimes called the businessperson's method of resolving disputes and tends to occupy a space between politics and business. Most countries have passed statutory law in regards to arbitration, and the courts can generally review procedural shortcomings. It is less flexible than other procedures and has become increasingly similar to litigation in terms of cost, time requirements and formality of procedure.

4.4 Dialogue projects

The purpose of dialogue projects is to constructively deal with conflict to resolve or at least influence it. They are particularly popular in intergroup-disputes and serve to improve the communication between members of the involved groups. Most dialogue projects take the

form of organised group encounters of a size that allows face-to-face communication. They can be located at grassroots level, aim to improve institutions and networking or even, as part of track one diplomacy, serve to pave the way for official peace negotiations (Ropers 2004).

Often individual and constitutional capacity-building is part of dialogue projects. Workshops aim to increase the participants' understanding of conflict and conflict dynamics and to develop or improve communication, negotiation and dialogue skills, which assist the parties in their transformative discourse. They can also help to build institutions, for example local government or judicial institutions, which allow society to handle conflict without it turning into violence (International Alert 1996a: 1).

Dialoguing can be one of the most important tools for addressing intergroup conflicts. It offers a clear, constructive alternative to confrontation and unproductive patterns of interaction and can reduce the risk of conflict escalation. Because dialogue lets participants experience each other in context and provides insight into values, logic and stories of the people involved, it can bridge intercultural conflicts and help conflicting parties improve their knowledge and understanding to transform the relationship (LeBaron 2003: 256). As areas of understanding or even empathy become established or deepen, points of difference may not disappear, but come to be viewed within a broader context that enables parties to identify ways forward in the problem at hand.

Dialogue projects require careful preparation and facilitation. The ambitious goals of problem-solving dialogue between parties of protracted conflicts can only be achieved within the framework of a long-term process of work and learning. Personal confidence-building, clarification of positions and perceptions and reflection on background facts are important prerequisites to any substantive discussion of the material issues. If crises arise during the process, these need to be handled jointly and carefully. Other issues include the right selection of initial protagonists and the organisational input required to finance, prepare and conduct dialogue projects (Ropers 2004).

4.5 Restorative justice

“Restorative Justice is a process to involve, to the extent possible, those who have a stake in a specific offence and to collectively identify and address harms, needs, and obligations, in

order to heal and put things as right as possible” (Zehr 2002: 37). Braithwaite conceives of restorative justice as a process in which all stakeholders affected by an injustice have the opportunity to discuss the consequences of the injustice and what might be done to put them right. The key values are that justice should heal and not cause further hurt, and that the parties should be empowered to deal with their conflict themselves. In addition the process should emphasise forgiveness, healing and apology (Braithwaite 2003: 35). Howley differentiates restorative justice from mediation. He points out that mediation strives to achieve a ‘win-win-solution’, while restorative justice is used when one person has committed a crime against another person or the community (Howley 2002: 119). Both processes, however, view respectful listening and opportunity for all stakeholders to air their concerns and tell their stories as central. Where mediation, in the Western facilitative view, is more concerned with the resolution of the particular dispute and the reconciliation of disparate interests of the parties, restorative justice focuses on empowerment, respect and harmony. While restorative justice processes, such as victim-offender conferences, family group conferences and circle processes have been used in Western societies since the 1970s (Zehr 2002: 3), the underlying principles of restorative justice bear many similarities to customary dispute resolution in the Pacific (Dinnen 2006: 401). Both strive to restore harmony and repair the relationship that is under strain. Restorative justice is often a slow process, as the wounds and injustices of the past need to be acknowledged and worked through by the people involved. On the other hand it promises a holistic restoration and reconciliation that may even improve the relationship in the community (Boege 2006: 8).

Jowitt advocates the use of restorative justice principles for customary land disputes in Vanuatu. She sees restorative justice as helpful for cases in which foreign investors want to lease land from indigenous owners. In these instances restorative justice concepts are not used to restore relationships, but to prevent future problems over leases from occurring and to build fair relationships. Restorative practices are often intuitive to indigenous societies and can therefore assist in cases where ‘rational talk’ is not enough (Jowitt 2004).

5. International Examples of Land Conflict Management and Dispute Resolution Processes

Land-related conflict is prevalent in many countries of the world. Countries that have emerged from periods of colonial rule or violent conflict often experience a plethora of disputes over land use and ownership. Although lessons learned from other parts of the world may not always be transferable to the Pacific region, they provide valuable insights into customary and introduced forms of land dispute resolution.

5.1 Promoting local grass-roots level dispute resolution (Timor-Leste)

The majority of rural land disputes in Timor-Leste are resolved using customary local dispute resolution processes that call on the wisdom of traditional leaders. Before state institutions are called upon communities attempt to resolve disputes at the village level (Meitzner Yoder 2003: 2).

5.1.1 Advantages of customary dispute resolution

Communities feel that customary arrangements reflect their values and provide a conventional and effective avenue for redress for local grievances, especially those involving theft, divorce and land disputes. In addition to this disputants and traditional leaders cite proximity to physical evidence of the disputed site, special expertise on the family and land histories of disputants, personal knowledge about disputants' ability to pay fines or compensation, reluctance to take kin relations to court and the importance of reconciliation through mediation by a local *adat* leader as advantages of customary dispute resolution (Meitzner Yoder 2003: 18). Conversely formal legal services are seen as expensive, inaccessible, slow and inconsistent in delivering law (McWilliam 2007: 2). In practice, government officials often instruct disputants to return home and try to settle the case 'within the family' or with traditional leaders. Before formal dispute resolution can be initiated disputants sometimes need to provide evidence that a customary process has failed. Even

when formal processes are invoked, traditional leaders are often involved as witnesses or advisors.

5.1.2 Types of dispute resolution processes

The actual processes that are used by customary dispute resolvers in Timor-Leste vary widely. Some employ decision-making processes, which are similar to arbitration where disputants have no choice but to accept and obey the decision. The majority of people interviewed by Meitzner Yoder indicated that disputants often play a more active role in the process and have input into solutions and agreements. Dispute resolvers therefore act more like mediators or conciliators who moderate a discussion between the parties. It was noted by a Land Dispute Officer that *adat* leaders use arbitration when the fault or answer is clear, but mediate when a solution requires negotiation or both parties have committed wrongs (Meitzner Yoder 2003: 19). A common feature of many processes is a reconciliation ceremony that signifies and seals the end of the dispute. Even cases that have been settled by the government or through court decisions return to this traditional practice for the dispute to be finally resolved and for the relationships to be restored. Ceremonies often include eating meat and drinking palm wine together as important steps in the settlement process.

5.1.3 Challenges for customary processes

Although customary processes are highly valued for most types of rural land disputes, they fail to resolve matters of private sector involvement or foreign investment. Traditional leaders attribute this to the fact that the private sector is not held to the same expectations of respecting traditional authorities as local villagers and the state are. Private involvement predominantly occurs in the coffee-growing sector. Corporate representatives may consult traditional leaders when involved in conflict with customary landowners but the customary processes often fail to lead to an acceptable agreement (Meitzner Yoder 2003: 16).

Other difficult cases arise when disputes are politicised, or when violence or threats of violence occur. These matters often end up in court. Timor-Leste faces land-related conflict resulting from resettlements during the Indonesian occupation. These cases remain unsettled and necessitate some form of outside intervention. They often contribute to inter-communal conflicts that exceed the capacity of the customary system (Fitzpatrick 2000: 157). When

cases are highly politicised, sometimes disputes occur over who are the *adat* leaders suitable for resolving the conflict.

Another interesting parallel to many Pacific Islands countries lies in the existence of legal pluralism in Timor-Leste. On the one hand there is the formal justice system with its reliance on the courts for dispute resolution, on the other hand there is the customary land tenure and customary dispute resolution system, which provides dispute resolution on the ground. Disputants, traditional authorities and government officials are currently waiting for forthcoming national land legislation that will help to settle some of the suspended issues surrounding land claims which have proven difficult to resolve for the customary system. Although legal pluralism often negatively affects customary processes, in Timor-Leste there is wide ranging acceptance of customary dispute resolution and the systems seem to be co-existing fairly effectively (McWilliam 2007: 3).

To address the cases that cannot be handled by the traditional authorities, Fitzpatrick recommends building bridges between the two systems. This necessitates respecting the customary processes and also researching who the local authorities are and who best performs the role of dispute resolvers before any new systems are put in place (Fitzpatrick 2000: 158).

5.2 Dispute resolution under Aboriginal land rights and native title legislation (Australia)

Despite many cultural differences, the fundamental principles underlying the customary land tenure systems of indigenous groups in Australia have some basic similarities to customary land tenure principles of indigenous peoples in the Pacific region, particularly in PNG, Bougainville, Solomon Islands and Vanuatu (Solomon Islands Law and Justice Sector Institutional Strengthening Program 2003: 85). Indigenous customary law relating to land in Australia has been legally recognised for some groups of Aboriginal and Torres Strait Islander peoples through either native title determinations in the Federal and High Courts, or through statutory land rights legislation in various states and territories of Australia. The *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (referred to subsequently as the ALRA) provides the most useful comparison of processes for dealing with indigenous land-

related conflicts, particularly on the question of identification and registration of landowners. The Act allows for certain lands to be granted as inalienable freehold estates to Aboriginal Land Trusts on behalf of traditional Aboriginal owners, and provides for the establishment of Aboriginal Land Councils as the main decision-making and administrative bodies to liaise between traditional Aboriginal owners of land, the Government, mining and other industry groups, and the general public. The Act ensures a secure source of funding for the Aboriginal Land Councils from consolidated revenue, based on calculations according to the amount of royalties received by the Government for mining on Aboriginal land. There are currently two large land councils covering the northern and central regions, as well as two smaller land councils covering the Tiwi Islands, and the Groote and Bickerton Islands. The land councils are governed and staffed by indigenous people, with access to advice from lawyers and anthropologists, and have the greatest degree of financial and political independence from Government control of any similar bodies in Australia (Nettheim et al. 2002).

Although Aboriginal Land Trusts hold title to Aboriginal land, they are “essentially passive holders of title”, relying on the relevant Aboriginal Land Council to administer their affairs and to convene meetings to advise and consult the traditional owners of the land held by the land trusts on all issues, and to mediate or conciliate any conflicts among the traditional owners of the land trusts and between them and other Aboriginal people with interests in the land, including disputes about membership of traditional landowning groups (Nettheim et al. 2002: 243). Where mediation and conciliation fails, Stead notes that Northern Territory land councils have power to resolve disputes as to the traditional Aboriginal ownership of Aboriginal land (Stead 1997: 165):

“This power arises from s.23(3), and similar provisions, which require a land council to identify the traditional owners of Aboriginal land for the purpose of performing certain functions. These functions include obtaining consent regarding development proposals and the distribution of royalties and other benefits to traditional owners. A key effect of these responsibilities has been to progressively ensure that the land councils in the NT identify and act under instructions from traditional owners and that they widely consult with them in order to do so.”

In contrast to land registration systems which require fixed identification of individual landowners, the Northern and Central Land Councils do not maintain public registers of

landowners, but instead regularly consult with Aboriginal communities and are able to continually update the information they hold on the specific identity of traditional landowners of different parts of the Land Trust areas, to take account of dynamic processes in customary land tenure. In the event of competing claims to traditional ownership of Aboriginal lands, land councils in the Northern Territory may attempt to conciliate the dispute and, if unsuccessful, may make a decision regarding traditional ownership (Stead 1997: 165).

Aboriginal Land Trusts in Australia provide an example of an empowering administration body which gives control of the land to the Aboriginal Land Councils as an extension of the landowning groups themselves. This can be contrasted with the NLTB in Fiji which has been criticised to take away the control of customary landowners. Aboriginal Land Trusts also try to bridge the divide between the Western statutory framework of land titles and the customary land tenure systems used by Indigenous Australians. While the greater land area is granted as inalienable freehold to the land trusts, the governing Land Councils themselves do not require registration of land to particular landowning groups and can accommodate a flexible customary tenure system. Dispute resolution practices of the Aboriginal Land Councils rely at first on consensual participatory processes such as conciliation, and a decision is only made when these processes do not provide results.

5.3 The Importance of spirituality and healing in indigenous conflict transformation (United States of America)

After almost a century of introduced Western processes of adjudication through the American court system, the Navajo people in North America began a process of consciously returning to traditional ways of justice. Navajo dispute resolution bears some superficial resemblances to processes of Western mediation and arbitration, however, it aims to provide holistic healing of relationships and follows principles of compassion, cooperation, friendliness, unselfishness and peacefulness. An often-described process is the *hozhooji naat'aanii*, or peacemaking process. It involves prayers and ceremony, which help individuals to find their proper place again and to function harmoniously with everything else. It is related to customary concepts of illness and healing and involves the direction of supernatural power to remove or overcome evil. The peacemaker's role is it to guide the parties to harmony and peace, his or her authority is persuasive and not coercive (Bluehouse & Zion 1993: 331).

Bluehouse and Zion describe a land dispute in which the peacemaker uses the art of storytelling and analogy to impart customary wisdom and acceptance of communal ownership of land to the disputing parties. Stages in the process involve an exploration of the parties' position in the universe, understanding the disharmony, and determining whether the parties are ready to attain harmony and peace again. Peacemakers are not neutral mediators in the Western sense. They have strong opinions about good and evil and the process includes an element of decision-making (Bluehouse & Zion 1993: 333).

Walker argues that the value of indigenous models of conflict transformation lies in the restoring of relationships and the holistic approach, which includes individual and communal needs, as well as spiritual and natural harmony. Western models of dispute resolution often solely focus on individual needs and interests and therefore are less meaningful and inclusive than customary practices (Walker 2004: 536). Native American processes relate to paradigms of interconnectedness, emphasise process and relationships, provide a holistic experience and work in an expanded conceptualisation of time. These processes may relate much better to customary systems of land tenure, which also emphasise group and kinship relationships, interconnectedness, spiritual importance of land and non-linear concepts of time, than Western introduced processes can.

6. Conclusion: Lessons for Designing Effective Land Management and Conflict Minimisation Systems in the Region

Land-related conflict is common in virtually all Pacific Islands Forum countries. Disputes over land arise over land administration issues, including benefit sharing, land tenure and ownership, and over land boundaries. They can become particularly heated when foreign or local private sector investment plays a role and dispute resolution becomes more complex when disputants originate from different cultures or custom areas. However, every country and region has developed mechanisms to deal with such conflict. Some of them work better than others, but almost all land related customary dispute resolution systems in the Pacific emphasise the importance of local custom and the desire to engage people from the

community or the region who are knowledgeable and locally authoritative as dispute resolvers.

Conversely, most PIF member countries have given the power to determine land related disputes to state based institutions such as land courts, land tribunals, or commissions. This focus on centralised power has changed the resolution of land-related conflict in the region. In some countries this has led to a replacement of customary dispute resolution processes, in other countries it has led to integration of both systems or the co-existence of a grass-roots and a formal level of dispute resolution (Crocombe 1988: 114).

Before any comparisons are made between processes and lessons learned it should be noted that it is difficult to draw comparisons between processes from different countries, since every process needs to be examined in its particular cultural, social, legal and political circumstances (Boege 2006; Solomon Islands Law and Justice Sector Institutional Strengthening Program 2003: 6).

6.1 Land-related conflict is inevitable

This desk study has shown that land-related conflict is prevalent in many regions of the world. Conflict is an integral part of social systems and occurs in all cultures (Besnier 1990: 291). It is not the total prevention of land-related conflict that needs to be researched, but its peaceful and effective resolution. Even though there is plenty of criticism of land courts and commissions in the Pacific it needs to be noted that there can be no perfect system which achieves satisfying results for all disputing parties. In many land-related conflicts participants try to maximise their gain. This is only more natural where land has not only economic value, but where it is at the root of identity, spirituality and worldview. When land dispute resolution systems are introduced or changed it is important to provide realistic information and dispel any myths that new systems will provide the panacea for land disputes to prevent the disillusionment that is reported from Vanuatu.

Often arguments can be based on many different principles such as different interpretations of custom. In these cases, it will be difficult to ascertain who is right and who is wrong; the 'losers' will most certainly feel disappointed and consider the decision unjust and not right (Crocombe 1988: 115). It is desirable to ensure that disputes are contained and do not move

to direct violence. While the prevention of destructive responses to land-related conflict is critical, many of the established introduced processes (such as court processes, land commissions or land registration) focus more on the settlement or resolution of particular disputes and rarely address structural injustice such as the unequal distribution of wealth, or power imbalances between well-resourced and informed foreign investors and less powerful customary landowners.

6.2 State-based dispute resolution processes in the Pacific

Rights-based dispute resolution provided by state courts has led to the abolition of warfare as a power-based dispute resolution process and has replaced it with an introduced system of Western-style adversarial courts. Although often introduced during colonial times, not universally accepted, and frequently slow and costly, land courts and other decision-making bodies still serve an important function in resolving land disputes and provide stability to PIF countries, as can be seen from the description of the Land and Titles Court in Samoa. These courts also serve a function of providing checks and balances to the power of chiefs as traditional decision-makers in cases where this power could be abused. Recourse to rights-based appeal systems can help strengthen the perception of fairness, legitimacy and state-based authority.

Where rights-based systems are well established, they should not be replaced overnight by other ways of resolving disputes, but should be strengthened and improved to better serve the needs of landowners and communities. This requires adequate resources, staffing, training and monitoring. Delays in the hearing of cases can be addressed by appointing more decision-makers.²¹ Anecdotal evidence from Solomon Islands suggests that Local Courts fell into disuse and lost respect because of the falling away of government support, particularly in relation to sitting fees since the start of the ethnic tensions in 1999 (Krone 2007: 7). Courts, similar to other state institutions, can only function properly if they are given the necessary resources to carry out their tasks. In societies where most disputants cannot afford to pay large court fees themselves these resources may well have to be provided by the government. The review and improvement of court systems, particularly at the local level, is therefore vitally important if they are to play a role in land dispute resolution.²²

6.3 Customary Dispute Resolution Processes

6.3.1 Advantages of customary processes

Customary dispute resolution processes like customary debate, customary conciliation, or chiefly determination can facilitate a change in the social reality of the village community which is necessary to deal with the dispute and its effect on the people. As participatory processes they are well suited to accomplishing this task. Since effectively the whole community is participating in the decision-making process and supports the discussion and determination, the parties often accept the decision more easily, as when compared to cases where a single individual or even an unknown bench of judges determines the dispute. Dinnen contends that Melanesian dispute resolution processes share some broad similarities. These include their inclusive and participatory character; acknowledgment of the social context of disputes and their impacts on a variety of parties. There is also an emphasis on relationship and reparation for harm done, the importance of dialogue and negotiated decision-making, as well as attempts to reach consensus solutions (Dinnen 2006: 402). Many of these characteristics can also be found in other parts of the Pacific.

Customary systems of dispute resolution are most effective where population density is low, and where the land is used mainly for subsistence gardening under shifting agriculture. They are often already in place, cost no or only little public money, require no specially trained staff such as lawyers, and do not need to keep and maintain records, buildings, or vehicles. Customary processes were also created to deal with the particular customary land tenure system in their region, just as Western court processes evolved alongside the rules of law that they governed. Since customary land tenure rights were rarely absolute and principles could be modified according to social, economic and political factors, customary dispute resolution processes generally displayed enough flexibility to adapt to the changing circumstances (Crocombe 1988: 116). In contrast, Western courts rely on precedent or written rules and cannot simply adapt to changing circumstances without a change in the law. As the example of Timor-Leste shows, customary systems can provide effective dispute resolution in places where the introduced system simply cannot reach due to lack of resources. A recent report on justice delivered locally in Solomon Islands recognises that 80% of the population live in rural areas with poor communications and infrastructure. These people are remote from

national court sittings and even from police services. Chiefs are an important resource for the administration of justices in these areas (Krone 2007: 1).

Customary processes bear resemblance to Western restorative justice and ADR processes such as mediation and share many of their advantages, such as consensus-based decision-making and a high level of participation in the process. In addition to this, many customary processes include reconciliation ceremonies and powerful apologies. These processes are often more important than actual conflict resolution talk in customary conciliation or decision-making.²³ This relationship dimension of the conflict resolution process is mostly absent in introduced dispute resolution processes. As the examples from the Pacific and the Native American peacemaking processes show, reconciliation ceremonies can provide powerful ways of reconnecting individuals and groups and can address deep underlying conflict. They may be particularly helpful for land-related conflict resolution.

6.3.2 Disadvantages of customary processes

Customary processes also have disadvantages. There are often no safeguards in place to prevent abuse and protect weaker parties from being disadvantaged by the system. Sometimes chiefs or big men, and not the wider community or the disputants, are seen to gain most of the benefit from customary processes. On the other hand, it needs to be noted that parties with more access to resources and authority also have benefits in independent Western court trials due to better legal representation and financial power (Crocombe 1988: 116). The combination of judicial functions with political power, which often falls together in the person of a chief or big man, can also create problems. This creates a tension that Western courts attempt to overcome by separating judicial, executive, and legislative powers. Another weakness of customary approaches can lie in the fact that they often contradict universal standards of human rights, have a limited sphere of applicability, and are geared towards the preservation of the 'good old' order (Boege 2006: 15). The review of the CLT in Vanuatu and the description of customary debate on Tanna raise the question, whether customary dispute resolution processes disadvantage women.²⁴ Customary systems can also lead to reduced productivity, where large areas of land are unused as 'disputed no-man's land' (Crocombe 1988: 116). Customary processes are endangered by social change and the loss of

traditional knowledge. They often have problems dealing with foreign interests or can lose their effectiveness when disputes are being argued through the media.

6.3.3 Need for more recognition of customary resources

The question of whether customary processes should be preferred over introduced or hybrid models can only be answered for each particular country or province and requires detailed research in the field. It can be argued that customary systems of dispute resolution should be recognised and supported for areas of low population pressure and where there is little cash cropping, as they have usually proven more effective than introduced systems. As population rises, farming becomes more commercialised and outside influences impact on the land tenure systems, such as for example in Vanuatu and Fiji, advantages of independent full-time court systems may increase. The nature of the dispute and the expectations of the parties also play an important role. Transitions to more Westernised systems need to be correctly timed, and infrastructure needs to be in place with trained dispute resolvers such as judges, resources, buildings, vehicles, staff for record keeping and other tasks, and also the capacity to inform the population about the new services, to build trust in the new system, and to monitor its performance (Crocombe 1988: 117). Where more formal dispute resolution mechanisms are necessary, or integrated solutions such as local or village courts, which decide on the basis of custom are preferred, these need to be recognised and supported by the higher courts (Corrin Care 1999: 112).

When customary dispute resolution processes are evaluated, it needs to be taken into account that these processes may not always comply with Western non-indigenous bureaucratic requirements, such as external financial accountability or neutrality. Rather than judging customary systems less efficient than Western introduced systems, questions need to be asked about the measures and benchmarks against which performance is judged (Nettheim et al. 2002: 361).

All three case studies highlight the importance of customary dispute resolution. In Samoa the village *fono* and Land and Titles Court provide forms of customary dispute resolution that are central to the peaceful handling of land-related conflict.²⁵ In Solomon Islands it is argued that customary land tenure and landowners must be taken seriously when planning development policy and projects. Customary land dispute resolution must be supported and the role of

chiefs in land dispute resolution should be strengthened. It has also been suggested that chiefly roles in mediation, reconciliation and consultation on land issues should be recognised in the Constitution and that the decisions of chiefs should be recognised in the courts of law as binding on the parties.²⁶ Vanuatu has recognised the importance of chiefs as dispute resolvers and the need to have *kastom* as the basis for land dispute resolution in the establishment of the CLT. Although there are many problems associated with it, it highlights the decision to rely on custom instead of introduced rules.²⁷ This view seems to be shared by most countries in the region. Where grass-roots level dispute resolution processes below the village or island court level have been maintained, these should not be substituted by any new or changed processes, but should be strengthened to provide early, cost-efficient, quick and, most importantly, culturally meaningful access to dispute resolution for land disputes. Just as informal negotiation serves to resolve the majority of disputes in almost every society around the world, customary processes may be able to filter out a large number of disputes that do not necessarily have to enter a more formal arena.

6.4 Integrating customary and introduced processes

As the examples from East Timor and North America show, customary dispute resolution processes can co-exist with introduced court-based dispute resolution and can provide localised and timely access to dispute resolution. Introduced state-based processes are often used to provide checks and balances for the customary system in the form of appeal processes.

6.4.1 Efficient appeal systems

The examples of the Vanuatu Island Courts and the Local Courts in Solomon Islands illustrate the problem of abuse of appeal systems for disappointed parties. An appeal system is only of value if the appeal body can review the matter in due time. Time, resources and the viability of the whole system can be compromised when every agreement or determination from the customary system is appealed to the Western courts. On the other hand the right to appeal a decision is in line with international human rights standards. Western court systems advocate the supervision of lower courts and tribunals by higher appellate courts to correct unbalanced processes. Nevertheless, the limitation of appeals to one or two instances is

common in Western court systems, and could prove helpful for reforms of Pacific systems (Crocombe 1988: 124). Appeals to a rights-based dispute resolution process offered by the state may also be necessary to improve the status of women in relation to land disputes. Corrin Care points out that women are often excluded from customary dispute resolution systems, even in societies where title to land is descended through matrilineal lines. Equality and freedom from discrimination are now protected by most constitutions in the Pacific region, although the reality on the ground is often different (Corrin Care 2006: 61). It is suggested to improve this power imbalance by strengthening women's options in the formal justice system, which might also improve their status in negotiating power in the customary system (Corrin Care 2006: 81).

Rights-based appeal systems need to recognise the power and knowledge of customary dispute resolvers and only intervene where the customary system does not function properly or where there is tension between customary practices and constitutionally protected rights. This recognition may require the review and reform of existing legislation and court procedure.

6.4.2 Hybrid systems

Recently the integration of customary and introduced processes and the creation of hybrid systems such as the Vanuatu Customary Land Tribunal or even the Land and Titles Court in Samoa have gained attention. PNG is an example of a variety of different processes, formal and informal, co-existing under the framework of the Village Courts. This points to the possibility of effective integration of introduced and customary ways of managing land conflict. It is essential that customary landowners have infrastructures that reflect their aspirations and assist communities to exercise and enjoy their rights. If integration is attempted, it must be a careful process, implemented with input from customary landowners, local customary leaders, local and national government and other stakeholders. Consultation processes, such as the one described by Paterson (2005) in relation to the CLT in Vanuatu, are not only necessary but mandatory, and need to be carefully followed if hybrid systems and new custom-derived processes are to be successful. The review of the CLT shows that mistakes were made when implementing the CLT system and currently it is uncertain if the

CLT will gain widespread acceptance in Vanuatu. Therefore utmost care must be taken when implementing such hybrid systems.

6.4.3 Separate land courts

A related question arises regarding special jurisdiction in land matters. Customary land tenure systems are very different from Western real estate law. Customary knowledge, status and community membership often are often more important than legal training and advocacy skills in disputes over land. Therefore the argument can be made that land courts and appeal instances should be separate from civil and criminal courts. This way dispute deciders have the opportunity to become experts in land matters and can fully concentrate on understanding the importance of custom. Modified or separate land courts also have the advantage that they can choose a procedure that is more in line with custom and do not have to adhere solely to an adversarial court process. The counter-argument emphasises economic considerations, such as the costs of setting up a separate system and the scarcity of monetary and human resources. Ultimately because of the importance of land to Pacific Islanders and the frequency of land disputes separate land courts or tribunals may prove a viable option for a number of Pacific Islands countries (Crocombe 1988: 123).

6.4.4 Addressing issues of legal pluralism

Not only does the relationship between customary and introduced methods of dispute resolution need to be clarified, but also the tension between custom and introduced law itself. Western courts use statutory and common law as the basis for dispute resolution. Many Pacific courts and constitutions also recognise custom as basis for decision-making in disputes over customary land. Unfortunately the relationship between the two is almost always uncertain and many statutes that have been passed infringe on the recognition of custom.

In Samoa the Land and Titles Court does not have its own written rules of procedure. The Supreme Court Rules apply, but they are designed for operation in the adversarial system and do not fit with the inquisitorial approach of the court. This has created uncertainty as to practice and procedure and has led to criticism of the court. Another problem is associated with the legal recognition of the village *fono*. It has been pointed out that the *Village Fono*

Act, although acknowledging the importance of the village *fono*, has unwittingly limited its the power.²⁸ Legal uncertainties are also prevalent in Solomon Islands and there is need for a review and update of the statutes dealing with land, for example the *Land and Titles Act* 1994.²⁹ In Vanuatu it is argued that a variety of acts dealing with the status and transfer of land rights breach the constitutional guarantee of customary land tenure (Simo 2006: 7). This could mean that in some cases, for example in Vanuatu, there is a need for law reform and the clarification of the relationship between custom and statutory law.

6.5 Addressing cases of foreign and private sector interests

Customary village level dispute resolution mechanisms are often insufficient where foreign or local private sector investors are concerned and the outcome of the dispute could lead to a change in the way the land is used, such as development for resorts or resource extraction. In these cases the customary owners often lack full understanding of the benefits and drawbacks of leasing arrangements. People do not realise that if they lease out their land, they might not be allowed to access it any longer or that they have to recompense tenants for any improvements made on the land. Further problems arise when individuals or groups register land to which they have no customary connection to profit from lease agreements with investors. Here intervention is necessary to counteract the asymmetrical relationship between well-resourced and knowledgeable investors and customary landowners (Jowitt 2004). A number of possible solutions can be drawn from current practice in the Pacific. Fiji has established the Native Lands Trust Board, which administers all leases of customary land. In other countries, such as Cook Islands, Vanuatu or Tuvalu leases are only valid if approved by the court, land commission or minister. Experience in Vanuatu, however, suggests the limitations of the latter approach in practice. Often the approving institutions lack the resources to monitor the situation closely and to prevent landowners from signing leases that could be detrimental in the long term.

6.5.1 Use of restorative justice processes to establish dialogue and build capacity

Jowitt (2004) advocates the use of restorative justice practices to address the current land-related conflict in Vanuatu. Although she does not explain how she envisions restorative

justice processes to address the power and information imbalance between landowners and investors, she effectively promotes capacity building and dialogue between investors and landholding groups to improve understanding and sound decision-making in regards to development projects and their short-term and long-term benefits and drawbacks. Establishing a dialogue and improving reciprocal understanding of landowners and investors may result in short-term delays of projects as dialogue processes need to be established, but may garner long-term gains when conflicts can be prevented or when solid relationships are formed that can deal with future conflicts. Because of the similarities between restorative justice processes and customary dispute resolution processes this approach may be acceptable to both customary landowners and foreign or private sector investors.

Questions arise as to who bears responsibility to initiate and conduct such processes and who needs to be invited. Responsibility can lie with the national or provincial government as one of the beneficiaries of development and investment. Restorative justice attempts to include all interested stakeholders. This could alleviate the competition between customary landowners to receive the greatest benefit from developers and lead to fairer agreements. The registration process itself could be made conditional on the results of the restorative justice or dialogue process.

Other questions involve the form of dialogue or restorative justice. Processes need to be culturally meaningful for all involved parties. In this regard restorative justice may be better suited than Western problem-solving workshops. On the other hand the process should also involve the necessary capacity building, personal and institutional, to allow a more equal dialogue and negotiation.

6.5.2 Government protection of customary landowners

Some intervention from the state or its agents may be necessary where customary dispute resolution processes cannot address an imbalance of information or power. Here the informed decision-making of customary landowners must be protected, even if this means that prolonged information, registration or review requirements need to be implemented. These processes, whether they are based on custom, the rule of law or restorative principles, are important conflict prevention and early warning systems which can address future conflict before it matures into destructive disputes. Again, these systems need to be reviewed and

improved for the particular country and region. In Solomon Islands the government has been asked to engage with customary owners and provide more information on rights, benefits, rehabilitation and compensation for potential mining and other resource extraction projects.³⁰

Examples of institutions that can protect local landowning groups and improve their capacity for informed decision-making and negotiation are the Native Lands Trust Board in Fiji and the Aboriginal Land Trusts and Land Councils of the Northern Territory of Australia. Because the Aboriginal Land Trusts in Australia administer the interests of different landholding groups they can draw on more resources, for example legal advice, than the individual groups themselves. This can help to reduce the power imbalance mentioned before.

6.6 Land registration and land recording

Land recording and land registration have been attempted in many PIF countries. There is little evidence in the literature that land registration is of value as a conflict prevention or dispute resolution process. On the contrary, land registration schemes often serve to incite further disputes and can lead to violent responses, as seen in the 2001 protest against the World Bank land registration scheme in PNG. In Solomon Islands there are calls for voluntary recording of land, but also warnings that formal recording could result in restricting the flexibility of customary tenure and lead to patterns dictated by Western notions of property and economic development.³¹

For some countries, like Nauru or Niue (Angelo 1993: 171; Deklin 1993: 152), records of land titles or genealogy records help in the decision-making. In other countries, like PNG, the discussion about land registration has triggered violent conflict. Successful practices will quite possibly depend on the circumstances in the particular country. The land administration practice of Aboriginal Land Councils in Australia attempts to maintain customary systems of tenure within a legal system based on registered land titles and statutory land laws. The greater land areas are granted as freehold land to Aboriginal Land Trusts and within the freehold area more flexible customary systems that do not require recording or registration prevail. These practices may require further research to determine suitability for the Pacific region. Currently it seems advisable not to progress land registration schemes to the detriment of other dispute or conflict resolution processes and to review the benefits and

drawbacks of the many land recording and registration projects already underway in many parts of the Pacific. Lessons from Solomon Islands point to the need for clear government policy and strategic review of the law governing land to address uncertainties and issues of legal pluralism.

6.7 Importing ADR and other Western dispute resolution processes

Although many Pacific societies are unfamiliar with the term ‘alternative dispute resolution’, Hassall has argued that in effect ADR is used extensively in many Pacific Islands Forum countries (Hassall 2005). Often the processes used bear strong resemblance to mediation and restorative justice in particular (Dinnen 2006: 401). Principles of empowerment, recognition, respectful listening, storytelling and joint decision-making are important in ADR as well as in many customary dispute resolution processes in the Pacific (Lunabek 2003: 12). Howley suggests that village chiefs and other traditional leaders are a strong resource for conflict resolution and that their capacities as conflict resolvers should be extended. Mediation and restorative justice training are a way to achieve this (Howley 2003: 217). Such training is undertaken, for example, by the Peace Foundation Melanesia in Bougainville.

Where conflict fractures relationships within a community³² the customary approach to resolving it often focuses on restoring order and social harmony within and between communities and the restoration of relationships between victim and offender. The process involves the community gathering around to discuss what contributed to the incident. To develop a common understanding of what went wrong, they must negotiate a consensus regarding the interpretation of past events. This can be a very long process that relies on much dialogue around establishing facts and the truth. Once this is achieved, perpetrators can confess and apologies can be made and forgiveness granted by the victim. Community members serve as witnesses and are involved in the forum, deliberating a sanction that will rehabilitate the individual in order to restore community. Such settlement processes involve chiefs or elders who facilitate discussion and negotiate compensation (typically items of significance within the community), which is a major component in settlements in order to recognise the wrong done and re-establish the relationship. Compensation here takes the place of violent exchanges. The high levels of social inter-dependence in small communities require restorative rather than punitive approaches.

Conflict resolution processes in the West operate under significantly different ideological orientations to conflict and people. Individualist ideology “views the human world made up of radically separate individual beings, of equal worth but with different desires (perceived needs) whose nature it is to seek satisfaction of those individual needs and desires” (Bush & Folger 1994). The satisfaction of individual needs dominates Western culture and accompanying conflict resolution processes.

Because of these underlying conceptual differences the simple adoption of foreign ADR practices cannot be recommended. Rather more research into traditional methods of dealing with conflict should be conducted to allow for a comparison with Western techniques. This could support the evolution of a style of dispute resolution which is best suited for the particular society or social group (Corrin Care 1999: 113).³³

6.8 Improving and developing systems for land conflict management

Looking beyond state- and community based land dispute resolution, the field of Conflict Management Systems Design for organisations emphasises the importance of stakeholder participation. Disputants are more likely to engage positively with dispute resolution processes, when they have participated in their design (Costantino & Merchant 1996: 66). Multi-tier processes which combine low level participatory and facilitative processes such as mediation with higher level rights-based processes such as arbitration or court adjudication provide good results. This can be compared to the appeal practice in land disputes in the Pacific, where disputants tend to make use of appeal processes. Family or village level consensual dispute resolution systems could provide broad access for conflicting parties with rights-based appeal processes available if these systems fail to produce acceptable solutions. So far research into improving and developing conflict management systems has only been conducted using Western style ADR processes and not customary processes. However the Timorese and Australian examples described above show that customary and Western systems can work together to effectively manage land-related conflict.

In addition to this, the use of pilot projects is recommended before systems are introduced on a wider, possibly even country-wide, scale (Costantino & Merchant 1996: 152). Processes

should also be monitored at all stages of the implementation and feedback should be sought from the people that have used the system with the option of changing and adapting the design if necessary.

6.9 Need for individual Pacific solutions instead of imported systems

Simo has pointed out that the CLT uses “a ‘one-size-fits-all’ *kastom* structure” for dispute resolution. This is not in accordance with the diversity of *kastom* in the different islands of Vanuatu and leads to an inflexible system not in line with *kastom* itself (Simo 2006: 42). This is a lesson which may be relevant to the region as a whole: Because of the ethnic and cultural diversity of Pacific Islands countries, dispute resolution processes need to be researched, evaluated and implemented for the particular countries or, if necessary provincial regions, and cannot be imposed using a ‘one-size-fits-all’ approach.

It follows that any system changes need to be Pacific solutions, and not rely solely on the introduction of more Western theory and practice. ADR and other processes could, however, serve as a source of information, and for critique and comparison, which could benefit the development of successful localised dispute resolution practices for land-related conflict.

6.10 Need for more research ‘on the ground’

From the literature reviewed it cannot be ascertained whether grass-roots level dispute resolution procedures should be facilitative, advisory or determinative. Wider and deeper research needs to be conducted than was possible under the mandate of this desk review to evaluate particular local problems on the ground and best practices and challenges for resolving these. An elicitive approach, which respects the knowledge and experience of local people, as described by Lederach (1995; 1997), is suggested for this research.

Many sources in the literature need to be verified, as practices may have changed since the considerable amount of time that has lapsed since publication of some of the materials. This can only be done through field research on the ground and consultation with stakeholder groups, governments, dispute resolvers and communities. Conflict management systems

design principles confirm that consultation is the first step in a successful design process, and that stakeholder acceptance is greater if the stakeholders are part of the design process. New approaches and changes to the current system should be tested in pilot projects before costly changes to legislation are made or existing organisations are abolished.

There needs to be further exploration of which systems are most suitable for the particular country, region and community and how they can be implemented. Processes should be tailored to the particular needs of the stakeholders involved and ‘one-size-fits-all’ approaches are not likely to yield good results for all situations. Often decisions about the particular type of forum, staffing, training, use of legally trained representatives and appeals are often made quickly and without thorough consultation of stakeholders due to funding pressures and political needs. The existence of so many radically different ways, many of which have proven to be of little effect, point to a need for further research on the ground before dispute resolution systems for land conflict are established (Crocombe 1988: 123).

6.11 Impact of social change and globalisation on conflict management

Regardless of the dispute resolution process used, unsatisfied disputants who are unwilling to accept the result may be an increasingly common phenomenon as people learn about rights and dispute resolution options that they were ignorant of before, and as they increasingly make use of mass media and legal representation. Dispute resolution systems need to be able to adapt and change with the changing environment if they do not wish to become obsolete over time.

Where conflict is caused by structural injustice and unfair distribution of resources, more emphasis should be put on honest dialogue and development assistance to improve the situation than on improving dispute resolution processes which deal with the superficial disputes instead of resolving or transforming the underlying conflict and the unequal relationship of the people involved. Here a discourse focused on the relationship between governance and economic development is needed.

7. Recommended Elements for Inclusion in the Proposed Regional Land Management and Conflict Minimisation Framework of Action

7.1 People in the Pacific have a cultural knowledge of successful ways of resolving land-related conflict. This knowledge needs to be recognised, respected, supported and extended. Dispute resolution systems need to be based on this knowledge instead of adopting practices from other parts of the world.

7.2 The cultural diversity and diversity in land tenure throughout the Pacific works against generalised approaches to land dispute resolution and requires localised, culturally meaningful and acceptable systems of conflict management that rely on the knowledge, needs and concerns of the people involved.

7.3 Where rights-based systems, for example courts, are in place, they need to be reviewed, reformed, and properly funded, staffed and supported. The interface between customary and rights-based processes needs to be reviewed to address issues of legal pluralism. This may require law reform and a reform of appeal structures.

7.4 Where private sector or foreign investment interests collide with the interests of customary landowners extra care needs to be taken to protect the interests of the local people and to establish open dialogue and capacity-building so that all involved parties understand the full consequences of development and investment and can make informed decisions. Restorative justice processes may be suited to assist in this capacity building. Unfair legislation that disadvantages customary landowners needs to be reviewed and reformed.

7.5 Land recording and land registration projects need to be reviewed for their benefits and drawbacks before they are promoted further as valuable conflict prevention mechanisms.

7.6 In the same way that custom evolves and changes over time, conflict management systems can evolve and change. Field research needs to be conducted into what processes are currently available and what their strengths and weaknesses are. On the basis of this research, systems can be improved and evolved.

7.7 New systems should be introduced slowly and only after extensive stakeholder consultation, information and training. Pilot projects may help to establish best practices.

7.8 Information-sharing networks that allow comparison and evaluation of successful and less successful conflict management practices can assist Pacific Islands countries in improving their systems and in learning from their neighbours and other countries. This may also assist in adapting to the effects of social change and globalisation.

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Annex 1: Case Study - Samoa

1. Introduction

1.1 Definition of Terms

1.1.1 Custom

The term ‘custom’ or ‘customary law’ is not defined in the Samoan Constitution, but the *Land and Titles Act 1981* defines ‘custom and usage’ or ‘Samoa custom and usage’ as ‘the customs and usages of Samoa accepted as being in force at the relevant time and [including]:

- a) The principles of custom usage accepted by the people of Samoa in general; and
- b) The customs and usages accepted as being in force in respect of a particular place or matter (Art 2).

This definition avoids three potential problems. First, by referring to ‘custom’ instead of customary law it avoids arguments about the, often illusory, line between the two. Secondly, the reference to customs ‘in force at the relevant time’ avoids the suggestions that ‘custom’ must be ancient in order to qualify. Thirdly, the reference to customs ‘in force in respect of a particular place’ avoids arguments about how widespread a customary rule must be to warrant recognition.

1.1.2 Samoan Terms

Samoan terms are defined in Appendix 1.

1.2. Key information

The Independent State of Samoa, known formerly as Western Samoa, and since 1997 simply as Samoa, is in the centre of Polynesia, about halfway between Hawaii and New Zealand. It has a land mass of 2,934 sq km, spread between two main islands, Savaii and Upolu, and eight smaller islands, over a sea area of 10 sq km. The capital is Apia, on Upolu. The terrain

is characterised by narrow coastal plains with volcanic, rugged mountain interiors. The population is about 182,000 and the major languages are Samoan and English. The country is devoutly Christian, with about 47% of the population belonging to the Congregational Christian Church of Samoa. The country has a Westminster system of government with a unicameral parliament, which has a term of five years. Candidates for election to Parliament must hold *matai* (chiefly) titles – 47 members are elected by all Samoans over 21, while the remaining two are elected by voters with no village affiliation. The Constitution appointed the first two successive Heads of State for life, with successors to be elected by Parliament.

1.2.1 Historical background

Samoa has been inhabited by Polynesian people since at least 1000 BC. In the early 1800s settlers started to arrive, and in 1899 Samoa became a German colony. After the outbreak of World War I, New Zealand assumed control and after the war the League of Nations gave it a mandate to continue this arrangement. After the Second World War, Samoa was administered by New Zealand as a United Nations trust territory. In 1947 an executive council of state and a legislative assembly were introduced. In 1962 Samoa became the first Pacific Island country to gain independence. The written Constitution was brought into force by a Constitutional Convention.

The Land and Titles Court is the direct descendant of the Land and Titles Commission established in 1903 by the German administration as a means of peacefully disposing of disputes between Samoans over *matai* titles and customary land. In 1934, under the New Zealand administration, it was reconstituted as a court of record called the Native Land and Titles Commission.³⁴ The Commission was renamed the Native Land and Titles Court and some changes were made to its constitution by the *Native Land and Titles Protection Amendment Ordinance* 1937. The Land and Titles Court is now governed by the *Constitution* and the *Land and Titles Act* 1981.

2. Overview of land tenure system

Land is part of Samoan identity and culture and its value cannot be assessed in economic terms alone. The Constitution recognises three types of land: customary, freehold and public.

Freehold land is land held in fee simple. It confers an absolute interest, the only restriction on which is that dispositions must be registered in the Lands Registry and sale to a non citizen requires the consent of the Head of State. Public land is land that is neither freehold nor customary and is the term used to refer to land held by the State. It includes all land below the high water mark. The amount of land in each category was estimated in 2003 to be about 81% customary land; 4% freehold land and 15% public³⁵ (Taule'alo et al, 2002).

Customary land is land held in accordance with Samoan custom and usage. Outside the formal system, customary land is divided into four categories: *vaomatua* (forest), *faatoaga* (plantation), *tuamaotama ma tuaaoa* (residential yards), and *tulagamaota ma tulagalaoa* (residential sites) (Va'ai, 1999: 42). Customary land is not individually owned, but is 'attached' to *matai* title or, in the case of uncultivated land, the collective titles of the *alii ma faipule* (high chiefs and orators) of the village. The four different types of customary land are subject to different types of *pule*: (authority) constitutive, distributive, exploitive and protective (Vaai, 1999: 42, 48) All land within the village boundary comes within the constitutive and protective authority of the village. Except in the case of forest land, this coexists with constitutive and protective authority of the family. Distributive authority resides in the *matai*, except in the case of forest land, where it lies with the village. Exploitive authority lies with the authorised occupant (Va'ai, 1999: 42).

Customary land is protected from alienation by an entrenched provision of the Constitution (Art 102), which makes it unlawful to alienate or dispose of an interest in customary land.³⁶ However, this is subject to the power of the State to compulsorily acquire land (*Taking of Lands Act* 1964) and the power to grant a lease or a licence with State approval (*Alienation of Customary Land Act* 1965).³⁷

3. Cultures, Change and the Land Tenure System

Samoa has been relatively successful in maintaining its traditions, and a complex code of social rules exist. Custom is fairly homogenous, although local variations exist,³⁸ largely driven by geographical factors, exposure to Western practices, and the personality of the *matai*. There are about 330 villages and each is made of several *aiga* (extended families). The power that an *aiga* wields in village affairs is proportionate to its size and rank or status. At

the head of each *aiga* is the *matai* (chiefly head of the *aiga*). The *matai* directs the *aiga*'s social, economic and political affairs. The *matai* title is not automatically inherited (although blood relationship is a factor in selection); rather, the honour is bestowed by the family, taking into account the candidate's record of service to the family and village and sometimes the wish of the dying *matai* (*maveaga*). (So'o and Fraenkel, 2005: 337; Va'ai, 1999: 52). Each village has a *fono* (council) made up of the *matai*, as representatives of their *aiga*. The *fono* is responsible for governing village affairs and is discussed further below. The other strong influence in the village is the church. The local pastor is usually endorsed by the *fono* and attempts to introduce other religions are strongly resisted.

In past years, the number of titles has increased significantly. Between 1961 and 1979 the number of *matai* titles rose by just over 150% (So'o and Fraenkel, 2005: 342). However, this figure may be misleading, as many *matai* hold multiple titles and some titles are held jointly (So'o and Fraenkel, 2005: 343). It has been suggested that the increase in titles has led to a movement towards recognition of individual rights and succession by the heirs of *matai* to customary land and that this has, in turn, given rise to conflict with community interests and increased the potential for disputes regarding the *pule* (authority) over land. (O'Meara, 1995: 140). However, this view has been contested on the grounds that it is based on a misunderstanding of the notion of *pule* (Vaai, 1999: 47-48, 256-258). It has also been pointed out that junior *matai* do not acquire the same rights to land as senior *matai*, and joint holders of titles did not necessarily have parallel rights to distribute land. Further, *matai* residing outside a village do not always retain *pule* over village lands (So'o and Fraenkel, 2005: 346). Notwithstanding the conflict of opinion concerning its cause, individualisation is occurring particularly in relation to customary land, near market areas and through the purchase of freehold land (Ward and Ashcroft, 1998: 69-70).

A related, but more specific, problem that is arising in relation to land stems from the fact that the *Land and Titles Act* permits a *pulefa'amau* (registration of authority). The Act defines this in terms of 'ownership' and this has caused confusion amongst Samoans.³⁹ A *pulefa'amau* is registered in the name of an individual rather than the *aiga*. The Court accepts that registration of a *pulefa'amau* entitles the holder to exclusive rights of occupation and use of the land, which may be inherited by the heirs of the registered *matai*. Thus it has been argued that registration of a *pulefa'amau* is being used as a device to individualise

landholdings, and this threatens the traditional basis on which society operates (O'Meara, 1995: 150). This process arguably amounts to alienation, in which case it may be unconstitutional as it offends Art 102.

4. Land-related Conflict

4.1 Examples of land-related conflict:

Generally speaking, disputes relating to customary land in Samoa fall mainly into the following categories:

- a. Competing claims to *pule* over customary land;
- b. Disputes concerning the use of customary land;
- c. Disputes as to the status of customary land;
- d. Disputes concerning compulsory acquisition of customary land;
- e. Disputes concerning compensation for compulsory acquisition of customary land;
- f. Disputes concerning the propriety of the decision of a court relating to customary land;
- g. Disputes concerning the constitutionality of a court relating to customary land; and
- h. Disputes as to boundaries of customary land. Boundaries are not usually surveyed (Elisara, 2000: 35).

With regard to freehold land, speculation and dramatic increases in prices may become a source of conflict.⁴⁰ Traditional patterns are also being challenged by urbanisation.⁴¹

An example of disputes in category (e) is the Salelologa case, where a dispute as to the amount of compensation paid by the government for the acquisition of land for the port of Salelologa was referred to the Supreme Court.⁴² The Court held that compensation should be reassessed on the basis that there is no distinction between customary and freehold land. Instead of increasing the compensation, the government returned 2,439 acres of the acquired land to the village, retaining only 400 acres.⁴³

4.2 Conflict management processes for land-related conflict

Customary land disputes are extremely common in Samoa. Like other disputes, they may be settled by negotiation either with or without the help of third parties. By virtue of custom and usage, disputes concerning land attached to *matai* title are usually settled within the family by the *matai* who will usually consult other family members before reaching a decision.⁴⁴ Where settlement is not achieved, the applicable forum for resolution of disputes relating to customary land depends on the nature of the dispute. The applicable forum is determined by a complex array of legislation, custom and common law. The possible forums are:

- i. The village *fono*;
- ii. The Land and Titles Court;
- iii. The Supreme Court (with an appeal to the Court of Appeal);
- iv. The Land Investigation Commission; and
- v. Arbitration.

4.3 Summary of processes on the ground

4.3.1 Village fono

Each village has a *fono* made up of all the village *matai*. At present there are about 350 village *fono*. The authority of the village *fono* has been recognised by statute (the *Village Fono Act* 1990). It meets in accordance with the custom of the village to resolve minor disputes and deal with village affairs. Within the *fono* there are strict rules of rank and the *ali'i ma faipule* form the core of the decision making process. The *faipule* (often referred to as 'talking chiefs') will take charge of the proceedings, but the *ali'i* (high chief) has the final word, after listening to the deliberations of the lower ranked *matai*. The jurisdiction of the village *fono* is limited to persons ordinarily resident in the village and living on customary land. Whilst it may make decisions about land use, its jurisdiction regarding disputes is limited in some villages to uncultivated village land; decisions regarding cultivated land will be made by the *matai* with *pule* over the land, usually in consultation with the family. Where there are disputes between *matais* on matters such as boundaries these are usually referred to

the Land and Titles Court rather than dealt with by the *fono*. There is an appeal to the Land and Titles Court which may allow or dismiss an appeal, or refer it back to the *fono* for reconsideration.

4.3.1 Land and Titles Court

The Land and Titles Court is governed by the Land and Titles Act 1981. It is constituted by at least four members, including the President or Deputy President, at least two Samoan Judges and one assessor. The appeal division is constituted by the President and two Samoan Judges who must be *matai*.

The Land and Titles Court has exclusive jurisdiction in all matters relating to Samoan names and titles and in all claims and disputes between Samoans relating to customary land. It also has express statutory jurisdiction to determine pule over customary land being compulsorily acquired (*Taking of Land Act 1964*) and hearing of objections to the granting of a lease or licence of customary land (*Alienation of Customary Land Act 1965*).

The Land and Titles Court also hears appeals as of right from the village *fono*. The appellate division hears appeals from original decisions of the Land and Titles Court with the leave of the President.

The law to be applied by the Land and Titles Court is expressly stated to be custom and usage and the law relating it, the Land and Titles Act and any other legislation with express application.

Otherwise, the Court is to decide matters in accordance with what it considers to be fair and just.

The Land and Titles Court does not apply the Supreme Court Rules, although it is authorised by the Act to do so, and appears to take an inquisitorial approach. Hearings are normally attended by the parties and their family members. Legal practitioners have no right of audience. Decision is by majority and Samoan Judges and Assessors have an equal voice in the final decision. The Act provides that decisions are judgments *in rem*, which means they are binding on all persons affected, whether parties to the case or not. This may raise a question of constitutionality, but this is not discussed further in this study due to space

constraints. Decisions must give reasons and be pronounced in open court. Copies of the decision may be purchased by parties and the public.

4.3.2 Supreme Court

The Supreme Court has exclusive jurisdiction to deal with disputes over compensation for land that is compulsorily acquired under the *Taking of Land Act* 1964. It also has jurisdiction to resolve with objections to certain decisions of the Land Investigation Commission (*Land Titles Investigation Act* 1966).

The Supreme Court has also asserted its jurisdiction to review decisions of the Land and Titles Court and Land Investigation Commission either under its supervisory jurisdiction or by way of declaratory judgment.⁴⁵ The Supreme Court also has jurisdiction to review a decision of the Land and Titles Court, the village *fono* or a decision of a *matai* if it contravenes a fundamental right guaranteed by the Constitution.⁴⁶ There is a right of appeal to the Court of Appeal from the Supreme Court.

4.3.3 Land Investigation Commission

The Land Investigation Commission ('the Commission') inquires into claims to individual ownership of land. The members of the Commission are the Chief Justice, the Director of Lands and three members appointed by the Head of State, one of whom must be a Senior Samoan Judge, four of whom must be present during any inquiry.

The Commission is empowered to determine whether land is customary, freehold or public land and whether or not the claim has been established. Its decisions are by majority. If the Commission determines land to be customary land it must refer the matter to the Land and Titles Court for *pule* to be determined.

4.3.4 Arbitration

The *Arbitration Act* 1976 provides for a process of arbitration. Parties may include a term in a lease of other contract relating to land (including customary land) that any dispute will be referred to arbitration. Arbitration clauses are commonly found in leases of customary land. The Act makes provision for appointment of arbitrators and other parts of the process, if

these have not been provided for in the contract. The Act also provides that the decision of the arbitrator will be final.

5. What Works and What Doesn't

5.1 Tensions arising from legal pluralism

The underlying cause of tension in customary land dispute resolution arises from the fact that there are two legal systems in Samoa: customary and introduced. These systems have different origins and are based on very different values. Competition between these values comes to a head when questions about customary land arise. Some of the most obvious conflicts and problems are outlined in this section.

5.1.1 Lack of clear rules

Although custom is defined, its content is not written down. The lack of clear rules may be seen by common lawyers as a source of uncertainty. On the other hand, the flexibility of custom law may be an advantage, permitting a holistic approach to dispute resolution. So far, the Land and Titles Court has resisted declaring general rules of custom. A related issue is that the precise relationship between custom and other sources of law is unclear. Whilst the constitution and legislation are stated to be superior to other sources of law, the relationship between customary law and common law is not expressly stated, so it is not clear which takes precedence in the common law courts (Corrin Care et al, 1999: 78-79).

5.1.2 Uncertainties as to procedure

The Land and Titles Court does not have its own written rules of procedure, although the Act provides for the Head of State, acting on the advice of Cabinet, to make rules to regulate its practice and procedure. The Act also provides that the Supreme Court Rules apply, unless inconsistent with the Act. These rules are designed for operation in the adversarial system and are in need of reform. In fact, those rules are not used and are inappropriate, being designed for operation in the adversarial system and being in need of reform. In practice, the Land and Titles Court appears to take an inquisitorial approach, and this appears to be

permitted (s 47(2)). Beyond the fact that the procedure is inquisitorial, little is known about exactly how the Land and Titles Court operates.⁴⁷ The uncertainty as to the practice and procedure of the court has led to some criticism on the basis of lack of transparency. There are significant delays in the Court,⁴⁸ but this problem has recently been addressed by the appointment of a full time President⁴⁹ who has reduced the waiting time for a hearing to six months. There are also a large number of adjournments.⁵⁰

5.1.3 Conflict between custom and written law

The recognition of the village *fono* by the *Village Fono Act* is an acknowledgement of its importance. However, by setting out the available penalties the Act has been held to prohibit the imposition of other sanctions, and has thereby limited the power of the *fono*, rather than enhanced it. For example, the Supreme Court has recently held that the *fono* is no longer empowered to make banishment orders.⁵¹ Another reason given for the Court's decision was that the village *fono*'s procedure did not guarantee that a person affected would be given notice of proceedings or a right to be heard and that this conflicted with the constitutional guarantee of the right to a fair trial. There are counter-arguments to this, including the fact that the village *fono* is not a court and that whilst there is no written notice, those involved would be informed through word of mouth. Further, there is normally a hearing and untitled men are usually entitled to make representations through their *matai* (Corrin Care, 2006a).

Gender discrimination is also an issue that arises in customary land dispute resolution. It has been argued that the *Village Fono Act* entrenches patriarchal and status based norms of customary law, and that these powers have sometimes been abused by traditional leaders (Meleisea, 2000). Women are involved in decision making at the family level and those who hold *matai* titles sit in the *fono*. However, although the number of female *matai* is gradually increasing, they do not generally form part of the decision making elite.⁵² It should also be noted that women may succeed to *matai* titles although the practice favours male heirs.

5.2 The strengths and weaknesses of the *matai* system

Custom and tradition constitute a strong, cohesive force in Samoa. This assists in preserving peace and harmony in society. Due to respect for the *matai*, many disputes appear to be

resolved at family level. Further, Samoa is one of only two regional countries which has attempted to integrate traditional dispute resolution with the formal court system (the other being Solomon Islands), by expressly recognising the authority of the *matai* in the village *fono* and providing an appeal to the Land and Titles Court. It is expressly authorised to resolve matters in accordance with custom and usage, without having to compile a written record. This is very different from ‘customary’ courts established by legislation in some other Pacific countries, which are burdened with written rules of procedures and Western practices.⁵³

On the other hand the fact that most customary land is ‘attached’ to *matai* title is not without problems. The traditional system is facing a challenge from growth in population and arguably from the growth in the number of titles and the corresponding movement towards recognition of individual rights. Individualisation through registration of a *pulefa’amau* also poses a challenge to communal ownership and decision making.

5.3 Alternative dispute resolution

The avenues for settlement once a dispute has been referred to the court system are extremely limited. The Report of the Committee on *Matai* Titles, Customary Land and the Land and Titles Court recommended a proactive role for the Registrar of the Land and Titles Court in the mediation and settlement of proceedings (Government of Western Samoa, 1975: ch 8). Although the Act makes limited provision in this respect, in practice, it appears that the Registrar and his staff resolve a large number of cases without a hearing.⁵⁴ This informal dispute resolution involves *talanoaga* or discussion at an unofficial meeting attended by the disputants (Va’ai, 1999: 190).

Recent amendments to superior court rules in other countries, such as Vanuatu, have introduced compulsory mediation as part of the court process (Civil Procedure Rules 2002 (Vanuatu), Part 10).

There is no legal aid or public solicitor’s office in Samoa and no right to legal assistance in civil cases. In negotiations this may result in an inequality of bargaining power. It may also lead to inequities in court proceedings relating to land.

6. Lessons Learned from the Literature on Addressing Land-Related Conflict in the Country

Generally, the approach to customary land in Samoa has been to build on the strength of tradition and to try to find a balance between continuity and change. The strength of this approach, due to the legitimacy of the process, is perhaps the most important lesson to be learnt. Outside the formal avenues for dispute resolution, *matai* and the family have been left to deal with customary land in a customary way, and many disputes are resolved at family level. However, individualisation of title to customary land poses a challenge to the traditional basis on which society operates.⁵⁵

Disputes relating to land are common and there is significant tension between the customary and introduced systems, which are founded on very different values. Customary land dispute resolution is governed by a variety of Acts, which give jurisdiction to a variety of different forums.

The Land and Titles Court has an advantage over ‘customary’ courts established elsewhere in the Pacific for a number of reasons. Firstly, it has adopted an inquisitorial approach and is not bound by technical rules of evidence; secondly, it has been accorded superior status; and thirdly, appeals to the common law courts are not allowed. However, there are uncertainties as to the practice and procedure of the Court and regarding the rules of custom and usage and as to whether they are subject to the common law. Lack of access to legal advice is also an issue, not only in relation to representation in court but also in negotiations regarding compulsory acquisitions and leases to third parties.

The recognition of the village *fono* by the *Village Fono Act* highlights its importance. The Act expressly recognises that the *fono* acts in accordance with custom and usage, which contrasts favourably with some ‘customary’ courts established elsewhere in the Pacific. However, there are lessons to be learnt here about the danger of interfering in customary processes, as the Act may have unwittingly limited the powers of the *fono*. There are also conflicts between constitutionally enshrined rights and the composition and actions of the village *fono*, which raise complex questions of how to balance the different values they encompass (Corrin Care, 2006b). These questions are of relevance throughout the Pacific.

Lack of avenues for negotiation and mediation restrict the opportunity for settlement, particularly once court proceedings have been commenced.

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Glossary

<i>aiga</i>	extended family
<i>ali'i</i>	chiefs
<i>faipule</i>	orators
<i>fono</i>	council
<i>matai</i>	chiefly head of the <i>aiga</i>
<i>pule</i>	authority
<i>pulefa'amau</i>	registration of authority over land
<i>pulenu'u</i>	village mayor
<i>tautua</i>	service
<i>tulafale</i>	talking chief

Annex 2: Case Study - Solomon Islands

1. Introduction

Land conflict and conflict management in Solomon Islands need to be viewed within the specific dynamics of historic and current circumstances. Land has always been of political, social and economic importance and discussions about land are often charged with emotion (Ben 1979; Donner 1992). The nation is composed of many rich and diverse cultures, which have lived within communal land systems for centuries. These traditional systems have had to make room for irreversible changes brought about with colonisation, the market economy, independent nationhood and globalisation. The developing cash economy has introduced new roles for land, including commodification of the land and its resources. This has given rise to new land disputes, which now clog the courts (Solomon Islands Government 2007). While disputes about land are not new, the contradictions between traditional and capitalist economic values have exacerbated disputes between local people over decisions about what should become of their land (Burt 1994). According to some, the country's parliamentary democracy has been severely weakened since independence by unresolved social and legal differences, particularly about customary and other forms of land use and ownership (Amnesty International 2004). It is also a significant concern that land disputes impede the development of customary land in the country (Kali'uae 2005; Solomon Islands Government 2007).

Now, emerging from several years of so-called 'ethnic tension' in which land conflict was highlighted,⁵⁶ and searching for ways towards a stronger economy, land tenure⁵⁷ and land use are central national concerns and no longer simply the concerns of small land holding groups. There are increasing pressures for reform of land systems. Two strongly opposing views inform land reform discussions: that customary land impedes economic development and therefore reduces the common welfare, versus the belief that customary land tenure provides livelihoods and supports the social fabric of the population (Solomon Islands Government 2007). This case study focuses particularly on issues around customary land and demonstrates the complexity of resolving land-related conflict in contemporary Solomon Islands.

1.1 Key country information

Solomon Islands is a country with a land area of about 28,000 square kilometres, scattered over six large islands, dozens of smaller islands and hundreds of islets and atolls (Asian Development Bank 2006). The population of approximately 500,000 is culturally diverse, with more than 80 ethnic groups (Burt 1994) and a consequent diversity in land tenure arrangements. The population is predominantly (93%) Melanesian, 4% Polynesian with a small minority of Micronesians (1.5%) who were resettled there by the British colonial authorities during the decade from 1955, due to overcrowding in their native Gilbert Islands (now Kiribati), then also a British colony ruled together from Honiara (Bobai 1979). There is also a small minority of Asians and Europeans. Now with one of the most rapid population growth rates in the Pacific region, 3.04% in 2000 (Boydell 2001), pressures on land are increasing, particularly as land matters become integral to development.

Land in Solomon Islands encompasses the spiritual and cultural lives of the people, and is a significant factor in both group and individual identity (Hauirae 2003). For Solomon Islanders it is much more than a commodity to be bought and developed. Land provides for the livelihood of much of the population, of which 75% is not in formal employment and depends largely on access to land and sea for food production, as well as for housing, materials for tools, canoe-making, medicines, carving and weaving. In fact, land is the only asset held by a majority of Solomon Islanders (Solomon Islands Government 2007). Access to customary land provides significant yet informal social security to Solomon Islanders, of whom about 85% live in rural areas. There is no land that is considered to be 'un-owned' (Roughan 2007), despite the alienation of land during colonial times. In the economy, which is based on primary commodities from agriculture, forestry, and fishing, land and competition for its resources have become issues of vital importance. While disputes concerning land use and ownership have long been apparent in the Solomons (Kali'uae 2005), they mainly involve intra-group clarification of different types of rights over the land. It is, however, believed that disputes over land and its boundaries have increased due to large-scale resource extraction such as mining, logging and plantations (Kabutaulaka 2000), particularly where disagreements arise about distribution of income from sale of the resources.

1.2 Historic background

Solomon Islands was colonised by the British in 1893. Independence was granted in 1978 and the nation inherited a Westminster-style parliamentary democracy. Significant amounts of customary land had been acquired by foreigners during the colonial period and in 1977, any perpetual estate registered in the name of a non-Solomon Islander was automatically converted to a 75-year fixed-term lease (Haurae 2003). At independence, the Local Courts were given jurisdiction for customary land disputes as at that time, expatriates with insufficient understanding of customary land issues largely controlled the High Court (SILJSISP 2003).

Following the civil conflict years of 1998 to 2003, including a coup in 2000, the parliament authorised intervention by the Regional Assistance Mission to Solomon Islands (RAMSI) from July 2003 to collect arms and rehabilitate the severely weakened mechanisms of government. RAMSI is now actively working on three main areas: machinery of government, economic governance and law and justice (RAMSI 2007). The Law and Justice Program, formerly Solomon Islands Law and Justice Sector Institutional Strengthening Program (SILJSISP), has provided personnel and administrative support, as well as assisting with infrastructure and procurement for justice agencies and the courts to help ensure the various elements of the Solomon Islands justice system operate effectively, openly and fairly. This program included provision of Specialist Land Legal Adviser to work closely with the Department of Justice and Legal Affairs and the Chief Justice of the Solomon Islands High Court to further develop work towards a lands dispute resolution mechanism.

During the conflict period, tensions over land escalated⁵⁸ and uncertainties relating to land ownership contributed to the disputes (Sullivan 2007). Illegal squatting and use of customary land on Guadalcanal, particularly around Honiara the national capital, exacerbated by the commercialisation of land, rapid population growth, land pressure and poor management of the urban growth, aggravated conflict between groups from Malaita and Guadalcanal (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). The importance of land to indigenous Solomon Islanders was clearly stated by the Isatabu Freedom Movement, a Guadalcanal protagonist group in the conflict, which stated, 'Land is Our Mother, Land is Our Life, Land is Our Future' (Isatabu Tavuli, vol.1, no.3, 2

March 2000 cited in Kabutaulaka 2001). The deep concern for land is demonstrated in the key ‘demands of Guadalcanal’ recognised in the failed Honiara Peace Accord of June 1999, which included the:

- demand for a return of alienated lands belonging to the people of Guadalcanal in the process of developing Honiara as the National Capital and those alleged to have been acquired illegally by migrating Malaitans who form the largest group of workers employed by the government and private sectors in Honiara; and
- demand that a state government be established in Guadalcanal and other provinces in order to achieve in Guadalcanal: control over sale and use of land; control over distribution of wealth derived from Guadalcanal province and control over migration of people from other provinces to Guadalcanal (Amnesty 2004).

Conflict over control of land and resources has the potential to further affect social, economic and political arenas in Solomon Islands. Good land governance is therefore crucial at this time.

2. Overview of land tenure systems

Systems of land tenure in Solomon Islands include customary land (which can be leased under provisions of the *Land and Titles Act 1969*⁵⁹), government alienated and leased alienated land (Sofield 2006). Customary land now makes up about 87% of the country, while the government owns about 9%. A further 2% is leased to foreigners, whom the Constitution (Section 110) prevents from buying perpetual estates (Sullivan 2007) and the remaining land remains with individual Solomon Islanders (Kabutaulaka 2000).

2.1 Land legislation

This section will look at some issues arising around land legislation and customary land tenure.

The Constitution, the supreme law in Solomon Islands, gives recognition to customary law and hence customary ownership of land (Hauirae 2003). The Constitution of Solomon Islands, Schedule 3 part 3, states that customary law shall have effect as part of the law of

Solomon Islands. The *Customs Recognition Act* 2000 (though not gazetted) confirms this position. A complex legal pluralism resulting from the mix of indigenous law that survived colonisation, adopted foreign laws from numerous sources and post-independence law made by the Solomon Islands parliament and courts leaves the relationship between different categories of law unclear (Corrin Care 2001). As a result, there is a struggle to develop a consistent view as to the status customary land should be given within the courts and this affects land dispute resolution (SILJSISP 2003).

The *Land and Titles Act* mandates tenure requirements, processes of recording and registration, ownership rights, ‘secondary’ rights and titling on all registered land. The Act also deals with leases, compulsory acquisition of customary and alienated land, land allocation, transfer and sub-division (Sullivan 2007). Part 3 of the *Land and Titles Act* provides for a process aimed at *registration* of customary land by entering it in the Land Register. While Section 241 of the Act enshrines in legislation that all dealings with customary land must be in accordance with current customary usage, the Act does not provide guidance to determine the extent of ownership of land by customary groups.

The 1994 *Customary Land Records Act* Cap. 132, on the other hand, provides a mechanism for interests, boundaries and other relevant information about customary land to be *recorded* for groups. Section 19 of this Act also provides for registration of customary land:

- (1) Any customary land holding group whose primary rights are entered in the record may apply to the Registrar of Titles in the prescribed form to have their recorded primary rights registered.
- (2) The Registrar of Titles shall on receipt of such application take such steps as he may consider appropriate to effect such registration.

However, there is no prescribed form as stated by subsection (1), steps to be taken by the Registrar of Titles to effect registration are unclear and ‘registration’ is not defined within the Act.

Under The *Customary Land Records Act*, Part III, the recording process by the Recording Officer should include:

- (a) the recognised name of the customary land holding group claiming the primary rights in the application made under section 9;

- (b) the genealogy of the group showing the basis for membership of the customary land holding group;
- (c) the method in which membership of the customary land holding group may be granted to others;
- (d) the name of the person, or the names of the persons who shall represent the customary land holding group and give effect to any dealing which may be made in respect to the land affected by the application made under section 9;
- (e) the method by which the person or persons referred to in paragraph (d) are appointed, dismissed and substituted; and
- (f) the names of the groups of persons claiming secondary rights and the extent of the rights claimed.

There is a lack of clarity and some overlap in dealings about customary land in the respective pieces of legislative provision.

2.2 Customary land tenure

Customary land is defined in the *Land and Titles Act* Sec 2 as ‘any land (not being registered land, other than land registered as customary land, or land in respect of which any person becomes or is entitled to be registered as the owner of an estate pursuant to the provisions of Part III) lawfully owned, used or occupied by a person or community in accordance with current customary usage, and shall include any land deemed to be customary land by paragraph 23 of the Second Schedule to the repealed Act’. Customary tenure provides access to land for the majority of Solomon Islanders. It is an expression of social relationships derived through blood connections and historical associations, both of which determine varying access to the land and its resources through ‘a hierarchy of seniority within the broad group of all those who have a claim on the land, each person’s claim being assessed in terms of the closeness of their relationship to the leading claimants of the land’ (Burt 1994, p. 334). Principal customs with respect to land tenure involve birth inheritance, land use rights related to marriage, other usufruct rights and their conditions, exchanges within or between clans or tribes that include the transfer of land custodianship and in many areas, rights to assign tribal land or arbitrate over land disputes by tribal chiefs or recognised ‘land chiefs’

(Sullivan 2007). Claims to land require the clarification of clan genealogies and histories of relationships between people and their land over many generations, as well as knowledge about sacred places and ritual procedures (Burt 1994). In some areas, people with this special knowledge only voice it publicly with reluctance. The reasons for this include avoiding the destruction of the precarious social harmony among people from different areas who have settled in the same area (McDougall 2005), to guard it against ‘theft’ and falsification of genealogies that prove land ownership (Scott 2000) or to save a ‘trump card’ for the event of a land dispute (Foale & Macintyre 2000). Moreover, protecting one’s lineage narratives can protect the status of one’s own claim to land but also avoids denying the merits of another’s, which thus avoids open conflict over land (Scott 2000). Traditional land norms or laws are not well documented and are evolving over time. Land-owning customs and practices differ among the language and ethnic groups, making it difficult for uniform legislation related to customary land to be effective across the country (Hauirae 2003).

Customary land tenure is very complex, potentially involving a multiplicity of groups with differing rights for any parcel of land. In the Auluta Basin on East Malaita, for example, 23 tribal groups have recorded boundaries of their lands and varying usage rights thereof within the basin area (‘Success to determine customary land recording extension’ 2007). Parts of the country, including Isabel, Ranongga, Roviana and Guadalcanal are predominantly matrilineal, and women are the ‘guardians of their people’s land’, which is mainly passed down through women (Tetehu 2005). Although women in these areas inherit land from their mothers, men are usually the spokespeople for the land (Foale & Macintyre 2000; Tetehu 2005). Other areas have a predominantly patriarchal system of land inheritance. In practice, however, land entitlements in most of the Solomons can be inherited through both mother and father, though the systems of inheritance may be confused with unilineal systems of descent because of the dominance of descent through either the male or female line (Burt 1994). Customary land tenure systems in many parts of the Solomons are better characterised as predominantly cognatic – where rights can be inherited through either father or mother (Koke 1979). This provides considerable flexibility for differing rights to land and sea to accommodate changing tribal circumstances.

Customary land can be acquired in a variety of ways including buying it with traditional wealth, or transferring land to another clan for specific reasons. In some parts of Makira, for

example, customary land could be classified as ancestral land, bought land, land given for protection, land given for compensation, captured land or land as security for lending money to another (Burt 1994). In contrast to introduced systems of land ownership, there is greater indigenous emphasis on the social rather than economic dimensions of customary land transactions. Among the Kwara'ae and many other language groups, the givers of land would retain an interest in the land and if the new leaders of that land were to give it to another party, they would inform those who gave it to them originally. If the later owners of the land were to die out or leave the land, the givers of the land may take charge of it again (Burt 1994). The giving and receiving of land has created a complex pattern of leadership claims over land (Baines 2005).

Uncertainty of customary rules for inheritance and use of land and sea areas is now evident in some parts of the Solomons (SILJSISP 2003) as the knowledge that governs people's rights to the land is under pressure from a decline in the oral tradition and systems that do not recognise the value of social cohesion (Solomon Islands Government 2007). Customary tenure systems are also under pressure to adapt to population pressure, increasing demands for land for public use, greater social mobility and new activities within the cash economy (White & Lindstrom 1997). The power of customary leaders to determine land disputes has been diminished under the influence of colonial powers and the availability of other forums for land dispute resolution (Pacific Islands Forum Eminent Persons Group 2005).

Registration of customary land is possible under the *Customary Lands Record Act* 1994 and also the *Land and Titles Act* 1969, though little has been achieved due to resource constraints (Sullivan 2007). The Tribal Lands Unit in the Ministry of Lands, Housing and Survey (MoLHS) is responsible for customary land recording, but is inadequately resourced to cope with current and anticipated demands (Sullivan 2007).

A pilot project to record customary land tenure in the Auluta Basin on Malaita has recently been undertaken (Sullivan 2007), with a view to duplicating the process, once refined, in other areas.

3. Land-related conflict

Land is the base for rural livelihoods and concern over land issues remains a potential trigger for conflict (McDougall 2005). Land-related conflict is common throughout Solomon Islands and conflicts over land can linger and resurface over many generations (Kwa'ioloa & Burt 2007). It has contributed to the recent period of conflict known as 'the tension' and also encouraged the return of Malaitans to Honiara after being driven out during 'the tension' because land disputes blocked much economic development on Malaita and the people found it difficult to earn incomes at home (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). While land disputes have remained relatively constant over time, a breakdown in government and customary management and in particular non-violent conflict management and dispute resolution explains in part why violent land disputes erupted during 'the tension' (SILJSISP 2003). Land conflict is also significant because many criminal cases entering the courts stem from land disputes (cited in Kali'uae 2005 p.23).

3.1 Examples of land-related conflict

Causes of land conflict generally fall into four categories - law (or custom), tribal membership, boundaries and rights or interests. Paterson (Burt 1994; Kwa'ioloa & Burt 2007) identified the major causes of land disputes as:

- a. disagreement about the management or use of customary land;
- b. decisions about use of land by an unauthorised person;
- c. a lack of understanding by some of the decision makers about decisions made about the use of customary land;
- d. decisions knowingly made about the use of land which are later considered unsuitable by customary owners or those who have other customary rights to the land;
- e. belief that benefits from agreed use are not received by all entitled to them;
- f. projects agreed to by landowners that are thought to be harmful to others or the government; and

- g. disputes between customary chiefs that have implications for the management and use of land.

Land disputes commonly occur when people attempt to gain exclusive control of land for economic exploitation (SILJSISP 2003). There are also frequent disputes over rights to reefs, which tend to occur where there is disagreement over the sharing of money from the sale of resources fished from the reefs or where tribal groups disagree over the management of marine resources (Kabutaulaka 2000).

Many problems with land result from the treatment of land as a commodity and not recognising the depth of its cultural and spiritual significance (ANU Enterprises 2006). Logging and land disputes, for example, are closely interrelated (ANU Enterprises 2006). Respondents in RAMSI's 2006 People's Survey indicated that logging operations gave rise to land disputes (2000). One respondent from Western Province explained that logging causes land disputes due to unfair distribution of the royalties from logging and falsifying genealogies, upon which land rights claims are based (2000).

Land tenure and indeed Solomon Islands cultures themselves continue to evolve in the light of the processes of resource exploitation. Kabutaulaka (Solomon Islands Government 2007) wrote of hybrid cultures emerging as a result of the commercialisation of land and the resulting cultural construction and deconstruction. These processes produce winners and losers, triggering land conflict. Kabutaulaka (Solomon Islands Government 2007) describes the way in which Asian logging companies, not familiar with working in communally-owned land in their own countries, tend to create individual landowners, which ignores many people with rightful claims to the land. In places where there is pressure to develop land, competing claims as to who represents communities and who can negotiate for them in resources deals are frequent (Kabutaulaka 2000). Less educated people with limited connections are the most likely to be marginalised.

Alienated/crown land is also a source of dispute and there is increasing pressure for alienated tribal land held under perpetual estate title to be returned to customary owners (Kabutaulaka 2000). There are persistent concerns that land was sold too cheaply in the colonial past, sold by people with no rights to sell it and that the permanent selling of land was unknown so the historic transactions were misunderstood.

Neglect of the rights and grievances of indigenous landowners causes land conflict to last for lengthy periods. Russell Islanders, for example, who had their traditional land on Pavuvu leased by the colonial government to a plantation company in 1905 have for many years demanded that the island be handed back to them (Mamu 2007b). Despite this, more recently a logging permit was given to a Malaysian company. The Lavukal people, together with some NGOs resisted this logging, but the government sent police to protect the company. The confrontations have been intense and one anti-logging campaigner was murdered (Mamu 2007c). As the ancestors weren't paid for the land and there is an increasing population with increasing demands for land, Russell Islanders have called on the national government to pay them SBD\$300 million in compensation (Sullivan 2007).

Issues of land tenure and security of title around Honiara and the slowness of government response to sensitive land issues contribute to conflict at local and national levels. There are recent reports that leaders in Burns Creek settlement in Honiara, for example, have expressed concern over alleged plans of the national government to return all alienated land to the indigenous people of Guadalcanal. They believe that there has been a failure of the Ministry of Lands to provide titles to plots that they purchased in 1998 from a company that previously owned the alienated land. They urgently need clarification of their status in relation to the land they believe they have purchased legally (Baines 2005).

4. Conflict Management Processes for Land-related conflict

4.1 Customary land dispute resolution

Traditionally, a hierarchy of land recording and land rights allocation operates. Tribal chiefs,⁶⁰ 'land chiefs' or clan leaders maintain oral records (rarely written) of land tenure for their groups collectively for tribal/clan land. They also allocate land use rights to lines and families, within tribal/clan land. The tenure record is commonly oral – in some instances preserved through stories. It is information derived from traditional culture and its associated laws, and is generally understood by the landowning group. Except where land was taken by force, disputes over claims to land are settled by the leader of each level of the hierarchy, or

referred upward to the next level (Kwa'ioloa & Burt 2007). These processes continue today, to varying extents.

Customary processes are used for intra- and inter-group land disputes. The landowning group should settle clan/tribal land disputes, with the assistance of chiefs. The multiplicity of cultural groups in Solomon Islands means that there are no uniform processes. On Isabel, customary chiefs act as facilitators and do not have power over the land. Chiefs can bring disputing parties together and create an atmosphere in which differences can be resolved (Scott 2000) as they are custodians and experts in traditional culture that provides approaches to deal with difficult issues (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). People knowledgeable about their lineage, its history and sacred places are potentially very important in resolving land disputes ('Ulufa'alu reconciles with Guale tribes' 2007), whether or not they are chiefs. Unlike the Western adversarial approach to dispute resolution, customary approaches in parts of the Solomon Islands are usually based on consensus (Donner, 1992).

When there is an agreed resolution to a dispute, relationships may be restored through customary exchange of food and shell money. In a recent example of this, Malaitan former Prime Minister, Ulufa'alu, who during 'the tension' was ousted from land he had purchased from Guadalcanal landowners many years previously, made a ceremony to reconcile with the five concerned tribes (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). The ceremony, including hundreds of people, involved the distribution of food and shell money to the tribes according to custom and was made to restore the relationships to enable both groups to 'live together for a better future'.

Little is written about contemporary Polynesian approaches to land dispute resolution in Solomon Islands and Donner (Amnesty International 2004) has suggested that more research in this area is needed.

4.2 Introduced legal land dispute resolution

In the formal legal system, only Local Courts and the Customary Land Appeals Court (CLAC) have jurisdiction over customary land matters, but only after all customary means of solving the dispute have been exhausted, that is, if the chiefs have been 'unable to make a

decision acceptable to all the parties' (section 8D, *Local Courts Act* Cap 93 Solomon Islands, as amended). Land disputes are thus initially addressed by customary leaders who are knowledgeable about the land and skilled in dispute resolution (SILJSISP 2003). Respected leaders have popular endorsement of their clan to do this work, though as previously noted, there is increasing pressure on customary leadership due to rapid social changes occurring in contemporary Solomon Islands.

Local Courts are led by customary law leaders, usually village chiefs without formal legal training (SILJSISP 2003). No legal practitioners may appear before either the Local Courts or the CLAC, although one member of the CLAC, when sitting, must be a magistrate (SILJSISP 2003). In some places where Local Courts are not operating, existing chiefs' committees are used to arbitrate customary land matters (SILJSISP 2003). Legislation governing Local Courts and the CLAC is contained in the *Land and Titles Act* Cap 133.

Customary land cases from the CLAC can be appealed to the High Court, but only on points of law. Many cases do proceed, however, to the High Court and place a high burden there. There can be no appeal of customary land matters to the Court of Appeal (SILJSISP 2003). Appeals from the process of purchase, lease and compulsory acquisition of customary land go to the Magistrates Court and, on points of law, to the High Court.

In 2003, the establishment of a Customary Land Tribunal was proposed to take over customary land matters. It was anticipated that this would increase accessibility and community participation in land dispute resolution, though risk of bias and uncertainty about how to approach previously decided cases could impact adversely on its success (Sullivan 2007). The proposal recognises that in addition to chiefs, elders, community leaders or current members of the Local Court or CLAC, who are well versed in the customary rules applying to their area, are also suitable for panel membership (Kali'uae 2005). Men or women could be members. While the tribunal has not yet eventuated, the proposal was re-examined during 2005 and 2006. Feedback from consultations was considered, much more research work undertaken and potential risks such as bias were thoroughly assessed. The original proposal was re-worked and put forward as a Tribal Land Dispute Resolution Panel and sent by the Ministry to the Attorney General's Chambers for drafting.

4.3 Land recording to prevent disputes

There are moves towards preventing land conflict through standard recording and official recognition of customary land tenure, initiated both by customary leaders and the government. It is considered by some that well defined systems of recording land boundaries and owning group membership are useful strategies to prevent such disputes (Sullivan 2007), though this is not universally accepted.⁶¹ Advantages for registration are said to include that security of title and boundaries can reduce land disputes and provide a reliable avenue for land-based taxes. Disadvantages are said to include the improper recording of owners, the omission of those with usufructuary rights over the land, the establishment of boundaries actually increasing disputes and the process of registration causing disputes among landowners, as well as the high cost involved (Baines 2005).

There are various examples of such recording of customary land tenure. The Lauru Land Conference of Choiseul, established in the early 1980s, encompassing all Choiseul land owners, and some Vella Lavella landowners related by marriage, has the objective of defining customary land boundaries down to line or family level. It has been successful in using the customary chiefly systems to settle land disputes (Kali'uae 2005). The Conference convenes annually, to collate genealogies, which have traced back to 26 men who were the original 'discoverers' of all the island land. Some records go back through seventeen generations. Transfers for compensation or other payments have been noted. Tribal groups have begun to define and record land boundaries based on oral tradition. They have not, however, subdivided the land nor registered it.

The Santa Isabel Development Plan 2002-2007 also aimed for the Isabel Council of Chiefs with Provincial support to document customary land and sea tenure principles and practices and to clarify land and sea boundaries and clan ownership (1994).

Various groups on Malaita are also working to identify land boundaries, genealogies and differing rights within the lands ('Auluta project launched' 2007; Sullivan 2007). The Kwara'ae movement to document genealogies and land began in the 1960s and is still continuing. Burt (Sullivan 2007) indicates that this is an enormous task which requires public funding. The Auluta Basin land recording pilot project on Malaita, mentioned previously, is

an example of government and community working together to record land ownership (McDougall 2005).

The various possible systems for keeping track of customary land being used currently include:

- customary oral records kept by knowledgeable elders;
- informal recording of land details by customary leaders or groups;
- formal recording of land details under the *Customary Land Records Act*;
- formal registering of land under the *Customary Land Records Act*; and
- formal registering of land under the *Land and Titles Act*.

These various processes make for a complex system of records that do not articulate easily.

In addition, there is some confusion by people in the use of the terms ‘recording’ and ‘registration’ in relation to customary land. Recording involves writing down and preserving an historical record of the oral knowledge relating to an area of land and people’s rights over that land under either informal or formal guidelines (Rules Committee 2007). There is no guarantee that what is recorded is actually correct and it may still be open to challenge. It is the first step required for registering any land and can lead to registration if the data collected is in the form specified in legislation. Registration, however, is a legal process that implies recognition and protection under a recognised statute.

4.4 Alternative dispute resolution

Alternative dispute resolution (ADR) mechanisms are sometimes used in land disputes in Solomon Islands. In some land dispute cases, for example, church leaders take part, encouraging people to work to solve the dispute so they can co-exist in the same community (SILJSISP 2003).

There are plans to introduce ADR to the suite of legal options for land dispute resolution. The introduction of a mediation mechanism to the legal system is planned for late in 2007 (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). It is anticipated that this alternative dispute resolution approach will be able to be used

in land disputes to significantly reduce the time they currently take to work through the legal system (CJ Sir Albert Palmer, Pers. Comm. June 2007).

4.5 What works and what doesn't

It is generally accepted that the current dispute resolution system for customary land is not working and case studies recorded by the Solomon Islands Law and Justice Sector Institutional Strengthening Program (SILJSISP) demonstrate why. The current Local Court and CLAC system are based on Western processes and do not fit well with customary practice (Hardy-Pickering 1997). About 99% of cases which go through the chiefly system are not accepted as binding, reflecting a combination of factors including the breakdown of customary mechanisms of dispute resolution, the increasing challenges put on this system in the current social and economic environment and the undermining of customary processes by the introduced legal system. It takes far too long for cases to then progress from chiefs' committees through the Local Court, CLAC and the High Court. For this progression, the average time, from 10 randomly selected cases for the SILJSISP study, was 10 years, with the longest being 31 years. The common issue of new claims arising over the same land result in more delays.

Although the model of involving customary dispute resolution before referring land disputes to the court system is useful, it is not without disadvantages, including the fact that 'traditional means of settlement' could be said to include physical aggression or remonstrations. Insufficient attention and support is given to this level of settlement and there is some break down of the traditional means of dispute resolution, resulting from the displacement of customary rules by the introduced legal codes over several generations (Baines 2005). There is anecdotal evidence that negotiations by elders are not always carried out in good faith and there may be bias in deciding issues of custom in small communities. The advantages of making the customary chief negotiations compulsory do outweigh the possible disadvantages of a party to the dispute refusing to take this level of the negotiations seriously, not least because they build into the process an appropriate and efficient form of alternative dispute resolution that is already used in customary processes (SILJSISP 2003), however, the non-customary idea of Local Courts made up of chiefs has not worked well and the capacity of chiefs to facilitate land dispute resolution has been exceeded by the number

and nature of land disputes (Mamu 2007a). Written decisions of the Local Court are often inadequate as they do not deal with all the material facts and set out reasons for finding of fact, which leaves decisions open to appeal (SILJSISP 2003).

In a recent visit of court officials to the Polynesian outer islands of Malaita Province, land issues dominated the hearings (Solomon Islands Government 2007). It is estimated that between 70 and 90% of Local Court work deals with customary land disputes and customary land matters are thought to be responsible for the failure of the Local Court to function well (SILJSISP 2003). While RAMSI has been focusing with the SILJSISP on strengthening the Magistrates and High Courts, the Local Courts and CLAC are hardly functioning (SILJSISP 2003) and not receiving needed support. Some land cases have been waiting now for more than five years to be heard in a Local Court (CJ Sir Albert Palmer, Pers. Comm. June 2007).

Problems in the current land court system have been noted at all levels and the lack of resources, training and appropriate procedure is evident in the:

- tolerance of incorrect applications and pleadings;
- confusion by decision-makers over jurisdiction;
- prevarication of decision-making; and
- drafting of incomplete reasons for decisions (Foale & Macintyre 2000).

Some confusion is evident over the interface between custom and common/statutory law by Magistrates and other court officers. This is exacerbated by the lack of clear legal policy on the extent to which courts should recognise customary law and affects land cases (Corrin Care 2000; Foale & Macintyre 2000; Solomon Islands Government 2007). In addition, the legal status of reefs and rivers is unclear.

The overarching system of gendered power influences access to land dispute processes (Tagini 2001), with women having few opportunities to defend their land rights (Solomon Islands Government 2007).

Land administration is another issue that exacerbates land problems. The large backlog in the land registration office is indicative of limited capacity or will to address this immense issue. Though various groups are recording their land boundaries and other relevant details, this process demands a ‘massive financial input from landowners’, which acts as a disincentive

(Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). Procedures for the return of alienated land to customary owners also need clarification (SILJSISP 2003).

5. Lessons Learned from the Literature on Addressing Land-related Conflict in the Country

Pressures from development and population will continue to contribute to land conflicts in Solomon Islands, however, the literature indicates various actions that can help minimise disputes.

It is clear that land dispute resolution systems need to be strengthened at all levels in Solomon Islands (Haurae 2003; Pacific Islands Forum Eminent Persons Group 2005). Timely, accessible and effective customary land dispute resolution at the local level is particularly needed so that conflicts are dealt with while they are still manageable (Pacific Islands Forum Eminent Persons Group 2005). The slowness of the current processes of land dispute resolution should be urgently addressed. The need for better access to justice at local levels requires strengthening and support of customary justice systems as well as the Local Courts and CLAC, or alternatively, the introduction of the proposed Tribal Land Dispute Resolution Panel.

It is recommended that the role of chiefs in land dispute resolution be strengthened (Corrin Care 1999) however, the best form for such formal recognition needs further consideration (2003). The Pacific Islands Forum Eminent Persons Group recommended that chiefly roles in mediation, reconciliation and consultation on land issues should be recognised in the constitution, which already reflects a desire to incorporate customary values into the law, though the legal framework currently in place belies this intention (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). Haurae (Kabutaulaka 2000) suggests that decisions of the chiefs in their hearings of land disputes should be recognised in a court of law and should be binding to the parties to the dispute. While chiefly roles can be central in land dispute resolution, idealising them should also be avoided. The common discussions about who are the real chiefs should not be ignored. The provision of suitable support for chiefs in their land conflict resolution work may be helpful.

Further, the inclusion of other community leaders in land dispute resolution, in addition to chiefs, may be beneficial.

Managing the intersection of customary and non-customary systems operating in land governance is critical to preventing and managing land disputes (Koti 2007). To minimise land conflict, customary land tenure and land owners must be taken seriously when planning development policy and projects (Sullivan 2007). Stronger government support for customary landowners is essential. The Bugotu Landowners Association, which comprises more than 120 land trustees from around the Bugoto area of Isabel, for example, has called for more government support (Hviding 1993). They believe that active government engagement with such customary landowners groups, informing them of the rights, benefits, rehabilitation and compensation for potential mining on their land could help to minimise conflict around mining projects.

There are calls for voluntary formal recording and recognition of customary land ownership and even for legal registration of customary land (Burt 1994, p. 332), however there are also warnings in the literature that formal recording of the complex but flexible land tenure systems of Solomon Islands could result in restricting the essential flexibility of customary systems, essentializing them to unilateral and limited inheritance (Burt 1994) and freezing them ‘into a pattern dictated by Western notions of property and economic development’ (Sullivan 2007). Registration of land in the name of clan groups or leaders also leaves unresolved the question of the needs of those who depend on other claims to the land (SILJSISP 2003). Any decisions and processes need, therefore, to be carefully planned and evaluated if implemented. It is crucial before any further work is undertaken to record customary land tenure, in projects such as the Auluta basin, that there is a thorough examination of the legal basis of that process and its legal effects in terms of future challenge to any ‘record’ and to the legal effect of ‘registration’ on the tribal land holding – that is in particular, does it have the effect of giving only one or more representatives of the tribe total rights to the land in question. Is inappropriate use of the current legal framework capable of removing land from tribal tenure by its effect and without the consent and knowledge of tribal members? To minimise the marginalisation and disadvantaging of weaker land-holding groups, any process towards recording customary land must involve prior awareness and education programs (Kali’uae 2005; Solomon Islands Government 2007). They would also

require much time and the direction of considerable resources to support this work at village level to record genealogies and conduct anthropological research to clarify and strengthen the understanding of local customs and law (Kali'uae 2005).

Any approaches taken to making customary land more available for economic development need to be 'evolutionary and cautious' (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004). In particular, the lack of clarity of legal principles in relation to customary land use and management needs to be addressed (Solomon Islands Government 2007). Approaches to land that emphasise the traditional community base for resource management (rather than an individual focus), while protecting resources needed for subsistence and resource sharing are needed (Solomon Islands Government 2007). Given the Solomon Islands' indigenous focus on the relationships between people and land and the emphasis on restoring relationships central to customary land dispute resolution, the continuing importance of customary reconciliation processes in contemporary Solomon Islands land dispute resolution should not be underestimated.

Current legal and administrative institutions are ill-prepared to deal with the land issues they are facing. Legislation needs to be clarified and even prior to this, there needs to be agreement as to its goals. Clear government policy and strategic review of the law governing land is needed, for example, updating of the *Land and Titles Act* and the *Customary Land Records Act*. Capacity building for administration of land is extremely important at the national level and in parallel with national institutional capacity building, there should also be an emphasis on improving capacity for land use planning at the village and provincial levels (Hegarty et al. 2004). Institutions such as the Ministry of Lands, Housing and Survey need increased financial resources and support to increase its human resources to better administer the *Land and Titles Act* and the *Customary Land Records Act* (Weisbrot 1989: 78) and thus minimise land disputes and maximise land conflict resolution. Land policy development, its communication and implementation are of great importance and issues of land tenure and security of title around Honiara need to be addressed with well planned policy implementation (Sahlins, 1963).

There are many significant issues relating to land that Solomon Islands currently faces and these need to be addressed carefully and consistently in order to better deal with existing land conflicts as well as to minimise future land conflict.

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Legislation

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Land and Titles Act 1969

The Constitution of Solomon Islands 1978

Customary Land Records Act 1994

Customs Recognition Act 2000

Annex 3: Case Study - Vanuatu

1. Key Information

Vanuatu, formerly New Hebrides, is an archipelago of more than 80 islands in the South West Pacific. It is part of the region, known as Melanesia, which also includes Papua New Guinea and stretches down through Solomon Islands and Fiji (as independent states). Vanuatu has a landmass of 14,760 sq km. The two largest islands, Espiritu Santo (or Santo) and Malakula, account for nearly one-half of the total land area. Vanuatu's population is relatively small with just over 200,000 people. The majority of the population lives in rural areas. The capital is Port Vila on the island of Efate where 30,000 people live. The second most populated location is Luganville, on the island Espiritu Santo where 11,000 reside. This small archipelago is culturally diverse with more than 100 linguistically distinct cultures spread over approximately 60 inhabited islands. English, Bislama and French also are official languages. Both custom law, as well as 'introduced' or Western law governs Vanuatu. A member of the Commonwealth of Nations, Vanuatu has a president, a prime minister and council, and a unicameral parliament.

Vanuatu's economy is primarily agricultural; 80% of the population is engaged in agricultural activities that range from subsistence farming to smallholder farming of coconuts and other cash crops. Copra, cocoa, kava and beef account for more than 60% of Vanuatu's total exports by value and agriculture accounts for approximately 20% of GDP. Other natural resources include hardwood forests, fish, coconuts and coffee. Tourism is Vanuatu's fastest-growing sector, having comprised 40% of GDP in 2000.

1.1 Historical background

Vanuatu has a long history of habitation. European contact with the islands began in 1606, when the Portuguese navigator Pedro Fernandez de Queiros visited the archipelago. In 1774 Capt. James Cook made the first systematic European exploration of the islands, which became known as the New Hebrides. English missionaries began arriving in the early 19th

cent. In 1887, the islands were placed under an Anglo-French naval commission. The commission was replaced by a condominium in 1906, with the legal system and other governing arrangements split between the two condominium powers. During World War II the islands served as bases for Allied forces in the Pacific. In 1980 the New Hebrides became independent and known as Vanuatu.

1.2 Historical background - land

Western law dominates the formalised legal infrastructure of Vanuatu. From 1906 to independence in 1980, a condominium British and French Government jointly ruled the New Hebrides, the colonial name given to Vanuatu. Under the Condominium, New Hebrides operated a separate-but-equal policy, meaning that there were two sets of most administrative systems, including two legal systems. Independence saw the permanent establishment of a Westminster-oriented style of government that largely adheres to the English common law system.

Land however is an exception. At independence in 1980, Vanuatu abolished all freehold ownership in land and returned the alienated land to the customary owners. Prior to Independence, there had been extensive alienation of land to foreigners. The Constitution, post independence, vested all land in the Republic of Vanuatu with the indigenous customary owners and their descendants. This was to ensure a paramount place for indigenous values in matters of customary land matters.

The rules of custom then formed the basis of ownership and use of land, which means that land cannot be sold off or alienated. These rules were constitutionally guaranteed, with the Constitution requiring the Government to arrange for appropriate customary institutions or procedures to resolve disputes concerning the ownership of custom land. The relevant sections of the Constitution are:

Art. 73: All land in the Republic of Vanuatu belongs to the indigenous custom owners and their descendants.

Art. 74: The rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu.

Art. 75: Only indigenous citizens of the Republic of Vanuatu who have acquired their land in accordance with a recognised system of land tenure shall have perpetual ownership of their land.

Art. 78 (2): The Government shall arrange for the appropriate customary institutions or procedures to resolve disputes concerning ownership of custom land.

Over recent years, the land reforms introduced at independence and the protection offered by the Constitution have largely been undermined. Land alienations, which had played such a big part in Vanuatu's independence movement in 1980, have emerged again on a scale that threatens the livelihood of Ni-Vanuatu, the authority of the government and the country's social and political stability (Lunnay, Fingleton, Mangawai, Nalyal and Simo 2007: 3).⁶² In 2005, the Vanuatu Daily Post reported that two thirds of Efate had been "bought" (leased) by foreign investors and it is claimed that 90% of the Efate coastline is now in foreign investors hands (McDonald 2006:1). This led to the National Land Summit in October 2006 held to discuss the most important land issues facing Vanuatu and in order to prepare a set of resolutions to present to the national leadership for formulation of a National Land Policy.

1.3 Ni-Vanuatu Relationship with the Land

Land is of fundamental importance to the Ni-Vanuatu. Sethy Regenvanu, the first Minister of Lands in Vanuatu, likens land in Vanuatu to "what a mother is to a baby" (Simo 2006:1). Those involved with decision-making regarding land must be alive to the principles underpinning indigenous land issues if a cohesive and sensible solution to the multiple dilemmas surrounding land is to be found.

Under the *kastom* view of land, land defines identity and is part of the web of life that holds together custom, culture, history and community beliefs. Land is spiritual in that it is the "mainstay of a vision of the world...is at the heart of the cultural system...and represents life materially and spiritually" (Bonnemaison). It is also significant economically through agricultural production, providing what is needed for survival – food, building materials, medicines and homes. Land also is a political means of binding people together through clan or tribal groups (Brown 2000c). Land is not a commodity that is bought and sold nor is it something that people own. Rather, land belongs to a tribe or clan for them to use as needed (Simo, 2005: 2).

2. Overview of land tenure systems

2.1 Customary land tenure

Customary land tenure systems are well established in Vanuatu. While custom differs according to each area, a general principle is that people claim rights to land through their genealogy and membership in a tribe or clan. Land inheritance can be both through the male line and the female line depending upon where a person is from and which custom is practiced. These inheritance rights are only rights to use, control and manage the land, not 'own' it. Ownership is not vested in an individual; rather the group has obligations to the land where the traditional management of the land and its resources ensures that each person is provided for.

This right to use land is traced back to the original inhabitants on that piece of land, therefore the security of a custom title depends on the knowledge of the original inhabitants. Members of the tribes and clans know the history of the land which they occupy and this is passed on orally from fathers to sons, uncles to nephews, mothers to daughters, and aunties to nieces. Chiefs and village elders can also play a significant role in knowing the history of the land and therefore in tracing land rights for tribes and clans. The right to use land may also be conferred on non-members of the tribe via traditional leasing, which can be both temporary – the land is returned after a short period of time – and also permanent (Simo 2005: 3). In both cases, a custom ceremony takes place in the presence of the entire community.

2.2 Introduced land tenure system

The formal/introduced land tenure system allows for the leasing of land to foreigners through a system of land registration. A person may register a piece of custom land in the Land Registry at the Ministry of Lands. By doing this, the land is released from customary control and no longer belongs to a collective group. Rather, the titled land belongs to the individual who signed their name to it; it is placed under the control of the government and the national laws relating to land. Under the Land Lease Act 1988, people may then lease the registered land for business or residential purposes.

This system of registration and leasing according to Simo (2005: 5) emphasises individual land ownership and contradicts Article 74 of the Constitution with regards to the protection of custom ownership.

A number of pieces of legislation exist. The Report of the National Review of the Customary Land Tribunal Program in Vanuatu identifies that three laws, the *Urban Land Act* 1981, the *Public Land Act* 1981 and the *Land Lease Act* 1988 enable non-indigenous people to lease land in Vanuatu, proving an opportunity for alienation of land. This is considered unconstitutional (Simo 2005: 7).

3. Generators of land-related conflict

Land-related conflict in Vanuatu, as compared to other countries including Australia, is not concerned with claims from indigenous people trying to reclaim formerly alienated land from the state. Rather conflict over land occurs between people of the same indigenous culture (notwithstanding differences in custom). According to Tahi (2007) the National Land Summit 2006 identified that these disputes arose in part when trying to establish the true and correct custom land owners. Furthermore, disputes arose when the custom land owner “forgot that they represented other members of the family, tribe or clan when they signed a lease...” (Tahi 2007: 29). Disputes also exist between foreign investors, developers and custom owners.

3.1 Foreign development and leasing

Since Independence, land can no longer be sold by its owners. However, it can be leased for periods of up to 75 years, which essentially excludes two future generations of owners from access to their land. As such, leases are potentially a route to “de-facto alienation of customary land” (Jowitt 2004: 6). This is a significant problem in Efate as nearly two thirds of the land has been leased and much of the coastal land of the island has been alienated.⁶³ This is also occurring on other islands, such as Espiritu Santo. Some of the more significant problems associated with leasing are:

3.1.1 Compensation for improvements

Custom owners are allowed to lease their land to foreigners. Under the Land Leases Act 1988, custom owners may take back their land at the end of the lease. However, increasingly land leases are specifying that custom owners must make compensation for improvements made to the land before they can claim their land back. This often places the land out of the reach of custom owners who have no capacity to make such repayments.

3.1.2 Insecurity of lease holdings

This refers to the granting of leases by someone whose authority to grant the lease is not definitively recognised.

3.1.3 Strata-title developments

Strata title developments, where the land is sub-divided and then leased to another party/parties, do not require the approval of custom owners. This is significant in that strata title increases the lease compensation costs.

3.2 Family and kinship disputes

Family and kinship disputes over land and the subsequent leasing of land generate significant problems in Vanuatu. Commentators recount stories of land being entrusted to family members for the future benefit of the entire family, only to have those to whom the land is entrusted lease the land to foreign developers. Jowitt (2004: 6) says this situation illustrates the precarious situation with regards to land dealings in Vanuatu, the custom concept of people being custodians or trustees and not owners. Paterson also notes other instances of those entrusted with land for the benefit of the community or family taking control of the process of leasing to the disadvantage of other members of the family or community who also benefit from the land. He explains the practice of leasing customary land to spouses, thereby depriving their children of access to the land until the death of the spouse and of any person to whom the spouse may have sub-leased the land (2005: 21). Adoption is also another problem as since there are no permanent or official written records of adoption, it is difficult

to ascertain the legitimacy of succession claims made by people who claim to have been adopted by the deceased.

A recent Dateline episode titled ‘Vanuatu Land Grab’ (2006) reports incidents of landless families being welcomed onto another tribe’s land, only to register that land in their name and then lease it onto a developer. This case was in Pango village on Efate and while the matter will be settled in court, these conflicts have a tendency to generate bitter feuds capable of tearing villages apart and stirring violence towards foreign nationals. There has also been talk of burning houses and physical violence including killing.

4. Conflict Management Processes for Land-related conflict

Land disputes and their resolution are governed by custom as well as Western legislative procedures and outcomes. If the dispute relates to issues of ownership of customary land or the boundaries of customary land, and resolution is not achieved through traditional customary dispute resolution, then disputants may commence proceedings before the Customary Land Tribunals (CLT). CLTs should determine the rights of the parties to the dispute in accordance with custom. The Supreme Court exercises supervisory powers over the CLTs to ensure that they are observing statutory requirements about procedure and natural justice, but it does not become involved as to the substance of the decision (Paterson 2007c). However, if the matter relates to other issues such as terms of the lease, then the Supreme Court will adjudicate on the matter. The Supreme Court will also hear appeals from the Island Courts filed before the CLT Act came into force, however there are long delays in having these matters heard (Paterson 2007c).

Previously, Island Courts, essentially a modified Magistrates’ Court, heard land disputes that could not be resolved via custom. Under this system, three justices, all of whom were knowledgeable in custom, adjudicated land issues. While Island Courts were *supposed* to determine disputes according to custom, there was no guidance on what the definition of custom was or by what method custom was to be ascertained and applied (Thomas 1989). For this reason, 100% of claims that went through the Island Courts were appealed to the Supreme Court (Jowitt 2004: 4). In response to this, the Chief Justice refused to allow the

Supreme Court to hear appeals given the constitutional safeguards of custom regarding land disputes. In 2001, jurisdiction over customary land disputes was transferred to the Customary Land Tribunals by the Customary Land Tribunal Act.

4.1 Customary dispute resolution by chiefs

In all islands of Vanuatu, there is an existing hierarchical system of customary governance by councils of chiefs based on area and island councils. In the larger islands where the custom is the same, each of these areas is regulated by a council of chiefs drawn from that area. In some islands, due to size or custom diversity, it is divided into sub-areas, each sub-area is regulated by a council of chiefs drawn from that sub-area. In each island, there is an island council of chiefs for the whole island. In the larger islands, the island council of chiefs is drawn from representatives of the area council of chiefs. In the smaller islands where there is only one custom area, the island council is also the area council of chiefs.

The authority of the chief to resolve customary land ownership matters is recognised by statute. Chapter 5 of the Constitution provides for the role of the chiefs at the village, island and district level and to discuss all matters relating to custom and tradition (Art. 30 and 31). Also the National Council of Chiefs must be consulted by Parliament before passing the National Land Law (Art. 76). In 2006, the National Council of Chiefs Act was passed, taking the place of an earlier law that only made minimal provision for elections, meetings and voting (Lunnay, Fingleton, Mangawai, Nalyal and Simon 2007: 24). The Customary Land Tribunal Act (CLTA) also recognises the authority of the chiefs.

Chiefs have been reported to resolve disputes between parties in a manner that is often reflective of arbitration, in that it involves some type of decision-making by the chiefs. The parties meet directly with the Chief who will act as a third party decision-maker, and while all parties to the dispute get the chance to speak, the final decision as to what will happen lies with the chief. In land disputes, however, the presiding chief often utilises assessors who assist in the decision-making process. The chief in this instance announces the decision of the panel of decision-makers.

4.2 Customary land tribunals

The tribunals came into force on 8 December 2001 when jurisdiction over customary land disputes was transferred from the Island Courts to Customary Land Tribunals via the Customary Land Tribunal Act. The purpose behind the CLTA was to provide an effective and culturally appropriate means of land dispute resolution and was developed in response to the ineffectiveness of both the Island Courts and the Supreme Court (CLTA Sec. 1). The failure of the Island Courts and the backlog of cases in the Supreme Court exposed the need for law to directly address land disputes.

The CLTs are constituted in different ways, depending on the location of the land in dispute. A single village land tribunal may only deal with land within the boundaries of that village and is constituted by the principal chief as chairperson, two other chiefs or elders and a secretary appointed by the principal chief (CLTA Sec. 8). Where the dispute involves land of more than one village, the tribunal is referred to as a joint village land tribunal constituted by the principal chief of each village, two elders of each village and a secretary appointed by the principal chiefs acting together. A chief must be included in the approved list established by the Act in order to qualify for appointment.

Appeals from the decision of either of these two bodies lie to one or more higher Customary Land Tribunals, depending on whether the land in dispute lies entirely within a “custom sub-area” or extends over more than one “custom sub-area” or “lies partly within one or more custom areas that are not divided into custom sub-areas” (Sec.12 (2) (c)). There is a final appeal from a custom area land tribunal to an island land tribunal. The membership of the tribunals also vary, depending on the same criteria.

4.3 Supreme Court

Up until 2001 appeals against Island Court decisions in land disputes lay to the Supreme Court. Currently it also has supervisory jurisdiction in regard to CLTs. Any decision of the Supreme Court is final and cannot be appealed (CLTA Part 8 s39). Where disputes arise in relation to other issues surrounding land (e.g. the terms of a lease) the Supreme Court has jurisdiction.

5. What Works and What Doesn't

5.1 Tensions arising from legal pluralism

As noted in other places within this report, tension surrounding land disputes in Vanuatu exists due to the two legal systems that operate in the country.

One of the key problems associated with legal pluralism and land disputes is the totally different way in which each system views land. The custom system views land in terms of tribes or kinship groups as being the custodians of the land; they are collective landholders. According to Simo (2005: 7) the term 'landholders' more accurately describes the custom and the Ni-Vanuatu relationship with the land. 'Landowner' however is the terminology used by the Western or introduced legal system and perpetuates the concept of individual ownership.

Another issue in relation to dual legal systems is the tension between custom being an oral tradition and the Western law using written rules and conventions. Custom laws in Vanuatu have never been written down, they pass orally between generations. One of the strengths of this is that it allows laws to change and adapt easily in order to meet society's needs. This flexibility is a hallmark of custom law. This is in contrast to the introduced system that has been tagged as being too inflexible due to the rigidity of written laws. The strength of written law is the supposed certainty it provides.

Research on the CLT indicates that some islands in Vanuatu (North West Malakula) have adopted the practice of writing down guidelines based on customary land laws. The reasoning for this is to provide tribunal members with accuracy in relation to custom. However Simo (2005: 28) urges that any movement in this direction must proceed with caution.

5.2 Strengths and weaknesses of the customary dispute resolution system

The people of Vanuatu have long established culturally preferred means of settling disputes and preserving harmony that utilise localised forms of decision-making, conciliation and

restorative practices. These *kastom* practices continue to be preferred over the adversarial approaches of Western law as they are seen as legitimate and capable of quelling conflict.⁶⁴ In relation to customary land disputes, the CLTA expressly recognises the authority of chiefs and their role in the resolution of customary land disputes.

The Review of National Land Legislation, Policy and Land Administration in Vanuatu (2007: 25) concludes however that the institution of chiefs is at a crossroads in Vanuatu. The report indicates that their involvement in land dispute settlement is frowned upon by the judiciary, citing the Court of Appeal who claimed that the only bodies that have lawful jurisdiction are the Island and Supreme Courts. However, the report concludes that the future role of the Malvatumauri Council of Chiefs in particular is highly relevant for land administration.

Gender discrimination in relation to resolution of customary disputes was noted as an issue. While women play an important role in land issues (they tend to be the ones who cultivate gardens and support families), and they have participatory rights in decision-making about the land, the deficit in customary practice is the limited decision-making capacities of women (Paterson 2005b). However, it is acknowledged that this situation is dependent upon each island. In North Pentecost, for example, women who have knowledge on land rights, boundaries and genealogies are consulted. Regenvanu (2005a) says that the National Council of Chiefs recognises the need to address the gender issue and have engaged in training “much more than they have in the past”.

5.3 Strengths and Weaknesses of the Customary Land Tribunals

While the CLTA thrusts custom to the forefront of dispute resolution and strives to follow custom, there are a number of concerns around procedures, outcomes and processes. Simo (2005: 26) cites the need for claimants to put their dispute in writing and allow 21 days for opposing claimants to put their case forward, as an example of an approach that more closely reflects the procedures and outcomes of the Island or Magistrates’ Court which is based on Western law. Such a time delay in resolving the dispute does not occur in *Kastom* processes. Further, there are difficulties in developing a ‘one-size-fits-all’ custom system to resolve land disputes. While the CLT is a framework which aims to include varying custom practices, it is an inflexible framework due to its Westernised legal nature.

Another significant concern is that the CLT provides for a decision that favours only one party. The implications of this are noteworthy. Not only does this divide communities, but also it creates the potential problem of homelessness and in a country that ensures no one is landless. This can generate further disputes that can even lead to violence.

The Report on the National Review of the Customary Land Tribunal Program In Vanuatu concluded that female research participants knew nothing about the CLT program, the objectives of the act or how they might participate (Simon 2005: 34). This raises significant concern about gender discrimination.

6. Lessons Learned from the Literature on Addressing Land-related Conflict in the Country

6.1 Challenges for the customary dispute resolution system and the CLT

While the approach to customary land in Vanuatu has been to protect custom and tradition, the reality is that since independence legislation and policy have created a serious problem in relation to: leasing custom land; lease conditions; foreign developments; establishing custom ownership and public awareness of land laws and rights.

In relation to the issue of land development, specifically leasing land to foreigners, the literature indicated a need for stronger policy development and suggested controls be established around leasing of custom land to foreigners in the form of advice being provided to custom owners. There appears to be a significant chasm between custom and introduced values and dialogue around such issues (which should try to bridge the divide) might prove to be useful for both Ni-Vanuatu and foreign developers and may create better understanding and more certainty for both parties.

Customary land disputes are governed by the Constitution and the *Customary Land Act* 2001, which are designed to protect custom traditions and ensure custom laws prevail. However, while the CLT system strives to follow custom, the Westernised legal framework limits its success. Calls for more participation in the design of such processes were a recurrent finding

in the literature regarding the CLT. Further, the need was identified for more awareness education and training in the CLTA and its operation throughout island communities aimed at both males and females.

A significant lesson learnt from the CLT, specifically its win/lose approach to resolving custom land ownership issues, was that processes should be cooperative in focus and not competitive. The potential of ADR processes such as mediation and also restorative practices was acknowledged as a potential cooperative mechanism and warrants further exploration.

6.2 ADR - A possible way forward?

The Vanuatu Judiciary Conference 2006 (Forsythe 2006) marked a watershed in the relationship between the *kastom* system in Vanuatu and the state system. For the first time in the history of Vanuatu as an independent nation, judges, lawyers, police and chiefs met together to discuss the issues arising from the existence of two legal systems in the country and to consider what steps could be taken to improve their relationship in the future. In his opening address the Chief Justice stated:

“The challenge is how the two systems can interact or interconnect so that Vanuatu society can live in peace, individuals are secured in their persons and property, community values are enhanced and protected commerce and investment – particularly foreign investment - is encouraged, and relationship between trade partners are conducted in confidence throughout the islands of the Republic”.

A growing body of literature⁶⁵ cites that hybrid legal systems, systems infrastructure built on the best of both traditional and Western approaches, hold promise for timely transformation of conflict and for conflict prevention in Melanesia. It would appear that there are synergies between traditional justice processes and Western Alternative Dispute Resolution (ADR) processes.⁶⁶

Indigenous communities practice what have been termed ‘chthonic legal traditions’ (Glen, 2000) where there is an emphasis on mutual obligation towards members of the group or clan. Melanesian cultures understand personhood and identity only in relation to the group. In such collectivist cultures, actions are weighed against how they will affect a web of relations and the concept of the individual is typically subordinate to the group (Monk and Winslade

2001: 32). Glen (2000: 64) makes the point that injury to an individual becomes the responsibility to the group; likewise injury caused by an individual becomes the responsibility of the group.

ADR is not foreign to Vanuatu. Legislative provisions exist (Civil Procedure Rules 2002, Part 10) to incorporate ADR into the formal courts system. Chief Justice Lunabek (2003: 107) concurs that mediation, as a process, is consistent with traditional methods of dispute resolution that predate the introduction of the formalised Western system in Vanuatu. He identifies that there are benefits from incorporating ADR into the Vanuatu judiciary, noting that it supports the consensual methods of settlement, it assists in maintaining relationship amongst communities and it contributes to making the courts more efficient (2003: 106). The Vanuatu Juvenile Justice Project Report (Rousseau 2003: 14) identified the future use of ADR as a possible means of bridging the divide between traditional and introduced justice systems.

The resonance between ADR processes and customary traditions of dispute resolution is the basis for the optimism that ADR might find a comfortable, useful place in Vanuatu society with regard to the resolution of land disputes. However, for Vanuatu to reap the benefits that ADR could bring to the judicial sector, specifically in working with traditional processes, the research indicates that there must be tighter links between government structures, institutions and grassroots communities (Dinnen 2003; Forsyth 2006).

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Legislation

Constitution of Vanuatu 1980

Customary Land Tribunal Act 2001

Notes

¹ See section 1 and 3 of the Solomon Islands case study in annex 2.

² See below section 3.3.4.

³ See section 4.2 of the Vanuatu case study in annex 3.

⁴ See section 4.1 of the Samoa case study in annex 1.

⁵ See section 3.1 of the Solomon Islands case study in annex 2.

⁶ See section 3.1 of the Vanuatu case study in annex 3.

⁷ See section 1.2 of the Solomon Islands case study in annex 2.

⁸ See section 3.1 of the Solomon Islands case study in annex 2.

⁹ For examples of the variety of different customary tenure systems see section 2.1 of the Solomon Islands case study in annex 2.

¹⁰ For another example of consensual customary conciliation see section 4.1 of the Solomon Islands case study in annex 2.

¹¹ This paper refers to customary Pacific leaders as 'chiefs'. It uses the contemporary nomenclature suggested by White & Lindstrom (1997). Originally Sahlins (2003: 289) distinguished between Melanesian 'bigmen' and Polynesian 'chiefs' with chiefs leading more complex hierarchical political groups than bigmen. While the authority of chiefs was recognised similar to those of European princes, bigmen distinguished themselves because of their personal achievements. This demarcation and simplification has been widely criticised in the literature since then (Government of Solomon Islands, National Peace Council of the Solomon Islands & UNDP 2004).

¹² For more details on the village *fono* see section 4.3.1 of the Samoa case study in annex 1.

¹³ See also section 4.2 of the Solomon Islands case study in annex 2.

¹⁴ For more information see section 4.3 of the Solomon Islands case study in annex 2.

¹⁵ See section 4.2 of the Solomon Islands case study in annex 2.

¹⁶ See also section 4. of the Vanuatu Case Study in annex 3. Since 2001 jurisdiction is given to Customary Land Tribunals (CLTs) which are discussed further in section 3.3.7.

¹⁷ More details on the Land and Titles Court can be found in section 4.3.1 of the Samoa case study in annex 1.

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- ¹⁸ For more detailed information on Customary Land Tribunals see section 4.3 of the case study Vanuatu in annex 3.
- ¹⁹ For more details see section 4.2 of the Vanuatu case study in annex 3.
- ²⁰ The terms ‘mediation’ and ‘conciliation’ are sometimes used interchangeably. While the debate is of little relevance for this paper conciliation as an ADR process should not be confused with customary conciliation processes as described in 3.2.2.
- ²¹ See section 5.1.2 of the Samoa case study in annex 1.
- ²² See section 4.2 of the Solomon Islands case study in annex 2.
- ²³ See sections 4.1 and 5 of the Solomon Islands case study in annex 2.
- ²⁴ See section 5.3 of the Vanuatu case study in annex 3.
- ²⁵ See section 6 of the Samoa case study in annex 1.
- ²⁶ See section 5 of the Solomon Islands case study in annex 2.
- ²⁷ See section 6.1 of the Vanuatu case study in annex 3.
- ²⁸ See sections 5.1.2 and 5.1.3 of the Samoa case study in annex 1.
- ²⁹ See section 5 of the Solomon Islands case study in annex 2.
- ³⁰ See section 5 of the Solomon Islands case study in annex 2.
- ³¹ Ibid.
- ³² Conflict isn’t regarded a negative in all societies. Brigg (Hviding 1998) explains that fighting to regain membership within the group can be seen as necessary.
- ³³ See also section 6.2 of the Vanuatu case study in annex 3.
- ³⁴ *Land and Titles Protection Ordinance* 1934, s 34, enacted in pursuant to the *Samoa Act 1921* (NZ).
- ³⁵ Five per cent of public land is owned by the Samoa Land Corporation. See further Ward and Ashcroft: 63-4.
- ³⁶ For the history of land alienation see Meleisea, 1987, chapter 2.
- ³⁷ For a further discussion on leasing of customary land see Ward, Gerard and Ashcroft, 1998: 61.
- ³⁸ A distinction is made between *aga’ifanua* (customs or practices common to all villages) and *aganu’u* (customs or practices peculiar to particular villages or families: Tuimaleali’ifano, Morgan, 2006: 171).
- ³⁹ Section 2 of the *Land and Titles Act* defines *pulefa’amau* as meaning, ‘the ownership of any customary land or the control of any Samoan name or title either by a person in his sole right or on behalf of any Samoan title, family, village or district’.
- ⁴⁰ For some statistics on land sales between 1990 and 2000 see Fairburn-Dunlop, 2001: 65-67.
- ⁴¹ See further, Storey, D, 1998.
- ⁴² *Elisara v Attorney General*, unreported, Supreme Court of Samoa, Va’ai, J, 25 June 2004, accessible via paclii.org at [2004] WSSC 29.
- ⁴³ See further, Setafano, P.M, Vaitogi V.I., Warren, F. & Sapatu, F. , 2004. Examples of other disputes may be found in Va’ai, 1999: 187-189.
- ⁴⁴ See further Vaai, S, 1999: 54, 188-191.
- ⁴⁵ See, eg, *Keil v Land Board and Others* (unreported, Supreme Court of Samoa, Sapolu CJ, 21 December 2000); *Pouniu v Land Titles Investigation Commission* (unreported, Supreme Court of Samoa, Carruthers J, 15 July 2004).
- ⁴⁶ See, eg, *Leituala v Maunga* (unreported, Supreme Court of Samoa, Vaai J, 13 August 2004); *Maunga v Leituala* (unreported, Court of Appeal of Samoa, March 2005). Space below?
- ⁴⁷ See Va’ai, 1999: 192-194, for some general remarks about procedure in the Land and Titles Court, but Va’ai concedes that this is largely a matter of discretion: Va’ai, 1999: 189.
- ⁴⁸ In 1990 it was reported that it would take five to ten years to clear the backlog: Department of Land and Titles Court Annual Report 1989-90, pp 9-11, referred to in Va’ai 1999: 194, n 34.

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- ⁴⁹ The Land and Titles Court Amendment Act 2004 permits the appointment of a person qualified to be appointed a Judge of the Supreme Court or a Samoan Judge as President.
- ⁵⁰ For example, in 2001 60% of cases were adjourned; in 2000 it was 64% (Department of Land and Titles Court Annual Report 2000-2001).
- ⁵¹ *Leituala v Maunga* (unreported, Supreme Court of Samoa, Vaai J, 13 August 2004); *Maunga v Leituala* (unreported, Court of Appeal of Samoa, March 2005).
- ⁵² There are some notable exceptions especially with women who have high ranking titles: Vaai: 52.
- ⁵³ See, for example, Island Court (Civil Procedure) Rules 1984 (Vanuatu), now repealed. Space below?
- ⁵⁴ Vaai asserted in 1999 that 60-65% of lodged disputes were resolved without a hearing: Va'ai 1999: 190.
- ⁵⁵ See Elisara, 2000: p 25, where the record of interview quotes a private solicitor/attorney states that there has been an alarming occurrence' of individualisation through this process.
- ⁵⁶ Land conflict at this time was fuelled by illegal squatting and use of customary land around Honiara, the commercialization of land, rapid urban population growth and resulting land pressure coupled with poor management of the urban growth (Allen 2005).
- ⁵⁷ Customary land tenure is used throughout this paper to include customary marine tenure as mangroves, near-shore reefs and lagoon areas are also controlled communally by kin-based groups under customary law regimes (Kali'uae 2005).
- ⁵⁸ The underlying causes of 'the tension' are related to historical patterns of uneven development which created socio-economic and opportunity inequalities. Issues of land, identity, ethnicity and socio-economic justice were all central to the conflict (SILJSISP 2003; White & Lindstrom 1997).
- ⁵⁹ See (2005).
- ⁶⁰ The designation 'chief' is not unproblematic in Solomon Islands and there can be disputes about who is actually entitled to be called a 'chief' (2000).
- ⁶¹ For example, McDougall presents the reasons for reluctance to record land ownership and boundaries in this way on the island of Ranongga and Scott for Makira.
- ⁶² For further detail on how this is threatening the livelihood of Ni-Vanuatu see "The Year of the Traditional Economy – What is it all about?" Ralph Regenvanu, Director, Vanuatu National Cultural Council.
- ⁶³ See "The Con/Dominion of Vanuatu?" Paying the Price of Investment and Land Liberalism – a case study of Vanuatu Tourism Industry.
- ⁶⁴ Reference is made to the role The National Council of Chiefs played in instigating the Kastom Peace Reconciliation in armed conflict between the Vanuatu Mobile Force and the Vanuatu Police Force in 2002. Another more recent example is the reconciliation ceremony between the people of East Santo and the Vanuatu Police Force facilitated by the Paramount Chief Mathias Lus. Also see The Report of the Juvenile Justice Project which also confirms the significant place of Kastom practices.
- ⁶⁵ Dinnen 2003; Barnes 2002; Hassal 2005; Lavell 2005; Maxwell & Hayes 2006.
- ⁶⁶ Dinnen (2003:4) makes the point that while restorative justice has emerged as a significant reform movement in many Western countries, especially with its focus on juvenile justice, he concludes that there are similarities it shares with older approaches to disputing still practiced in many Pacific communities. He also acknowledges it has had significant impact on other forms of conflict and dispute resolution. Also see Hassall (2005) Alternative Dispute Resolution in Pacific Island Countries.