LAND POLICY AND ECONOMIC DEVELOPMENT IN PAPUA NEW GUINEA

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PART I: INTRODUCTION

Unquestionably, land occupies a complex social, economic, cultural, religious, psychological, and therefore legal role in Papua New Guinea society, which precludes it being analysed in straightforward economic terms as simply a factor of production. The unique characteristics of land in traditional Papua New Guinean society are well captured in the following statement by Burton-Bradley:

> "In the course of my work in Papua New Guinea, I have become aware that the indigenous person has a psychological attachment to his land transcending the purely economic and legal arrangements of the superimposed alien culture, however liberal the latter might be. I find that he may go along with the formal arrangements in order to please, but in his thinking and at a deeper level his basic attitude to what is his land remains substantially unchanged throughout life, independent of any transactions and exchanges which have taken place. His land is the place where he was born, where he was subjected to primary enculturation, where he has lived the most important aspects of his life, where the values of his cultural-linguistic group have been constantly reinforced,

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> and where, in most instances, he may die. As he grows up he learns that it is the place where his ancestors preceded him, and to which they may return, thus giving the attachment a magico-religious sanction. It is the place where his children and his children's children will follow. At the psychological level it is clearly an extension of the concept of self."[1]

While recognising the complexity of the role of land in Papua New Guinea society, economic analysis remains relevant in two respects: first, a substantial and increasing amount of customary land in Papua New Guinea (97% of the land in Papua New Guinea is held in customary ownership) is being utilised for the production of saleable surpluses and in this respect its use can be rationally analysed in efficiency terms as an economic factor of production. Conservative estimates suggest that at least eight times the area of land presently being utilized for any form of agricultural production (including subsistence) could be utilized for commercial agricultural production. An emerging crisis in unemployment — the World Bank estimates[2] that only 10-20% of the projected 250,000 net citizens additions to the work-force during the 1980's will be able to find formal employment despite rising levels of education and concomitant expectations — makes more effective utilization of this land an urgent imperative. Secondly, as Posner has recently argued[3], even the traditional functions of land in a purely subsistence society can be viewed as having an economic rationale. In the absence of extensive information networks predicated upon literacy and in the absence of an effective government machinery to enforce contracts, group ownership of land can be conceived of as a kind of informal mutual insurance company which permitted members of a group opportunities for greater diversification of risk and to that extent enhanced economic security. With the emergence of alternative mechanism which provide insurance or social security such as self-insurance through diversified market and contractual activities, expli-

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1 B. G. Burton - Bradley "The Psychological Dimensions" in Peter G. Sack (ed.) Problems of Choice, A.N.U. Press, 1974 p. 32.

2 World Bank Report on Papua New Guinea, December 1982

3 Richard A. Posner, "A Theory of Primitive Society, with Special Reference to Law", (1980) 2nd Ed. J. Legal Studies 1.

cit insurance through insurance institutions, and minimum guarantees of social welfare through State sponsored social security programmes, the changing role of land as a source of economic security can be subjected to rational analysis.

In considering possible lines of evolution from the customary *status quo* in land matters, several factors are placing an increasing strain on the existing system and make rational and ordered policy responses an urgent imperative if the present system is not simply to collapse over time in the face of these shocks. First, one can predict that as land acquires increased economic value as a source of income generation in the money economy, pressures for increased opportunities for acquisition and alienation will mount. Similarly, one can predict that as land assumes increased economic value, and as population growth further increases its scarcity value, the potential for land disputes (already pervasive) will increase, reflecting the enhanced values attached to assertions of territorial imperatives. Finally, one can predict that population mobility, reflecting higher levels of education, improved transportation infrastructures, and increased opportunities to participate in the development of the country, will render composition of land-owning groups less stable. Thus, the environment in which a new land policy for Papua New Guinea must be fashioned must deal with the prospect of more direct dealings in customary land, more land disputes, and less stable group structures, all in the context of a country with no written history generally and no customary land records specifically. This scenario suggests the need for the introduction of a regime that permits, without overbearing formality, limited direct dealings in customary land, a frontal attack on the task of designing effective dispute resolution mechanisms, a new regime governing group decision rules, and a feasible set of measures that will ensure a progression towards a documentary customary land law system. In the case of alienated land (i.e. the tiny percentage of private freeholds, or land previously acquired by Government from customary land-owners and held in its own right or leased to other parties), the detailed administrative procedures presently in place regulating the issuance, transfer, mortgaging, and amendment of leasehold interests have created inordinate delays in the effectuation of land transactions in this sector. The necessity for such detailed regulations also calls for searching review.

PART II: CUSTOMARY LAND: ALIENATION AND REGISTRATION

Two abiding issues of debate with respect to land policy in Papua New Guinea have been: first, whether individualisation of land tenure is

a pre-condition to greater economic productivity in activities involving land and, second, whether a comprehensive system of registration of ownership and perhaps occupation interests in customary land is necessary to induce a greater rate of investment, especially in the rural economy. On the first issue, the importance of individualisation of land tenure to enhanced economic productivity is easily exaggerated. Even in developed economies, most major economic resources are owned by groups, whether corporations, cooperatives, insurance companies, pension funds, mutual funds, etc. What is distinctive about the Papua New Guinea concept of communal ownership is the inability of a group to alienate interests in its land in most circumstances, except to the Government. Even where alienation is permitted i.e. to the Government, the rule of unanimity amongst group members which generally prevails generates formidable transaction costs in effectuating and maintaining agreements. With respect to the second issue (registration), past attempts (the *Native Land Registration Act 1952* and the *Land Titles Commission Act 1962*) to determine and register interests in customary land have completely failed. This in large part seems explicable by reference to the excessive ambitiousness of the proposals, which aspired to register all customary land in Papua New Guinea (i.e. involved "systematic" rather than "sporadic" registration). In a country lacking a written history, comprising 700 separate tribes speaking 700 different languages, espousing many different customary laws, recognising ownership as largely a function of the vicissitudes of tribal war, mostly defining individual ownership rights by reference to membership in often very large and ill-defined lineage groups, and recognising a multiplicity of different ownership and occupation interests in land the problems of developing, implementing, and maintaining a documentary title system (with a State guaranteed registry of all ownership interests) are nothing short of immense.

In dealing with the question of alienability of interests in customary land, Ward points out[4] that there has been a rapid growth in informal and often non-customary dealings in customary land, including clan land usage agreements permitting an individual member of a clan exclusive use of given land for agricultural production for a certain period of time, group projects involving inter-clan agreements as to common working and development of both groups' land, leasing and outright sale of land (often to migrants from other regions of the country), contrived disputes under the *Land Disputes Settlements Act*

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4 Alan Ward, "Customary Land, Land Registration and Social Equality in Papua New Guinea", History of Agriculture Discussion Paper No. 20, U.P.N.G., 1978.

1975 designed to produce binding declarations of title to land in order to facilitate development projects, and unofficial transfers of government leasehold interests in land settlement schemes. Part of the explanation for the growth in non-customary, direct dealings (of dubious legality) in customary land appears to be a chronic inability on the part of the Department of Lands to develop flexible and expeditious procedures to govern the intermediation role assigned to the central government by the existing provisions of the Land Act 1962-73. These provisions prohibit dealings in customary land otherwise than in accordance with custom except in favour of the government and essentially require any party seeking to acquire an interest in customary land to approach the central government through the offices of the Department of Lands to buy or lease the land from the customary owners and then in turn lease it to the party interested. Delays of two to three years in completing this process are the rule; much longer delays are common. Apparently at the present time a backlog of the order of 8,000-10,000 lease applications await processing by the Department of Lands. We agree with Ward's conclusion -

> "that there is widespread popular support for direct dealing, and the attempt of the Committee of Inquiry into Land Matters 1973 to uphold a near-monopoly for the government is breaking down, as straight commercial transactions are elaborated under the guise of 'customary' dealings"[5]

We propose that limited direct dealings in customary land be permitted and formalised. These dealings would be restricted to the creation of leasehold interests (absolute alienation would not be permitted) and would be subject to review where non-automatic citizens or significant tracts of land or investments are involved to ensure their basic fairness to the customary land-owners in the light of the following guidelines:

(1) No lease should normally exceed X years in length.

(2) Where the customary land-owners are guaranteed significant participation in the project planned for the leased land, a lease may be granted for up to Y years. Highly participatory, joint venture type arrangements with sources of development capital and management expertise should be strongly promoted.

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5 Ward, *op. cit.*

(3) Where a lease is being granted to a public authority (e.g. any level of government) for public purposes (e.g. schools, police stations), a lease may be granted for up to Z years.

(4) No lease should be approved if the terms do not reflect a fair return to the customary owners.

(5) No lease should be approved if it would create a serious risk that the remaining land of the customary owners may prove inadequate for subsistence food production.

(6) No lease should be granted unless the applicants for approval can demonstrate that the agreement reflects the consent of those authorised to act by the decision-rule applicable to the group of customary owners in question.

Mortgages of interests in customary land in favour of government lending institutions and the major trading banks should also be permitted, subject to a mortgagee not being able to foreclose or sell the land on default, but instead be limited to working the land either directly or through an assignee for a period (e.g. up to ten years). Mortgages would not be subject to the review process.

In our original study, we proposed that the vetting function for leases be vested in local land courts. Further consideration of this question now suggests to us the need for a more expert body drawing on legal, agricultural, business and sociological skills. Such a body would need to be specially constituted. In addition, we now see a need for a further body to play a pro-active, promotional role in agricultural development i.e. identifying development opportunities, presenting these to customary land-owners, helping mobilize land groups, assisting in making applications to land courts for declarations of land rights, identifying and negotiating with possible sources of finance and management expertise on behalf of land-owning groups. We believe that such a body could be built on a reconstituted and restructured National Plantation Management Agency (renamed e.g. the National Rural Land Management Agency), especially if current proposals to place the agency under the aegis of the Development Bank (the principal source of rural credit) are proceeded with. Such an agency would, because it is widely decentralized, provide one-stop service for customary land-owners seeking assistance with problems of security of title, finance, and management and technical assistance in developing their land.

With respect to the issue of the security of title to interests in customary land (to which previous registration regimes attempted to respond) we propose adaptations to the existing Land Disputes Settlement Act, focusing on present land disputes, prospective (or apprehended) land disputes, and agreements with third parties. These proposals are all refinements and extensions of practices that have recently been evolving under this Act.

In the case of present land disputes, we recommend a strengthening of the existing informal mediation process under the Act by better training and vetting of mediators and the statutory codification of local customary land-laws by provincial governments in order to establish some parameters within which mediation can take place. In the event of failure of the mediation process, the study proposes a restructuring of local Land Courts whereby the disputants each nominate a qualified mediator (not previously involved in the dispute) and the two mediators agree on the appointment of a specialised, full-time, Land Court magistrate as Chairman of the Court. The parties would be encouraged and assisted to retain legal assistance in the preparation and presentation of their cases. The process suggested would hopefully offer an appropriate combination of local knowledge, acceptability, specialised expertise, and a measure of discipline in the isolation of the issues in dispute and the presentation of evidence and argument on those issues. Appeals from Local Land Court decisions to Provincial Land Courts would lie only in respect of errors of law and procedural irregularities (not findings of fact). Provincial Land Courts would be staffed by senior, legally accomplished and highly experienced magistrates and parties would normally be represented by local legal advisors. An organised system of reporting important Land Court decisions should be instituted to improve the consistency of, and weight attached to principle in, Land Court decisions. Consideration should also be given to requiring parties to a land dispute to post a compliance bond before the adjudication process begins which would be returned say a year after the issuance of an order, if the order has been respected.

In the case of prospective land disputes, where a group fears that if it invests resources in enhancing the productivity of their land, another group may subsequently press an adverse claim to the land (especially if the first group's venture proves successful), the study proposes a procedure whereby the first group can apply to a Local Land Court magistrate for a binding declaration of its rights. Following appropriate public notice of the application (by local radio broadcasts, etc.) and in the absence of objections to the declaration sought, the Local Land Court magistrate can proceed to make the declaration, which then binds all parties. If objections are

received, then the procedure outlined above for present disputes is triggered. Where customary land-owners wish to enter into leasing or mortgage arrangements with third parties, they would first obtain a declaration of their land rights from a Local Land Court as described above. Thereafter, in the case of leases, they would be subject to a "fairness" review by the vetting agency described above. If they satisfy this review, they would then be filed, as would mortgages, with the relevant office of the provincial land court magistrate which would check, in the case of mortgages, that necessary consents to the transactions had been obtained (the vetting authority would perform this function in the case of leases) and then forward the agreement for registration in the customary land register proposed below.

By facilitating lending against the security of land and joint-venture leasing arrangements utilizing equity capital, a major infusion of additional development capital into the customary land segment of the agricultural sector should be encouraged.

Details of mediated agreements and Land Court orders in present disputes, declarations in prospective disputes, and agreements involving third parties would be entered in a proposed new centralised customary land titles registry in Port Moresby and in regional land registries maintained (probably) by Provincial Land Court officials. This registry system would form the beginnings of a documentary system for customary land titles. Once registered, Land Court orders would be come binding on all parties. Non-enforcement by the government of registered orders against parties seeking to defy an order would result in government compensation awards to any party relying on the order to his detriment. The mechanics of such a system might work roughly as follows.

A local Land Court, on issuing an order declaring rights in land, would forward it to the Provincial Land Court Magistrate's Office for filing, pending expiration of appeal periods or proceedings. Appeal periods would need to be somewhat shorter than at present to expediate the process. In the case of uncontested applications for declarations of land rights, this should create little injustice. When appeal periods or proceedings expire, the original Land Court order would be forwarded to the Registrar of Titles at Port Moresby for entry into the proposed register of customary land. A copy of the order would be retained by the Provincial Land Court Magistrate's Office. On receipt of the order, the Registrar of Titles would prepare a standardized abstract of the order, identifying the land-owning group, and describing the location, area, and demarcation of the land and the nature of the land-owning group's interest therein

(typically base title only would be registered). Registrable land court orders would have to embody low-quality, chain and link surveys of boundaries. A copy of the Registrar's standardized abstract would be remitted to the Provincial Land Court Magistrate's Office for filing in a regional duplicate register. Where leasing or security (mortgage) transactions are entered into by land-owners following a declaration of their rights by the Land Court, lessees and mortgagees would bear responsibility for filing the agreement with a Provincial Land Court Magistrate's Office. The agreement would then be forwarded to the Registrar of Titles who would abstract it as above and forward a copy of the abstract to the relevant Provincial Land Court Magistrate's Office for duplicate regional filing. Non-registration would render an agreement unenforceable by the third party. The Registrar of Titles would, on entering an abstract in the central customary land register, in all cases also send a copy of the abstract to representative(s) of the land-owning groups named to act in that capacity in the Land Court order and to third parties involved in agreements.

PART III: TRANSACTION COSTS

In order to mitigate the substantial and sometimes crippling transaction costs often associated with land dealings in Papua New Guinea, a number of strategies warrant consideration:

Bargains for Lesser Interests

Negotiating agreements for lesser interests than have been historically involved in outright purchase or long-term (99 year) leasing of customary land (typically through the government) probably involves fewer problems in securing agreement amongst members of a land-owning group than to the alienation of more substantial interests. Permitting limited-term direct leasing is consistent with this consideration.

Greater Specification of Gains and Costs

Where feasible, agreements with customary land-owners (e.g. leases, sales of timber rights) should attempt to specify fully the allocation of gains, costs and risks so as to minimise future uncertainties and possible disenchantment and breach.

Showcase Effects

Stretegic location of demonstration projects involving the use of customary land may reduce uncertainties and inhibition in the minds of other customary land-owners about the wisdom of entering into transactions or arrangements involving their land.

Compensation in Kind

In the case of land required for government projects, compensation in kind, by the provision of alternative blocks of land, may sometimes be seen as a superior substitute to money for the land surrendered and facilitate negotiations over the acquisition.

Modifying Group Decision Rules

In place of the rule of unanimity that seems typically to govern group decisions over land dealings, serious consideration needs to be given to the adoption of majoritarian or representative decision rules if the increasingly fluid nature of group composition is not to paralyse decision-making governed by unanimity rules. The land corporations provided for under the New Zealand *Maori Affairs Act 1953* which operate through an elected committee of management under court supervision offers an attractive precedent. Third parties dealing with the committee of management can legally treat the committee as duly authorised to enter into agreements on behalf of the corporation. The existing *Land Groups Act 1974* goes some distance in this direction and could be modified to permit limited direct dealings by customary land-owning groups with third parties.

More Forward-Looking Bargaining Strategies

In negotiating with customary land-owners over land required for public projects, government often finds itself in a position where having begun a project, it requires a particular tract of land almost at any price. More forward-looking bargaining strategies, involving the identification of alternative routes or projects and the negotiations of options to purchase with respect to land required for the alternatives may avoid the government being "held up" for extortionate

amounts of compensation,

Contract Enforcement and Renegotiation

Many contracts with long term impacts involving customary land tend to unravel. The incidence of contract breach seems high in many contexts (e.g. compensation agreements, sales of timber rights). The law needs to specify very clearly the circumstances in which renegotiation or adjustment will be permitted; otherwise the government has to be prepared to see that contracts are strictly enforced. An economic environment in which contracts can be breached with impunity whenever it is expedient to do so is likely to generate substantial investor uncertainty and ultimately disinvestment.

PART IV: COMPENSATION CLAIMS

Land compensation claims against the government have been a particularly acute and disruptive issue in Papua New Guinea. Some concerns are directed at earlier pre-Independence acquisitions where no or inadequate compensation is alleged to have been paid. Other concerns are directed at more recent acquisitions where, in some cases, inadequate compensation is said to have been paid, and in other cases, excessive compensation is said to have been paid either by way of political favouritism or in response to the extortionate bargaining position of groups in a position to disrupt or obstruct a major project.

The study proposes that the Land Act (or any separate Land Compensation Act that might be enacted) should specify as exhaustively as possible all compensable interests including those that have no direct market value (loss of sacred places, ancestral burial grounds, etc.) and that schedules be developed and revised from time to time setting out rates of compensation for these various interests. Compensation awards would be determined in all contexts by a political tribunal, such as modified National Land Commission, with appeals therefrom to the courts only with respect to legal or procedural irregularities. Compulsory acquisition and compensation provisions in the Land Act, the National Land Registration Act 1977, and the Land Acquisition Act 1974 would be consolidated in a single statute and administered by a single tribunal.

Compulsory acquisitions under the Plantation Redistribution Scheme appear to have had a detrimental impact on the productivity of the plantation sector. In some cases, uncertainty as to which plantations would be acquired and what compensation payments would be likely to be forthcoming in that event has induced disinvestment in the sector and falling productivity. In other cases, poor management of the plantations following acquisition and distribution to local groups has had a similar effect. The study proposes that remaining expatriate plantation owners be permitted to retain (or convert to) long-term leasehold interests in their plantations and be able to transfer or mortgage these interests freely, including effecting transfers to non-nationals. (We understand that the government has recently adopted a similar policy). The government should seek to make available other alienated but undeveloped land to local groups for development.

PART V: ALIENATED LAND (GOVERNMENT LEASEHOLDS)

In the case of alienated land (3% of the land in Papua New Guinea), specifically government-owned leasehold interests, the procedures in place under the Land Act and administered by the Department of Lands for the issuance, transfer, amendment, and mortgaging of leasehold interests have created lengthy delays in processing land dealings involving government leasehold interests and have contributed to the scarcity of developable land, especially in urban centres. Few offsetting benefits seem to be associated with these detailed regulatory controls. A better strategy would seem to be to establish some general constraints on urban development through Town Planning and construction specification requirements, building permit requirements reflecting the availability of water, sewerage, and other amenities, and survey requirements. Within these constraints, a relatively free market in land in urban centres should be permitted with the government auctioning off leasehold blocks for development to the highest bidders, and direct long-term leasehold dealings in customary land in urban centres being permitted by way of extension to the proposals on direct dealings outlined above.

Concerns over distributional questions, such as the availability of low-income urban housing, should be met by separate programmes designed specifically to this end rather than by policies that disrupt the entire market on this account. These programmes might be financed, in part, by land taxes that reflect the development potential of land (which would create incentives to realise that potential) and/or a capital gains tax on the purchase and re-sale of urban properties.

PART VI: CONCLUSION

The proposals we advance are highly incremental in nature and do not involve cataclysmic (and unattainable) agendas of reform. The proposals on alienation and registration of interests in customary land recognise evolving practices in the field (in the case of alienation) and involve some relatively straight-forward refinements and extensions to The Land Dispute Settlement Act (in the case of registration). They are readily amenable to trial in a pilot scheme in one or more provinces. The proposals for dealing with land compensation claims would again involve relatively straightforward adaptations and extensions to aspects of the National Land Registration Act and to the role of the National Land Commission, (probably in the form of a new Land Compensation Act and Land Compensation Board, as exemplified in many other jurisdictions).

The proposals for reducing the legal and administrative impediments to the supply of leasehold land in urban centres would involve establishing some broad parameters for development but drastically reducing case-by-case review and approval of all individual legal transactions.

In order to think discretely and practically about land reform issues, it might be useful to set in train policy development strategies that focus sharply and to some extent separately on the following issues:

(a) What to do about alienability and registration of interests in customary land, and related questions of land dispute resolution, especially in the rural sector;

(b) What to do about land compensation claims;

(c) What to do about facilitating transactions involving alienated (leasehold) land, especially in urban centres, and how to ensure greater availability of land, including customary land, in these centres;

(d) Whether pilot schemes in particular regions or centres might be a productive path to follow in testing out new approaches to each of the first three questions.

As Aaron Wildavsky, a distinguished American political scientist and

policy analyst, once remarked: "Policy analysis is an activity creating problems that can be solved".[6] Decomposing land problems in Papua New Guinea into discrete issues and identifying some incremental moves that might be made with respect to each issue seems to respect the force of this observation. More global conceptualization of the problems and more ambitious agendas of reform are likely to leave the severe land problems presently being encountered in Papua New Guinea unresolved for many years to come.

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6 Aaron Wildavsky, Speaking Truth to Power: The Art and Craft of Policy Analysis, Boston, Little Brown and Co., 1979, p. 17.