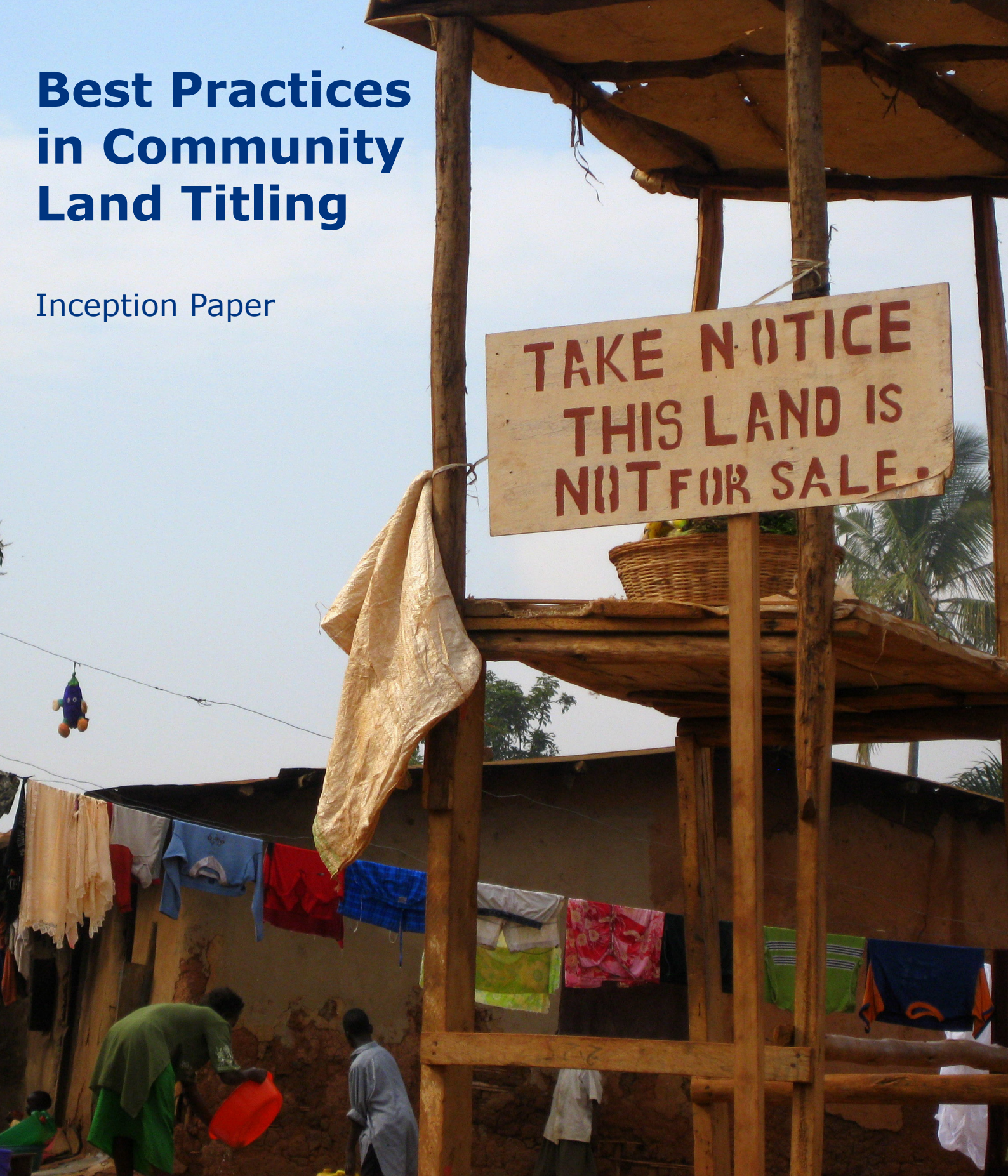


Best Practices in Community Land Titling

Inception Paper



International Development Law Organization
Organisation Internationale de Droit du Développement

BEST PRACTICES IN COMMUNITY LAND TITLING – INCEPTION PAPER

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Cover image: © Rachael Knight

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About the program

To investigate how best to support community land titling efforts and protect the rights of vulnerable groups within the context of decentralized land management and administration, IDLO is implementing a two-year "Community Land Titling Initiative" in Liberia, Mozambique and Uganda. The data gathered is expected to inform policy dialogue, assist nations to refine and improve the implementation of existing community land titling laws, and provide useful insights for countries seeking to develop laws and policies for community land titling and registration.

Partnerships

This program is being implemented by the IDLO Unit for Research, Policy and Strategic Initiatives in partnership with local NGOs in Mozambique, Liberia and Uganda:

Mozambique

LexTerra (www.lexterra.co.mz)

LexTerra is a private legal consulting firm specializing in community land rights and investments, whose mandate is to provide high quality consulting services on land and natural resource policy and legislation to government and NGOs, and to support communities and investors in making mutually beneficial land-sharing agreements according to the Land Law's mandates. It is led by a highly qualified attorney who specializes in land tenure law and has amongst its staff a biologist with over ten years experience leading communities through community land titling exercises.

Liberia

The Sustainable Development Institute (SDI) (www.sdiliberia.org)

The SDI works to transform decision-making processes in relation to natural resources and to promote equity in the sharing of benefits derived from natural resource management in Liberia. The organization's vision is a Liberia in which natural resource management is guided by the principles of sustainability and good governance and benefits all Liberians. Its activities cover a range of crosscutting issues including governance and management, environment, state and corporate social responsibility, economic and social justice for rural populations and the democratic participation of ordinary people in government management of natural resources. The organization received the Goldman Environmental Prize (the world's largest prize honouring grassroots environmentalists for outstanding environmental achievements) in 2006.

Uganda

The Land and Equity Movement in Uganda (LEMU) (www.land-in-uganda.org)

The LEMU aims to unite the efforts of local people, government, civil society organizations, students, elders, volunteers, and others to improve the land rights and tenure security of the poor. LEMU works to ensure that policies, laws and structures are put in place to allow all Ugandans to have fair and profitable access to land. To this end, LEMU undertakes research, policy analysis, and grassroots legal advocacy. LEMU serves as a link between government and communities: it educates rural communities about their rights, roles, and responsibilities under Uganda's Land Act, while simultaneously working to help government and policy makers understand rural communities' experiences of land tenure insecurity.

Donor Support

This research is being supported by the Bill and Melinda Gates Foundation (www.gatesfoundation.org) as part of IDLO's broader research program: *Supporting the Legal Empowerment of the Poor for Development*.

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BEST PRACTICES IN COMMUNITY LAND TITLING

INCEPTION PAPER

Executive summary

In many African nations, the state retains ultimate title to land. Individuals and groups may hold rights of use or possession over land, but do not enjoy actual ownership. Within this context, “land tenure” can be defined as the way that land is held by individuals or groups, while “land tenure security” describes the extent to which land users can be confident they will not be arbitrarily deprived of the bundle of rights they enjoy with respect to such land.

In developed countries, individual land titling has been largely successful in facilitating high levels of tenure security. The rights recognized under such frameworks are exclusionary, and fixed both geographically and temporally. Arguably, individual land titling is less suitable in contexts where much of the land is held communally under customary land administration and management systems. These systems generally comprise a complex mesh of overlapping rights that can be held by individuals, families, clans, entire communities, or be reserved for future generations and changing community needs. Land holdings are also not always geographically fixed: in rural areas, for example, it is common for users to employ dynamic cultivation patterns (necessitated by factors such as fluctuations in rainfall or soil fertility) that change by season and year. Finally, community members often rely upon common resources such as forests, grazing lands and water sources for their livelihoods and daily needs. Community members are generally considered the “co-owners” or rightful users of such land.

In such contexts, the question of how to best promote tenure security raises complex questions. Individual land titling schemes have generally proved inadequate to protect the full range of usufruct rights typical of customary land management systems. In some cases, such schemes have led to increased inequity and disenfranchisement of vulnerable groups. Individual titling is also generally not designed to take account of communal or secondary rights over land, such as rights of way, common pool resource claims, or the migratory routes of nomadic groups and hunter-gatherers. As a result, these rights remain unrecorded and may be lost. A particular concern is the loss of women’s land rights that can occur where formal title documents are issued only in the name of (usually male) household heads.

The issue of how best to protect the land holdings of rural communities has been brought to the fore due to increasing land scarcity brought on by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and multi-national corporations who are increasingly seeking to acquire large tracts of land for tourism-related development, biofuel projects or agricultural production, among other uses. In many cases, governments facilitate land grants with a view to attracting investors that may bring commercial, agricultural or industrial growth and contribute to improvements in gross domestic product and living conditions. In other situations, officials may transfer land either illegally and/or for personal profit. Because most land in African nations is owned by the state, communities have little power to contest such grants. Moreover, the land being appropriated is often held by rural communities that operate under customary law and have no formal legal title.

Titling land held by families and communities under customary law is the most obvious means of protecting communities’ land rights from encroachment. A potential method is to allow communities to register their lands as a whole by reference to customary boundaries, and then empower these communities to control and regulate intra-community land holdings and usage. Titling land in this way can yield significant benefits. First, because community land titling

facilitates the recognition of communal, overlapping and secondary land rights, it may provide particular protection to poor and vulnerable community members who do not have their own land. Second, it has the potential to safeguard an entire community's land at once, hence representing a faster and more cost-effective means of protection than individual titling. Third, community land titling may help to foster local economic growth and promote sustainable natural resource management.

Community land titling is not, however, without its dangers. Under such systems, land management and administration is necessarily devolved to communities themselves. Yet growing land scarcity and increased land competition has been shown to exacerbate local power asymmetries and affect a breakdown in the customary rules that govern land holdings and the sustainable use of common resources. As a result, there is a heightened risk that vulnerable rights holders, such as widows, orphans, pastoralists, tenants and people living with HIV/AIDS may lose land to land-grabbing relatives, in distress sales, or in boundary claim disputes with more powerful community members. A further issue is that while titling provides opportunities for communities to sell or rent land (or the natural resources on such lands), power and information asymmetries mean that communities are in a poor bargaining position to negotiate fair and equitable contracts with the state, private enterprise or investors.

While various African governments have passed legislation that facilitates community land titling, in most cases, these laws are not being fully or well implemented. Reasons for this include:

- poor community awareness regarding their rights;
- insufficient government capacity;
- overly-complex and bureaucratic processes;
- opposition by government and elite (who may lose their power and authority to control land as land administration is devolved to the communities themselves);
- the prohibitive costs of and time involved in titling and registration processes;
- the high level of technical expertise and resources involved in land surveying, titling and registration; and
- the inter- and intra-community disputes that arise during the process of determining community boundaries.

If the potential benefits of community land registration are to be realized, steps must be taken to overcome these difficulties. Steps must also be taken to reduce or eliminate power and information asymmetries and increase communities' negotiating power with parties interested in purchasing, renting or utilizing community-held lands or partnering with communities for integrated development. Finally, where land management and administration is devolved to the community level, safeguards need to be set in place to ensure that the land rights of vulnerable groups are protected and that local elites do not engage in corrupt or exploitative practices at the expense of the wider community.

1. Land tenure security

1.1 What is land tenure security?

“Land tenure” is the way that land is held or owned by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims can be formal (state-based), informal, customary, or religious in nature and can include leasehold, freehold, use rights and private ownership. The strength of one’s land rights may hinge on national legal definitions of property rights, local social conventions or other factors. Land tenure rights may include the freedom to:

- occupy, use, develop or enjoy land;
- sell land or bequeath land;
- lease or grant use rights to land;
- restrict others’ access to land; and/or
- use natural resources located on land.

“Land tenure security” refers to the degree of confidence that rights-holders will not be arbitrarily deprived of the bundle of rights they enjoy over particular lands. It is the reasonable guarantee of ongoing land rights, supported by a level of certainty that such rights will be recognized by others and protected by legal and social remedies if challenged.

Secure land rights are a necessary precondition to safeguarding the livelihoods, food production and economic survival of the poor.¹ Enhanced tenure security encourages and promotes increased household investments in land and buildings; people who may be evicted at any time are less likely to use local natural resources sustainably or invest in their homes, villages or neighborhoods. Secure land rights, by contrast, provide incentives to maintain and conserve natural resources, plant long-term crops and contribute to local development. Over the long-term, such investment can translate into improved health and living standards. Land tenure security is also often a precondition to accessing credit; banks are less likely to lend to those in physical possession of land but with no formally recognized rights to that land.

Legal systems — state, customary or religious — define the rights and obligations of individuals, families and communities in relation to land and determine how land rights are to be administered and enforced. How and whether the relevant legal system acknowledges one’s land rights is the basis for land tenure security.

1.2 Customary land tenure

In rural areas, particularly where state administration and infrastructures are absent or inaccessible, customary legal systems are often the primary means of enforcing community rules and resolving land-related conflicts.² It is impossible to comprehensively define the nature of these systems. First,

¹ Who are the poor? The “poor” can include the full spectrum of racial, cultural, ethnic and religious diversity, and can apply to individuals and communities with a range of economic situations. Being “poor” in one region or community may make one rich in another. The term “the poor” can be patronizing and oversimplifying at times; it does not take into account the relative and varying degrees of wealth within rural populations that from the outside appear uniformly “impoverished”. In this publication, the phrase “the poor” will be used as shorthand for all of those individuals, peoples, communities and groups that lack the power and capacity to fully and freely access and use formal legal systems to claim and defend their land rights.

² See generally, E Scheye, *Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks*, Netherlands Institute of International Relations (2009) citing E Alemika and I Chukwuma, *A Report on Poor Peoples’ Perceptions and Priorities on Safety, Security and Informal Policing in A2J Focal States in Nigeria*, Center for Law Enforcement Education, Lagos (2004); B Baker and E Scheye, ‘Multi-Layered Justice and Security Service Delivery in Post-Conflict and Fragile States’ (2007) 7(4) *Conflict, Security & Development* 503-528; L Chirayath, C Sage and M Woolcock, ‘Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems’, (prepared as a background paper for the World Development Report) (2006); J Faundez, *Non-State Justice*

the governing principles and rules are not static but constantly evolving in response to cultural interactions, socio-economic and demographic shifts, political processes, and environmental change. Second, customary systems are unique to the communities in which they operate. It is arguable that the reality of the custom practiced can never be known by someone not living and functioning within its precepts.³ However, while the custom regulating land use and management varies between and within countries, provinces and villages, a number of common characteristics can be identified.

Scholars generally agree that the customary land use and ownership patterns of the rural poor comprise a complex mesh of overlapping and temporal claims, some of which are held privately by families and lineages, and others that are held communally in furtherance of the health, prosperity and religious practices of the greater community.⁴ Other areas are left open for the use of future generations, or to accommodate shifting patterns of agriculture due to fluctuations in rainfall, crop rotation, soil fertility and changing community needs. Land rights are primarily derived from membership to a given group or allegiance to a specific political authority. Chiefs and sub-chiefs (or head-men) must approve new grants of land within the community, clan or tribe, but families may sub-grant their lands to other individuals or families through inter-familial arrangements similar to leasing or sharecropping.

Within a customary system, a range of secondary rights may also exist. These include rights of way; rights to use natural resources located on lands shared by the community or by more than one community; seasonal access to particular areas (i.e. by pastoralists or hunter-gatherers whose customary rights include yearly passage through, visits to, or use of land and natural resources considered to be within the bounds of another sedentary community); and rights to enter into sacred areas for religious practices.⁵

Drawing on the work of various anthropologists, sociologists, and other African scholars, Cousins lays out some constructs as representative of current pan-African customary land management systems, including:

- Land rights are embedded in a range of social relationships and units, including households and kinship networks and various levels of 'community'; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (for example, individual rights within households, households within kinship networks, kinship networks within local communities).
- Land rights are inclusive rather than exclusive in character, being shared and relative. They include both strong individual and family rights to residential and arable land and access to common property resources such as grazing lands, forests and water.
- Rights are derived from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases). They are somewhat similar to citizenship entitlements in modern democracies.
- Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).
- Control is concerned with guaranteeing access and enforcing rights, regulating the use of common property resources, overseeing mechanisms for redistributing access (for example, trans-generationally), and resolving disputes over claims to land. It is often located within a hierarchy of nested systems of authority, with many functions located at local or lower levels.

Systems in Latin America (2003); Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (2001); W Schärff, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (draft paper prepared for a workshop held at the Overseas Development Institute, University of Sussex 6-7 March 2003).

³ S F Moore, *Social Facts and Fabrications - 'Customary' Law on Kilimanjaro 1880-1980* (1986) 319. See also A Whitehead and D Tsikata, 'Policy Discourses On Women's Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary' (2003) 3(1) and 3(2) *Journal of Agrarian Change* 94.

⁴ See generally: B Cousins, 'More Than Socially Embedded: The Distinctive Character of "Communal Tenure"' (2007) 7(3) *Journal of Agrarian Change*; L Cotula (ed.), *Changes in 'Customary' Land Tenure Systems in Africa* (2007) 11; C Tanner, *Law Making in an African Context: the 1997 Mozambican Land Law*, FAO Legal Papers Online no. 26 (2002).

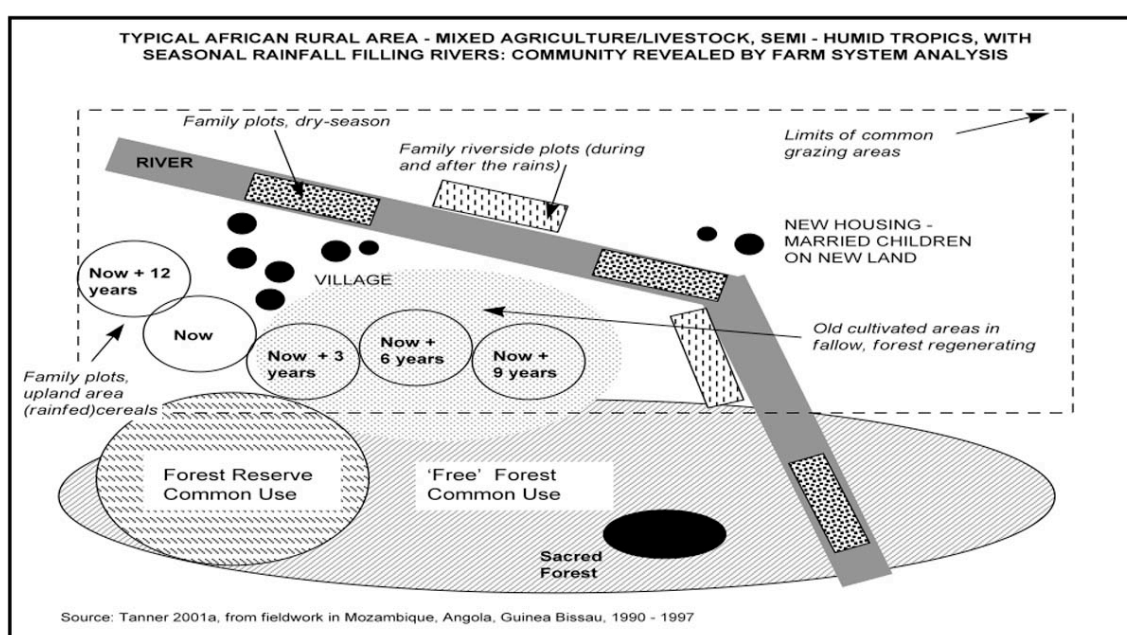
⁵ Ibid.

- Social, political and resource boundaries, while often relatively stable, are also flexible and negotiable, given the nested character of social identities, rights and authority structures.⁶

Customary land management and administration systems may also reflect and be shaped by:

Intra-community and intra-family power relations: The socially embedded nature of customary land rights means that the strength of one's land claims may be influenced by various cultural and societal factors including intra-family dynamics, an individual's place in the community, or their capacity to navigate various relationships and social forces.⁷

Ecological context: Rainfall, temperature, soil fertility and climate may dictate small-scale farmers' use of risk aversion strategies such as shifting cultivation patterns, diversified plots, and leaving fields to lie fallow. As illustrated by the diagram below, depending on the type of livelihood practiced and the kinds of crops planted, a household may require access to and control over different types of land and resources over time.⁸



Dominant livelihood practiced by a community: The manner by which communities hold and manage land will often be influenced by dominant cultivation practices. Pastoralists, sedentary small-scale farmers and hunter-gatherer populations, for example, will necessarily have different land claims, use patterns, and rules governing land use. In certain circumstances and at particular times, therefore, one piece of land may be shared by groups practicing a variety of livelihoods, and thus its administration will be subject to overlapping customary paradigms. According to Cotula: "For a given piece of land, customary systems may cater for multiple resource uses (for example, pastoralism, farming, fishing) and users (farmers, resident and non-resident herders, agro-pastoralists; women and men; migrants and autochthones; etc) which may succeed one another over different seasons."⁹

Finally, it is critical not to conflate the term "customary" with "communal." Custom is the *system* under which land is held, while communal is the *way* in which *some* of that land is used. Alden Wily

⁶ Cousins above n 4, 293.

⁷ J Quan, "Changes In Intra-Family Land Relations," in Cotula, above n 4, 53, citing S Berry, *No Condition is Permanent – The Social Dynamics of Agrarian Change in Sub-Saharan Africa* (1993); J P Chauveau and J P Colin, 'Changes in Land Transfer Mechanisms: Evidence from West Africa', in L Cotula (ed.) *Changes in "Customary" Land Tenure Systems in Africa*. International Institute for Environment and Development (2007).

⁸ Tanner, above n 4, adapted from C Tanner, P De Wit and S Madureira, 'Proposals for a Programme of Community Land Delimitation' (National Seminar on Delimiting and Managing Community Lands, Beira, August 1998).

⁹ Cotula, above n 4, 11.

explains that: "Customary domains are territories over which the community possesses jurisdiction and often root title; ... [within such domains] a range of tenure arrangements typically apply."¹⁰ By contrast, common properties are "properties which are owned by all members of that community in undivided shares [claims to such properties are] defined by virtue of membership to the group."¹¹

2.3 Legal pluralism and tenure security

As noted above, in some rural contexts communities administer, manage and transact their lands completely within the bounds of customary paradigms. Where one or more customary justice system operates alongside the state justice system, a situation of legal pluralism exists.¹²

The operation of parallel systems that employ different rules and legal paradigms can lead to inequity, undermine the rule of law, and foster land tenure insecurity.¹³ Individuals may be encouraged to "forum shop" between such systems in order to obtain the most advantageous outcome. Moreover, where there is no hierarchical relationship or measures to promote consistency in outcomes between formal and customary systems, uncertainty and lack of predictability may result. This may lead to opportunistic behaviours and lawlessness, and weaken the capacity of either system to resolve conflicts and protect rights effectively.¹⁴

Legal pluralism, coupled with weak access to justice,¹⁵ has particularly negative consequences for the rural poor's capacity to protect and enforce their land rights. When the poor cannot access the formal legal system, they are effectively confined to customary fora. If the formal legal system does not recognize customary rules relating to land holdings and transfer, the poor have little protection against land speculation by elites, investors and state compulsory purchase processes. While customary systems may provide a high measure of tenure security within a community, they are often insufficient to protect the poor's rights in the event of a violation by more powerful, external actors who may not only possess the wealth and knowledge needed to access the formal system, but also manipulate it to their advantage.

¹⁰ L Alden Wily, 'The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies (Draft)' (paper presented at the conference for Land Rights for African Development: From Knowledge to Action; A Collaborative Program Development Process, Nairobi, Kenya, 2005).

¹¹ Ibid, 6.

¹² In reality, the complex, overlapping nature of customary and statutory legal constructs means that neither the chiefs adjudicating customary disputes, nor the judges hearing cases in formal courts apply a "pure" version of customary or statutory law. As explained above, a century of colonial rule impacted the tenor and nature of customary law, infusing it with various "statutory" constructs. Meanwhile, statutory systems for land management in Africa by nature must incorporate some of the customary constructs underlying land relations in rural areas, particularly in the areas of negotiation, mediation and conciliation. As such, "The neat distinction between 'customary' and 'statutory' land tenure systems is considerably blurred, and....between the ideal-type 'customary' and the ideal-type 'statutory', a great deal of hybrids and 'in between' exist.... Local reality usually resembles more a continuum of different combinations of both." L Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects In Africa* (2007) 11.

¹³ Individuals may be encouraged to "forum shop" between such systems in order to obtain the most advantageous outcome. Moreover, where there is no hierarchical relationship or measures to promote consistency in outcomes between formal and customary systems, uncertainty and lack of predictability may result. This may lead to opportunistic behaviours and lawlessness, and weaken the capacity of either system to resolve conflicts and protect rights effectively. See: P L Delville, 'Changes in "Customary" Land Management Institutions: Evidence from West Africa,' in Cotula, above n 4, 39.

¹⁴ Ibid.

¹⁵ To a large degree, situations of legal pluralism exist when, for various reasons, the formal legal system is inaccessible to the poor. In such instances, the poor may rely on customary systems not out of choice but because they do not know about laws that protect their rights, cannot (physically, financially or linguistically) access state offices or complete the complex processes necessary to formally secure their land claims, or may be afraid of or not have faith in the capacity of state systems to help them to claim, protect and enforce their land rights. Alternatively, people may choose to use customary mechanisms to govern and resolve their issues because in certain contexts customary bodies are more successful at their functions and better suited to the local context than state institutions. For example, customary tribunals may: hear a dispute more quickly than the formal court system; be conducted in the local language; give greater weight to relevant local evidence and culture; address conflicts holistically and arrive at compromises that allow both parties to a conflict to go on living amicably with one another (rather than ruling in favour of one party at the expense of the other); and are generally less expensive and more easily accessed by the rural poor than the formal system. Customary dispute resolution systems, however, are rarely flawless. Such processes are unregulated, leaders may be unaware of national laws, and decisions may be based upon discriminatory customs.

2. Current Trends Impacting African Land Tenure Security

Growing land scarcity and associated increases in the value of land and competition over land have contributed to an overall weakening of the land rights of rural communities. There are various forces compounding land scarcity and competition for land in Africa today.

First, population growth, climate change, environmental degradation and land speculation by elites are decreasing the amount of fertile, arable land available for allocation within families and to community members. This is particularly the case in urban and peri-urban areas close to main roads, markets, schools, hospitals and other infrastructure.

Second, governments are increasingly granting large land concessions to investors for agro-industrial enterprises, hunting and game reserves, ranching, tourism, and forestry and mineral exploitation.¹⁶ In some cases, this is done with a view to fostering commercial, agricultural or industrial growth so as to improve national gross domestic product and living conditions. In other situations, officials transfer land either illegally and/or for personal profit. The land appropriated is often held by rural communities that operate under customary law and have no formal title with which to contest such grants.¹⁷ For example, pastoralists often require large tracts of land for herding livestock. Governments at times argue that since pastures have low food production levels, it is in the public interest that they be converted to commercial farmland.¹⁸

Third, increases in land values also create incentives for individual rights holders to sell land for personal gain in violation of either statutory laws (for example land may also be sold by one family member without the knowledge or permission of other rights-holders), or customary rules (for example local leaders redefining their customary stewardship of land as "ownership" rights, and subsequently selling common lands for personal profit).¹⁹ In this context, individuals who have knowledge, power, access to decision-makers and wealth fare better in the outcome of resource struggles. Such asymmetrical relationships are also embedded in community-level social relations, including gender dynamics within families, class relations between individuals within communities, and cultural differences between ethnic groups. In practice, this means that vulnerable groups and those with weaker land claims including women, pastoralists, tenants and other 'outsiders'²⁰, and people living with HIV/AIDS²¹ are at the greatest risk of losing land. A prime example is rights holders terminating the use rights of tenants, often unilaterally and sometimes violently and without notice, in order to sell or rent land to richer families or urban investors.²² There is also evidence of 'distress sales' among families living with HIV/AIDS: as primary income earners fall sick and are

¹⁶ Rising food scarcity, fuel shortages, and emerging climate change trends are prompting investors to seek large concessions in developing nations. In some cases, wealthy nations and multi-national corporations are increasingly seeking to acquire large tracts of land for tourism-related development, biofuel projects or agricultural production, among other uses. See further: L Cotula, S Vermeulen, R Leonard, and J Keeley, IIED/FAO/IFAD, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals In Africa* (2009).

¹⁷ A key issue is that rural communities often hold land communally. Where such land is not under cultivation or use by a specific family, it can be mistakenly (or disingenuously) classified as vacant and hence be particularly vulnerable to acquisition by elites, investors and state development schemes.

¹⁸ One Tanzanian policy document asserts that: "Pastoral production has very low productivity levels.... degrades large masses of land... [and] invades established farms... At the moment it is impossible to control livestock diseases.... Pastoralists have to be given land and told to settle." SPILL, URT (2005) 14, cited in R Odgaard, Danish Institute for International Studies, *Land Rights and Land Conflicts in Africa: The Tanzania Case Country Policy Study* (2006).

¹⁹ See for example: J Blocher, 'Building on Custom: Land Tenure Policy and Economic Development in Ghana' (2006) 9(166) *Yale Human Rights & Development Law Journal*; D Ayine, *Social Responsibility Agreements in Ghana's Forestry Sector*, Developing Legal Tools For Citizen Empowerment Series (2008).

²⁰ For the purposes of this publication, "outsiders" may be defined as those individuals or families who have moved into and become part of rural communities but are not directly related (by blood or tribal affiliation) to that community's founding families. With less land to go around, "belonging" and social ties are redefined; outsiders may be pushed out, lose their land or face restrictions on their access to communal resources.

²¹ There is mounting evidence of "distress sales" among families living with HIV/AIDS: as primary income earners fall sick and are unable to work and money is needed for medicines and funeral expenses, families are forced to sell land (often below market value). See further: M Villarreal, 'Changing Customary Land Rights and Gender Relations in the Context of HIV/AIDS in Africa' (paper presented at the symposium *At the Frontier of Land Issues: Social Embeddedness of Rights and Public Policy*, 2006).

²² P Mathieu et al, *Making Land Transactions More Secure in the West of Burkina Faso* (2003) 5.

unable to work, and as money is needed for medicines and funeral expenses, families are forced to sell land (often below market value).²³

In some areas, increased land scarcity, competition, and land commoditization has precipitated a breakdown of the customary rules that govern the equitable and sustainable use of common resources — rules that have in the past functioned to protect the land rights of vulnerable groups.²⁴ For example, while scholars disagree over the relative strength of women's land claims under customary systems,²⁵ the consensus is that as land becomes scarcer, existing customary safeguards of women's rights to land have been eroded. Evidence has emerged that, when land is scarce, customary leaders and families move away from more flexible systems of land holding (which take into consideration a woman's need to support herself and her children) to more rigid interpretations of women's land claims. In some contexts, families are reinterpreting and 'rediscovering' customary rules that undermine women's land rights.²⁶ In short, despite the strength and inherent negotiability of kinship-based land claims, in the context of land commoditization, women often lose their

²³ Villarreal, above n 21 5, 7.

²⁴ The increasing commercialization and commoditization of land has influenced the operation of customary systems of land administration and management. Chimhowu and Woodhouse observe that even during standard customary land transactions, there is a shift towards making reference to market values, evident in the "increasing weight placed upon cash, relative to symbolic elements of exchange, and an increasing precision in the 'seller's' expectation of what they should receive", A Chimhowu and P Woodhouse, 'Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa' (2006) 6(3) *Journal of Agrarian Change*, 359. For example, in jurisdictions where gifts are provided to chiefs in exchange for allocating community land, today, these gifts are more closely related to the land's market value, L Cotula and S Cisse, 'Case Study: Changes in "Customary" Resource Tenure Systems in the Inner Niger Delta, Mali' in Cotula, above n 4, 81-101, 89) Mathieu et al write, "These new land tenure practices reflect a period of uncertainty, a time of "hesitation" as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and a binding element in social relationships." Mathieu et al, above n 22, 3.

²⁵ To understand this phenomenon, it is necessary to explain how women's land rights function under customary tenure. Broadly speaking, under patrilineal systems daughters do not inherit property from their fathers or uncles, but move onto their husbands' lands after marriage. They are not permitted to inherit their husband's land, as it is passed through the male bloodline from fathers to sons and/or because it belongs to the husband's family or tribe. Within this paradigm, women's land claims hinge on their relationships with male relatives. Women cannot own land, may lose their land when widowed, may be considered the property of their husbands (who in some cultures have paid a "bride price" for their wives), and may have little or no decision-making power over questions of household agricultural production and sale. See generally: R Giovarelli, 'Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property' (2006) 4 *Seattle Journal for Social Justice*; Whitehead and Tsikata, above n 3.

²⁶ Many scholars argue vehemently that customary paradigms disempower women. A second analysis is that the strength of women's land rights vary widely depending on each woman's own particular family situation. In other words, since women's land claims are negotiated through kin (besides and in addition to husbands), women's land entitlements are therefore based on the fulfilment of a range of social obligations to family members, and thus the more well-connected and well-regarded a woman is, the stronger her claims to land. Whitehead and Tsikata cite Karanja as arguing that in spite of having no inheritance rights, "women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives..." (Whitehead and Tsikata, above n 3, 96-97). Whitehead and Tsikata also cite a number of authors as concluding that the very strength of women's land claims is in their "embeddedness," and that this embeddedness provides a strong safety net. Other scholars argue a third position: that women's land rights under customary law are actually much stronger than originally imagined. Quan cites Yngstrom as finding that women can be considered to hold primary and often strong land use rights because of the recognition of the centrality of women's roles in production and social reproduction; women's land use rights are secured by husbands' social obligations to ensure that their wives are able to feed themselves and their children. Similarly, Yngstrom finds that these use rights not allocated and safeguarded by the husband alone, but by the entire extended family network that the woman has married into. (Quan, above n 7, 55; I Yngstrom, 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems' (2002) 30(1) *Oxford Development Studies*. These authors conclude that "women's claims to land are not justified solely through the recognition of their obligations in food production, but that local-level land-management fora make moral and material evaluations of inputs and behavior between male and female household members over a very wide spectrum when adjudicating land claims." (Whitehead and Tsikata, above n 3, 77-78). Scholars' opinions may vary so widely due to the reported experiences of the women in a wide range of customary situations across various nations; it may be that all three viewpoints are correct, depending on which communities the fieldwork was carried out in, and as well as the social standing of the women interviewed. See also L Cotula, C Toulmin and J Quan, *Better Land Access for the Rural Poor, Lessons From Experience And Challenges Ahead*, International Institute for Environment and Development/FAO (2006); A M Tripp, 'Women's Movements, Customary Law, and Land Rights in Africa: The Case of Uganda' (2004) 7(4) *African Studies Quarterly*.

bargaining power amongst their husbands' kin and within their own families.²⁷ Woodhouse has noted that "When competition for land intensifies, the inclusive flexibility offered by customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful".²⁸

There is also evidence that the incidence of HIV/AIDS infection in Africa is exacerbating these trends. Under customary law, while widows rarely inherit land upon their husband's deaths,²⁹ they are usually allowed to continue to live on the lands of their husband unless they remarry. In areas of high land scarcity, however, relatives are increasingly capitalizing on the deaths of male heads of household and exploiting stigmas surrounding HIV/AIDS to dispossess and disinvest widows (and orphans) of their lands.³⁰ Villareal finds that:

Widows are often blamed for killing the husband by infecting him with HIV and in-laws use HIV/AIDS as a justification to dispossess them. Widows are frequently accused of witchcraft... Many of these widows are infected with HIV or living with AIDS, and dispossession, harassment and eviction often takes place when their economic and health conditions are rapidly deteriorating. Consequently, such widows and their children are left without shelter, means of livelihood and support networks in the community.³¹

It is not surprising, therefore, that as development agencies and governments advocate reliance upon customary laws for local land administration, some women's groups argue for free markets in land titling and registration that provide women with the right to inherit, purchase, and own land in their own name.³²

Fourth, because in much of sub-Saharan Africa land belongs to the state and therefore may not be conventionally bought and sold, increases in land value have led to the evolution of unregulated black and 'grey' land markets.³³ Such markets facilitate the transfer of land in violation of either statutory or customary rules through a range of financial transactions — from rental agreements,³⁴ to sharecropping, to outright sale and purchase.³⁵ Such illicit land transfers fail to provide adequate protection both to buyers and to families of sellers, who may not be aware of or who may be adversely affected by the sale of their lands. Mathieu reports that in many cases these transactions "are hidden and made without relying on publicly acknowledged terms of sale and purchase."³⁶ Moreover, they are rarely accompanied by legal proof of purchase or ownership and there is often uncertainty concerning the terms and conditions of the exchange. Some land sellers take advantage

²⁷ Whitehead and Tsikata, above n 3, 91; P Peters, 'Inequality and Social Conflict Over Land in Africa', *Journal of Agrarian Change*, (2004) 4(3) 269-314; Yngstrom, above n 26.

²⁸ P Woodhouse, 'African Enclosures: A Default Mode of Development' (2003) 31(10) *World Development* 1715.

²⁹ This is because the land (and oftentimes the family's livestock, furniture, and all productive assets) is reclaimed by her husband's family, goes directly to her adult sons, or is held in trusteeship by uncles and other male relatives until her sons are of age to inherit.

³⁰ Villareal above n 21, 8.

³¹ Ibid.

³² It is not surprising, therefore, that as development agencies and governments advocate reliance upon customary laws for local land administration, some women's groups argue for free markets in land titling and registration that provide women with the right to inherit, purchase, and own land in their own name. However, it should be noted that there is also fierce disagreement within the feminist community around the issue of women's groups pressing for individual title and land ownership. The counterargument is that while richer, more educated urban and peri-urban women may gain from laws allowing women to own land (and for land to be sold) the vast majority of poor, rural women will only lose out as land becomes further commoditized.

³³ A "grey" land market may be defined as one in which land may not be legally sold but the structures upon the land and other improvements to the land *may* be legally sold. As a result, the value of the structures and improvements is elevated to include the actual value of the land, but the land is not technically what is being transacted.

³⁴ Rural to urban migration and increased morbidity and mortality caused by HIV/AIDS may in some situations be serving to *increase* the supply of land in rural areas, as families may have insufficient labour to farm their lands themselves and instead choose to rent out land to individuals lacking the tribal or kinship ties necessary to be allocated land by the chief. Chimhowu and Woodhouse write that "Renting land to 'outsiders' provides landholders with a means to retain control of this 'surplus' land against claims on it from other members of the local community." They hypothesize that "in the absence of formal land markets, and lacking the tribal or 'kinship' entitlement to customary land, vernacular markets offer an initial entry point through land rentals and in some cases land sales." Chimhowu and Woodhouse, above n 24, 355.

³⁵ See further: Chauveau and Colin, above n 7, 76.

³⁶ Mathieu et al, above n 22, 3

of the covert nature of the proceedings to engage in fraudulent practices such as making multiple sales of the same land or selling family-held land without the consent of other rights-holders.³⁷

3. Current Theories: Individual Land Titling and the Evolutionary Model

Various African nations have experimented or are currently experimenting with programs of systematic individual land titling and registration. The rationale — originally put forward by the World Bank and later re-emphasized by the Peruvian economist Hernando de Soto³⁸ — has been that individual titling can safeguard the land rights of the poor, provide a mechanism through which small-scale farmers can use land as collateral for credit, and foster commercial enterprises by bolstering investor confidence in national land tenure security. Such efforts began in post-colonial Kenya and continue today in Uganda, Tanzania and Angola, among other nations.

Experience has demonstrated, however, that individual land titling and registration schemes do not consistently lead to increased prosperity for the poor and may even contribute to greater resource asymmetries, loss of land, and deprivation of use rights. Specifically, meta-analyses of titling and registration initiatives have shown that:

- Powerful individuals can use their wealth, knowledge and/or influence to acquire unregistered or 'free' land, exacerbating power concentrations and class distinctions;
- Formal land titling and registration may encourage 'distress sales' in times of hunger and extreme poverty;
- Structural obstacles such as the location of government offices, complex administrative procedures and the costs associated with land registration procedures can limit the participation of disenfranchised groups, and unless specific measures are taken, ethnic minorities and women may be excluded from titling efforts;
- Fear of land taxation or of compulsory government land acquisition (facilitated by land registration) dissuade the poor from registering their land claims;
- Where land rights are registered under the name of the male head of the household, women's land holdings may go unrecorded and be lost;
- Where land registration fails to record communal or secondary land use rights such as rights of way or common pool resource claims, these rights can be lost;
- Where land registration does not record the migratory routes of nomadic groups and hunter-gatherers, or the overlapping and shared use claims of pastoralists and sedentary communities, these rights can be lost;
- The complexity and high cost of cadastral mapping, coupled with insufficient government capacity, means that mapping has often gone unfinished, undermining tenure security; and
- Where the costs of titling land are prohibitively expensive, landholders (particularly the poor) can engage in informal, unrecorded and thus unprotected land transactions.³⁹

³⁷ Interestingly, to improve the safety and validity of these transactions, the parallel development of improvised, *de facto* written documentation of these transactions is accompanying the emergence of a market for land rental and sale. Such written certificates of sales are essentially contract documents and receipts, creating "proof" of the exchange for posterity, should the transaction be challenged or questioned. The use of signed documents to legitimize land transactions are a kind of "informal formalization" and are intended to reduce the ambiguity and uncertainty of extra-legal and non-customary land transactions. The papers may include the names and identity card information of the parties to the exchange, the amount paid, the duration of the agreement if a rental, the size and boundaries of the land transferred, and the rights and obligations of the parties, etc. The papers rarely mention the words "sell or buy". Mathieu et al see these documents as a hybrid procedure at the interface between formal legal procedures and custom, above n 22.

³⁸ Hernando De Soto argues that there are trillions of dollars worth of "dead" capital sitting un-leveraged in developing nations, and that all that is necessary to unlock this capital and bring it (and thus national economies) to life is to give all citizens of a nation formal legal title to their land. H De Soto, *The Mystery of Capital* (2000).

³⁹ See generally: T Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 *American University International Law Review* 647; Whitehead and Tsikata, above n 3; D A Atwood, 'Land Registration in Africa: The Impact on Agricultural Production' (1990) 18(5) *World Development*; R Barrows and M Roth, *Land Tenure and Investment in*

In response to such findings, the World Bank and other multilateral development agencies have slowly moved away from mandatory titling and registration schemes to embrace the potential of customary law to mediate land relations at the local level.⁴⁰ In the field, the World Bank actively supports efforts to decentralize land administration systems and has publicly advocated a greater role for customary land tenure practices.⁴¹ This move follows recognition that land tenure systems must be grounded in local and traditional land management practices if they are to be effective, efficient and considered socially legitimate, and further, that reliance on customary administration and management practices is a simpler and less conflict-prone route to the eventual titling, registration and privatization of land ownership (which the World Bank still views to be a precondition for investment and economic growth). This approach is appealing to development actors more broadly as it is deemed consistent with the strengthening and democratization of local politics and the promotion of bottom-up initiatives. The World Bank Policy Review Report (2003) holds that:

Customary systems of land tenure have evolved over long periods of time in response to location-specific conditions. In many cases they constitute a way of managing land relations that is more flexible and more adapted to location-specific conditions than would be possible under a more centralized approach...[and] in a number of cases, for example for indigenous groups, herders, and marginal agriculturalists, definition of property rights at the level of the group, together with a process for adjusting the property rights system to changed circumstances where needed, can help to significantly reduce the danger of encroachment by outsiders while ensuring sufficient security to individuals.⁴²

Critical to this policy shift has been the growing acceptance of an 'evolutionary model' of property rights. The model posits that informal markets for land will naturally emerge out of customary systems as land scarcity, improvements to land and changes in the market economy increase the

African Agriculture: Theory and Evidence, Land Tenure Center (1989) 136; J Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa*, Land Tenure Center (1986) 128; A Haugerud, *The Consequences of Land Tenure Reform among Small Holders in the Kenya Highlands*, Rural Africana (1983). Experience in implementing individual titling schemes has also shown that: i) the high costs of recording the ownership and multiple use claims of every plot of land within a nation can lead to poorly-executed or unfinished mapping exercises, which can serve to further undermine the tenure security of those parcels of land not yet mapped and registered; ii) the costs of officially registering one's land may be prohibitively expensive for the poor, which can lead to a situation in which only elites gain formal title to their lands; iii) individual land titling and registration can facilitate and lead to distress sales in time of hunger, sickness and extreme poverty; and iv) land registries can be difficult for already-vulnerable groups to access and use, and unless particular care is taken by government administrators, under-represented groups such as ethnic minorities and women may be excluded.

⁴⁰ Whithead and Tsikata summarize the World Bank's policies in this way: "Changes in the World Bank's thinking between 1975 and 2001 about land reform are well documented by their own land and agriculture specialists. ... From being centrally concerned with freeing land into individual ownership through the introduction of 'modern' registered freehold titling, the [Land Policy Division, or LPD] has moved against registered titling as the necessary precondition for agricultural investment and growth. Although still dominated by an orthodox modernizing position that land markets and individual tenure are essential...the LPD's current thinking is influenced by recent evolutionary theories of land tenure that see privatization developing from below, in response to population pressure and commercialization. By the late 1980s, it had increasingly developed a more positive view of the capacity of African customary systems of tenure to change in the 'right' directions...[and] become more concerned with the growing evidence that registered individual title had not brought the predicted economic benefits...In the early 1990s, new studies were undertaken or funded by the World Bank on the supposed link between the security of freehold tenure and improved agricultural productivity.... No differences in the productivity and investment of lands held in freehold title compared with those held in customary tenure were found...Customary tenure systems appeared to offer sufficient security of tenure for farmers to invest in land, although the lack of formal title meant they had no automatic rights of disposal. There seemed to be no compelling economic justification for replacing customary land law with state guaranteed titles. This important set of studies led Bruce et al to re-evaluate customary systems and their capacity for change and flexibility and to downplay the role of state backed formal systems of individual titling.... They forecast: 'a market economy will eventually produce a land tenure system that, while not identical, will bear a strong family resemblance to the Western concept of ownership' and therefore recommended incremental approaches to policy, adapting, and not replacing existing land management practices, with the role of the state to provide the legal and administrative environment that will support and promote evolutionary change. The heavy financial costs of introducing and maintaining systems of registered title are further reasons cited for the policy sea-change." Whitehead and Tsikata, above n 3, 11-13.

⁴¹ E Daley and M Hopley, *Land: Changing Contexts, Changing Relationships, Changing Rights*, Department for International Development (2005).

⁴² K Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank (2003).

resource value of land. Collective tenure, communal use and other mainstays of customary land allocation will slowly be replaced by individualized land rights that can be inherited, sold and rented.⁴³ This change should occur naturally in response to evolving popular needs, rather than be imposed through regulation and policy.

It must be noted that support for the evolutionary model is not universal. Critics argue that the collective nature of customary rights does not necessarily create a disincentive to investment⁴⁴ and that the dynamic is more complex than a straight line from custom to land markets. Cotula *et al*, for example, argue that communal land rights may co-exist alongside intra-family individualization processes, and that resource rights may be apportioned in a manner that enforces the primacy of original community members vis-à-vis outsiders or newcomers.⁴⁵ Another important argument is that the evolutionary model ignores that such an organic transition from the customary to market mechanisms may deepen pre-existing social inequalities, serve the elite, and create unjust outcomes.⁴⁶

4. Community land titling

Partially in response to the abovementioned policy developments and partially as a means of increasing national development (both by strengthening the land claims of the poor and by attracting investment through greater tenure security), several African states have drafted laws that place custom at the centre of rural land administration and management. Botswana was the first nation to undertake this effort in 1968, and since then a number of countries, including Senegal, Namibia, Niger, Uganda, Burkina Faso, Mali, Lesotho, Malawi, Ghana, Swaziland, Mozambique, Tanzania, South Africa have followed. Some of these nations have created complementary land administration bodies with responsibility for managing customary land rights, while others have decentralized land administration to existing customary structures. In certain cases customary land rights have been recognized as equal to state-issued land rights, customary dispute resolution bodies have been incorporated into the national court system,¹ and customary rules have been integrated into formal jurisprudence.⁴⁷

In several nations, laws make it possible for rural communities to register their lands as a whole according to customary boundaries ("community land titling") and formalize communities' land administration and management practices. Under these laws, communities may control, regulate, receive and distribute benefits related to the common lands.⁴⁸ In some nations, land laws designate the community as the lowest unit of local government, both downwardly accountable to community members and upwardly accountable to district government. Under other laws, communities may be required to establish themselves as:

- a private legal entity capable of holding collective land rights; or
- A body corporate that holds resource rights on trust for the members of their community and can transact with outsiders.⁴⁹

⁴³ D Fitzpatrick, "'Best Practice' Options for the Legal Recognition of Customary Tenure" (2005) 36(3) *Development and Change* 421-422; *ibid*, 47.

⁴⁴ *Ibid*.

⁴⁵ L Cotula and C Salmana, 'Case Study: Changes in 'Customary' Resource Tenure Systems in the Inner Niger Delta, Mali' in Cotula, above n 4, 81-101.

⁴⁶ See generally; Peters, above n 27.

⁴⁷ L Alden Wily, *Governance And Land Relations: A Review of Decentralisation of Land Administration and Management in Africa*, International Institute for Environment and Development (2003).

⁴⁸ In such processes, lawmakers have had to overcome several difficulties. For example, in many states, constitutional provisions do not allow for private land ownership — all land is owned by the state in trust for the people. A further difficulty is that the vast majority of land transactions are governed by customary land administration and management systems that facilitate various overlapping community and individual use rights.

⁴⁹ Alternatively, formalising common property management regimes under "Community-Based Natural Resource Management" (CBNRM) initiatives may help to play a critical role in protecting communal lands. Namibia has provided for this. Taylor suggests that for "states unwilling to accord full recognition to customary rights...[or] in the absence of legal systems that acknowledge direct community *ownership* of land, the granting of *management* rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to outside interests. M Taylor,

In some jurisdictions, individual or household/family titling within the context of community land administration and management is also possible. In Uganda and Tanzania, for example, individual or household land can be titled through a publically adjudicated hearing at the village-level, with the participation of customary authorities and taking into account overlapping and secondary use rights.⁵⁰

Land laws that allow for community land titling and which devolve land administration and management to the community level are often designed to both encourage and promote rural investment. To this end, these laws strive to protect the interests of the state, private investors and communities alike. For example, Mozambique and Tanzania's land laws establish that investors who wish to acquire land for development projects must negotiate with the communities who hold the ownership or use rights over that land and enter into rental or profit-sharing agreements in return for land use. Such arrangements have the potential to protect community land holdings and livelihoods, facilitate investment-related economic growth, and boost government tax revenues. Further, it is expected that where communities freely enter into such agreements and benefit from an investor's presence they will be less inclined to mount legal challenges (clogging up the legal system) or engage in acts of passive resistance such as sabotage.⁵¹

4.1 The benefits of community land titling

Integrating the statutory and the customary through community land titling can yield significant benefits. First, it is a means of enhancing the tenure security and safeguarding the livelihoods of rural communities. By facilitating the recognition of communal, overlapping and secondary land rights, it provides particular protection to poor and vulnerable community members who may not have their own land. Importantly, community titling has the potential to safeguard an entire community's land at once, and may therefore be a faster and more cost-effective means of tenure protection than individual titling.

Second, community land titling can foster local economic growth and promote sustainable natural resource management. Community lands often have high income-generating potential in terms of their natural resources and real estate or rental values. Once land is titled and legally recognized as belonging to a community, that community may then choose to capitalize upon such potential for the benefit of all members. Titled land may also be used as collateral for loans to communities for income-yielding or development-related projects.

4.2 The dangers of community land titling

As described above, under systems of community land titling, land management and administration is necessarily devolved to communities themselves. This presents its own risks in terms of elite capture, corruption and exploitation of vulnerable groups. Land management associations may be dominated by local power-holders, and community decisions relating to land titling and management may entrench class differences or perpetuate discriminatory practices.⁵² A key risk is that negotiations with investors may favour leaders and not community interests, and that economic benefits accrued may not be distributed equitably. In such contexts, community members with more tenuous land claims, particularly women, widows, orphans, long-term tenants and pastoralists, are at increased risk of having their rights to land violated or losing land.⁵³ According to Chimhowu and Woodhouse:

Rangeland tenure and pastoral development in Botswana: Is there a future for community-based management?, CASS/PLAAS Occasional Paper Series No. 16 for the Centre for Applied Social Sciences and Programme for Land and Agrarian Studies (2007).

⁵⁰ *Uganda Land Act* 1998 (Uganda) Chapter 227; *Village Land Act* 1999, (Act No.5 of 1999) Article 6, The United Republic of Tanzania.

⁵¹ J Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).

⁵² See further: Cotula, above n 12.

⁵³ Mathieu et al, above n 22; Peters, above n 27; Woodhouse, above n 28; Yngstrom, above n 26.

The social embeddedness of vernacular land markets means that those with greatest influence over land under customary tenure (tribal chiefs and heads of patrilineages) will be best placed to gain from the commoditization of land through sales and rents.⁵⁴

The high vulnerability of women's land claims is of particular concern when land administration is devolved to local communities without proper safeguards. As described above, in some contexts women may have little decision-making power within their family or be unable to contest violations of their rights through customary institutions. Even when women's land rights are protected under statutory laws, they may face multiple barriers to claiming and protecting these rights within their communities. First, customary dispute resolution systems may not uphold statutory provisions. Second, women may lack the economic independence and resources necessary to pursue a legal action through formal channels and/or be at risk of social or physical sanction for engaging non-customary processes. Finally, if women do seek to defend or claim their land rights through the formal state system, they may face discrimination or be at increased risk of exploitation.

A further issue is that while titling may provide opportunities for communities to negotiate with private enterprise and investors to enter into business partnerships, or to sell or rent their land (or the natural resources on such lands), power and information asymmetries mean that communities are often in a poor bargaining position to negotiate fair and equitable contracts. Communities may be unaware of their land rights, the market value of their land or the profits that investors may derive from local natural resources. They may also receive inadequate or incomplete information regarding the environmental or social impact of the investor's proposed activities. Finally, communities may be subjected to intimidation by investors, state officials or customary authorities and/or forced to sign agreements adverse to community interests.

For example, research conducted in Mozambique into the nature of community-investor negotiations revealed instances where consultations comprised only one meeting lasting a few hours, with no time provided for community members to discuss the matter among themselves.⁵⁵ Further, the

⁵⁴ Chimhowu and Woodhouse above n 24, 360.

⁵⁵ Research into the nature of community consultations conducted by Tanner and Baleira concluded that, at least within the sample reviewed, the vast majority of applications submitted by an investor included a community consultation. However, a review of 260 community consultations undertaken by the Centre for Legal and Judicial Training (CFJJ) and the FAO Livelihoods Programme found that communities were not provided with a genuine opportunity to negotiate and bargain with investors for mutual benefits, payments or the provision of amenities in exchange for their land. The research concluded that both investors and government officials tended to view consultations not as a mechanism to promote community development and partnership, but simply as one of various administrative hurdles necessary to complete before securing a right of land use and benefit. Likewise, anecdotal evidence collected by Calengo et al indicated that during community consultations, particularly for beachfront land and areas with potential for tourism-related investment, government officials appeared to be aligned with investor interests rather than being focused on protecting community interests, promoting partnership ventures, or ensuring that communities were appropriately compensated for the loss of their land. The CFJJ/FAO data indicate also that the majority of agreements are poorly recorded; most written records are inadequate, with insufficient detail or no uniformity of presentation, and huge variations in the type and quality of information recorded. The meetings' minutes are generally vague and do not include sufficient detail concerning: the content of the negotiations, the "benefits" promised, the time frame in which these benefits will be delivered, or the economic gains to be realized by the communities in exchange for their land. In contrast to the multiple mandates in the Land Law that investors must show proof of implementation of the proposed exploitation after a certain point, there are no mandated benchmarks or timelines for provision of any promised "community benefits." Tanner reported that by 2005, no community had yet taken legal action against an investor for failure to provide the agreed "mutual benefits." Yet the CFJJ/FAO study of land and natural resource conflicts showed definitively that "poorly carried out consultations are often a basic cause of bitter and longstanding conflicts between local people, the state, and those who would occupy their land and use their resources." Meanwhile, even if a community did take such action, it is not clear how enforceable it would be in a court of all. The Land Law is silent on how such agreements should be interpreted and enforced by the courts. (A J Calengo, J O Monteiro and C Tanner, Mozambique *Land and Natural Resources Policy Assessment, Final Report*, Centre for Juridical and Judicial Training, Ministry of Justice (2007) 13-14; C Tanner and S Baleira, *Mozambique's legal framework for access to natural resources: The impact of new legal rights and community consultations on local livelihoods*, FAO Livelihoods Support Programme, Working Paper No. 28 (2006) 5-6; S Norfolk and C Tanner, *Improving Tenure Security for the Rural Poor Mozambique Country Case Study*, FAO Legal Empowerment of the Poor Working Paper No. 5 (2007) 24; C Tanner, 'Land Rights and Enclosures: Implementing the Mozambican Land Law in Practice' (paper presented at The Changing Politics of Land in Africa: Domestic Policies, Crisis Management and Regional Norms, Proceedings of the International Conference on The Changing Politics of Land in Africa: Domestic Policies, Crisis Management, and Regional Norms, 2005).

borders of the land to be utilized were rarely walked or otherwise physically verified.⁵⁶ Calengo et al conclude that such consultations are conducted merely to give the “process a veneer of legitimacy by showing that local rights are apparently respected.”⁵⁷ He notes that communities may also be unaware of their right to reject the proposed agreement, feel pressure from District Administrators to consent, or be “persuaded by authorities that all investment is good, or ... told that they have little choice as ‘the land belongs to the State’.”⁵⁸

A related problem is that officials responsible for interfacing with investors often have little or no downward accountability to rural communities. They may be directed by their superiors to promote national development and therefore be more focused on fostering investment and economic growth than ensuring that communities are equitably compensated for the loss of their lands. Again speaking of Mozambique, Calengo *et al.* find that in many cases “it is clear that officials see their job as helping investors get the land they need, and do not accept that local rights are ‘real’ in the sense that they give locals secure private tenure that cannot simply be taken away.”⁵⁹ Similarly, Durang and Tanner have found that:

While the consultation should result in some compensatory benefit for local people, this is very much a secondary objective for the land administration services compared with the need to secure a community ‘no-objection’ and give the investor his or her new [right of land use and benefit within the time limit of] less than 90 days.⁶⁰

4.3 Poor implementation of community land titling laws

While several countries have passed legislation facilitating community land titling, in most cases these laws have not been well or widely implemented. In Uganda, since the passage of the Land Act (Chapter 227) (1998), no community has submitted a successful application to create a Community Land Association and seek joint title to common lands.⁶¹ In Liberia, no rural community has secured titled to their lands under the Public Lands Law (Title 34 of the Liberian Codes Revised) (1972-1973) since 1988.⁶² In Mozambique, although many communities have gone through the legally-mandated delimitation process and have been granted a formal “right of land use and benefit,” this has not provided sufficient protection; communities have continued to be pressured by local administrators and investors to agree to private ventures being built on their lands without equitable rent, partnership status or profit shares. Some of the reasons for poor implementation are explored below.

4.3.1 Procedural complexity and weak institutional capacity

First, legislative and procedural requirements may be inconsistent with the realities of community life or require evidence that customary rights holders cannot provide. In some nations, for example, land claimants need to demonstrate visible proof of use of and investment in land, such as planted trees, standing crops, or residential structures. This is difficult for pastoralists whose livelihood requires them to range over vast areas, upon which they often do not leave permanent proof of their presence or claims.

Second, where laws prescribe complex and multifaceted claims procedures, there is a higher likelihood that titling applications will not be processed correctly or within the legally-mandated time limits. This is exacerbated in contexts where titling processes involve the approval of multiple government actors, ministries, or departments. For example, loopholes that establish one

⁵⁶ Norfolk and Tanner, above n 55; T Durang and C Tanner, ‘Access to land and other natural resources for local communities in Mozambique: Current Examples from Manica Province’ (paper presented at Green Agri Net Conference on ‘Land Administration in Practice’, Denmark, 1-2 April 2004).

⁵⁷ Norfolk and Tanner, above n 55; Tanner and Baleira, above n 55.

⁵⁸ Calengo, Monteiro and Tanner, above n 55, 13-14.

⁵⁹ Ibid, 18-19.

⁶⁰ Ibid, 14.

⁶¹ Durang and Tanner, above n 56.

⁶² See further: R Knight, *The Relevant Legal Frameworks of Mozambique, Uganda and Liberia*, IDLO Best Practices in Community Land Titling Legal Framework Memorandum (2009).

⁶³ L Alden Wily, ‘So Who Owns the Forests?’: *An Investigation into Forest Ownership and customary Land Rights in Liberia*, SDI and FERN (2007) 128.

government body as responsible for issuing land titles to private investors and another government body for issuing titles to rural communities (as in Tanzania), or that allow for more than one unified, integrated land cadastre may result in the allocation of land to investors already claimed by rural farmers.

Third, the implementation of community land titling legislation may be undermined by lack of state resources (particularly lack of funding to support titling schemes and inadequate access to necessary information such as computerized maps and technical equipment), staff capacity (caused by understaffing and lack of training, particularly in new laws and procedures), and systemic failures (such as excessive centralization of administrative processes and overlapping jurisdictions).

4.3.2 *Government corruption*

Community land titling laws may be manipulated by those in power to secure their access to or control over valuable land and resources. Corruption may mean that services that should be available to all are converted into 'favors' based on kinship, personal networks or political affiliation. At its most extreme, government officials may accept bribes or funnel monies earmarked for development initiatives into their own pockets. Corruption also frequently occurs at local-level state offices, as administrators require unauthorized payments for their services as a means of supplementing inadequate state incomes.

4.3.3 *Lack of political will*

Community land titling laws necessarily devolve powers of land administration and management from central and mid-level officials to rural communities, mandating the transfer of authority and control over (oftentimes) increasingly valuable and sought-after land from state officials to community members. While this may have been the intention of legislators, the executive and administrative officials whose powers have been curtailed are likely to resist such change. Ouédraogo writes:

Nor should we overlook the lack of political will shown by the administrative authorities in implementing legislation favourable to local land rights. Either no practical steps are taken to implement the law or, worse still, the administrative — and even judicial — authorities...are sometimes persuaded to take decisions which fly in the face of the law.⁶³

Commenting on this phenomenon in Uganda, McAuslan argues that: "[a]ny fundamental changes in [land] laws, particularly changes designed to remove powers from ... public officials, are likely to be opposed by those officials unless they can see some specific benefits flowing to them from the reforms."⁶⁴

In Uganda, for example, the Land Act (1998) grants ownership over all customarily-held lands to individuals, families and communities, regardless of formal documentation, and vests responsibility for land management in District Land Boards that are "not [to] be subject to the direction or control of any person or authority".⁶⁵ According to McAuslan, government officials who previously controlled such land and registration processes felt marginalized and obstructed implementation of the law:

Overnight, officials were stripped of their powers of land management, which were vested in district land boards. Even worse, the inherent powers of land management that are inseparable from land ownership also disappeared from the public domain and became vested in millions of peasants and urban dwellers. Perhaps most shattering of all was that the loss of powers was accompanied by loss of control over resources — funds hitherto

⁶³ H M G Ouédraogo, *Legal Conditions for the Recognition of Local Land Rights and Local Land Tenure Practices* cited in IIED, *Making Landrights More Secure – International Workshop for Policy Makers* (2002).

⁶⁴ P McAuslan, 'A Narrative on Land Law Reform in Uganda' (paper presented at Lincoln Institute of Land Policy Conference, 2003, 27).

⁶⁵ *Uganda Land Act* 1998, section 60, subsection 1.

available to the centre were to be allocated to the districts. What, then, was to be the future role of the officials, and what access would they have to public and donor funds?

Something similar can be seen in Mozambique where Negrao found that successful implementation of the *Lei de Terras* (1997) (Land Law) was obstructed by “resistance from employees in the title deeds offices to accept the new law...[because] they would no longer have the monopoly in the decision-making regarding land adjudications.”⁶⁶

4.3.4 Lack of legal knowledge and poor access to justice

The potential beneficiaries of community land titling may have only a vague conception of the legal constructs that exist beyond the customary rules governing social relations within their communities. Poor awareness of their land rights may stem from a variety of practical and social factors:

- Information dissemination regarding applicable laws may not extend to rural populations;
- Where information dissemination does occur, laws may not be translated into local dialects or include alternate forms of media designed for illiterate populations. Further, laws may contain technical language that is difficult persons without formal or legal education to understand and follow;
- Where information regarding the applicable law is made available, such information may not specify rights and obligations, or provide populations with insight into how to claim, defend and enforce such rights.

Even when potential beneficiaries of community land titling are aware of their rights, they may have difficulty accessing and enforcing such rights. Reasons include:

- Cost: Administrative and legal processes are often unaffordable for the rural poor. There may be separate fees associated with each step of the administrative process, including obtaining necessary documents, making photocopies and filing applications. Rights-holders also must bear the costs of travel to courts or government offices, the loss of income that may result from being absent from one’s livelihood while pursuing the application in government offices, and, in the case of land titling, the high cost of surveyors’ fees;
- Time: Administrative processes are often lengthy and the time required to overcome bureaucratic obstacles may be difficult to predict. Moreover, people living in poverty may not have time to invest in activities beyond those required for day-to-day survival;
- Language and communication: High rates of illiteracy among the rural poor decrease their ability to navigate administrative procedures, which are often based on written documentation and completion of relevant forms. Such persons may be unable to complete necessary forms and gather required documents. Likewise, individuals who do not speak the official national language may be unable to successfully complete necessary administrative processes;
- Distance: Where government offices are located in urban centers, time, resource and cost constraints may prevent the rural poor from accessing them;
- Procedural complexity: Legislative and procedural requirements may prescribe complex processes that are difficult for the poor and less-educated to navigate or that require evidence that customary rights holders cannot provide.

⁶⁶ J Negrao, *Land In Africa – An Indispensable Element Towards Increasing The Wealth of the Poor*, Oficina dos Centro de Estudos Sociais No. 179 (2002) 19.

5. Realizing community land titling

If the potential benefits of community land titling are to be realized, steps must be undertaken to overcome the difficulties discussed above and also protect communities and vulnerable groups within communities against the dangers inherent in the community land titling model. Such measures might include, but are not limited to:

5.1 Legislative and procedural reform

Land law and its implementing regulations should establish straightforward and unambiguous procedures and clearly set out the rights and responsibilities of all key actors. Interventions might include:

- Review and amendment of relevant legislation and accompanying regulations and procedures to ensure simplicity, eliminate ambiguity and promote ease of implementation (such as streamlining administrative processes) for both administrators and rural communities alike;
- Review legislation to ensure that the procedural burdens imposed on rural communities are reasonable and take into account the cost, capacity, language and literacy restrictions of applicants (such as widening the definition of proof to include customary forms of evidence).⁶⁷
- Enhance coordination within and between relevant government ministries (such as establishing comprehensive, synchronized and updated land information and record-keeping systems).

5.2 Enhanced state support for community land titling and administration

Where community land titling initiatives decentralize land administration and management to the community level, new roles and responsibilities could be created for local and regional officials. For example, local land officials may be trained to:

- provide technical advice and capacity-building to community-level land administration structures to support their efforts to manage land and natural resources, resolve boundary disputes, undertake participatory mapping exercises, complete paperwork for formal registration and create village land use and management plans;
- help communities to negotiate and enforce contracts with investors, and assist them in their efforts to responsibly manage any resulting financial benefits;
- educate communities about relevant laws and administrative procedures;
- develop the capacity of community leaders to sustainably and equitably manage community resources and resolve land disputes according to principles of fairness and equal rights.

Further, state administrators could be encouraged to better support community land interests. They may need to receive training on relevant land legislation and related procedures. They should also be sensitized to the needs of rural communities and encouraged to see their role as 'solution-providers' and defenders of community rights. Generating such changes in institutional culture is complex and may require both oversight and the provision of incentives. For example, when communities are negotiating with investors for benefits-sharing agreements, incentives might include directing a percentage of the income accrued by communities to local state offices as a means of ensuring that communities receive appropriate compensation, profit shares or other benefits. Oversight mechanisms might include:

- the creation of expedited complaint procedures and appeals processes;

⁶⁷ See for example J Unruh, 'Land Tenure and the "Evidence Landscape"' (2006) 96(4) *Developing Countries' Annals of the Association of American Geographers* 754–772.

- separating administrative and management functions within relevant government ministries with a view to eliminating conflicts of interest and ensuring independence and transparency;
- procedural reforms that promote transparency in budget allocation procedures and financial management of relevant government ministries;
- the establishment of land management advisory boards, ombudspersons or specialist NGOs to oversee and review the performance of relevant administrative offices and land officials;
- regulatory reform to make land administration records and copies of laws and regulations freely available to the public. Community members should also be able to inspect their files and request information regarding how decisions were made; and
- establishment of advocacy services to assist community groups or individuals process title applications with a view to eliminating practices such as petty rent seeking.

5.3 Enhanced legal empowerment and access to justice

Steps should be taken to improve communities' awareness of their land rights, develop their capacity to complete administrative and judicial procedures to secure their land rights, and enhance accessibility to the formal legal system, including through:

- information dissemination regarding community land titling legislation (as well as related bodies of law such as inheritance and natural resource management) using mechanisms that take account of differences in access to information, linguistics and literacy. Examples include radio programs, street theatre, print media (newspapers, posters or cartoons) or community workshops;
- community training in the operation of the formal legal system as well as the practical skills necessary to process land claims (for example how to locate the responsible government authorities, the required documentation, how much applications should cost, available support services and to protect one's self themselves against corrupt practices such as by requesting receipts and copies of original documents submitted). Training should be inclusive and specifically target marginalized groups. It should also take into account such groups' time, security and resource constraints; if only the village elite can afford to leave their work to participate in training, capacity-building exercises may entrench existing power asymmetries. Legal education initiatives may also include training on practical skills related to identifying and claiming land rights including map-making and map-reading, local data collection and sustainable resource management;
- the establishment of state services to help applicants navigate state-level administrative processes (such as assistance for illiterate applicants, translators for those who do not speak official languages, fee waivers for indigent applicants, and mobile registration processes for isolated populations). Specific measures may need to be established to serve the needs of vulnerable populations (for example creating specific days during which specially-trained state officials process women's property claims).
- the establishment of legal support services to help communities to defend their interests in the face of environmental abuse; protect and enforce land rights from usurpation by outsiders; mediate and resolve inter-community land conflicts; establish legal personality so that they can establish conservancies or contract with investors; draft community constitutions or natural resources management plans; and represent individual and community interests during compulsory purchase processes.

5.4 Safeguarding the interests of communities and vulnerable members within communities

To level information and power asymmetries, communities may require support during their dealings with outside investors and government officials. Within communities, individual members with more

vulnerable land claims may need particular support to ensure that their land rights are respected during community land titling processes. Interventions might include:

- the establishment of oversight and accountability mechanisms to protect communities during their dealings with investors, such as:
 - > laws or regulations to hold investors accountable for delivering agreed-upon compensation to communities for the use or leasing of community lands;
 - > expedited complaint procedures and appeals processes, should investors fail to deliver the agreed benefits or rental payments.
- the establishment of safeguards to protect the rights of vulnerable groups within the context of decentralized land management and administration, such as:
 - > provisions in national legislation that safeguard women's land rights (for example, Uganda's Land Act (1998) requires that the written consent of husband, wife and all adult children living on the land be obtained before land can be sold or mortgaged⁶⁸). Other provisions might require that the name of both spouses must be put on any formal registration of property used as the family home;
 - > legislation that requires communities seeking title to their lands to create a set of by-laws or a constitution concerning how they will administer and manage their lands in a manner consistent with national human rights provisions;
 - > community land titling legislation that requires democratic election of and female representation on community land management bodies;
 - > mechanisms for bridging customary and statutory legal systems, for example by requiring that decisions reached by customary courts be registered at district courts, who then review them for compliance with national human rights provisions, or by creating a direct line of appeal for disputes adjudicated at the community level to district level courts and then upwards through the court system.

⁶⁸ *Uganda Land Act* (1998) section 39.

Conclusion

African nations that have introduced community land titling laws have an opportunity to advance an innovative model of integrated rural investment — one in which communities can formally claim their land rights and then partner with investors to promote local land claims, protect natural resources, and contribute to local development. Whether the potential of this model will be realized depends upon levels of political will (at both central and local levels), community empowerment, and the degree of support provided to communities as they seek to successfully complete the administrative procedures set out in their nations' relevant legislation. Efforts must be made to address the obstacles that prevent full implementation of these laws and restrict communities' ability to successfully claim and defend their land rights. A further issue is the effects that devolution of land management and administration might have on less empowered rights holders and groups with highly vulnerable land claims, and what measures can be taken address these. In this regard, legal service organizations (such as lawyers' associations, legal aid organizations or paralegal groups may play an important role in facilitating community land titling and helping communities to claim and protect their land rights. Such groups might provide the following types of support:

- disseminating information regarding relevant laws and legal concepts;
- providing training in community land titling processes;
- helping communities to navigate and successfully complete formal land titling processes (for example filing titling or community land association applications , defining the boundaries of community lands, or mediating intra-community conflicts);
- assisting communities as they develop structures and processes to regulate the management and administration of land at the local level (for example drafting community constitutions or bylaws to govern community land management and administration, developing natural resource management plans, or establishing community dispute resolution mechanisms)
- providing legal information, counseling and representation to vulnerable groups;
- assisting communities to develop by-laws through participatory processes and that contain provisions addressing intra-community discrimination and conflict resolution;
- assisting communities to better understand their land rights in the context of investor negotiations;
- assisting communities negotiate effectively with investors (including by establishing legal personality so that they can enter into contracts and partnerships with investors, establishing and negotiating such partnerships or rental and business arrangements, drafting contracts and creating mechanisms for contract enforcement) and
- enforcing community land claims through legal processes in the event of bad faith usurpation.

Exactly what type of support communities need to successfully navigate the administrative procedures set out in their nations' land laws remains unknown and untested. IDLO's Community Land Titling Initiative is designed to test the efficacy of many of the above interventions. By providing different levels of legal support to study communities, the Initiative seeks to determine how to most effectively and efficiently assist communities as they complete titling processes and formally establish their land claims. It will also track the real costs of titling efforts, and monitor the interventions necessary to ensure that the rights of vulnerable community members are protected. As discussed above, a great deal of work must be done to support state agencies' to competently and professionally carry out their roles and responsibilities.⁶⁹ It is IDLO's intention that by tracking communities as they progress through the titling process, the initiative will also identify possible

⁶⁹ See for example: FAO, *Good Governance in Land Tenure and Administration*, FAO Land Tenure Studies Series No. 9 (2007).

regulatory and governance improvements, and in this way contribute to the more effective implementation of community land titling legislation.⁷⁰

⁷⁰ For further information concerning IDLO's Best Practices in Community Land Titling, please see the related documents available at
<<http://www.idlo.int/english/Programs/Research/LegalEmpowerment/Pages/ProjectsDetails.aspx?IDPRJ=24>>.