



GOVERNMENT OF SAMOA

**SAMOA SECOND INFRASTRUCTURE AND ASSET
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**Customary Land Tenure
Review**

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INTRODUCTION

This report is a review of Customary Land Tenure in Samoa. It was prepared in the most part by Fiu Mataese ELISARA¹ on behalf of Land Equity International and the Ministry of Natural Resources, Environment and Meteorology (MNREM) as part of the Second Infrastructure and Asset Management Project (SIAM II) - Land Administration and Survey Component.

The review was envisioned as background for the Land Administration Reform sub-component of SIAM II. The overall purpose is to develop an understanding of the traditional systems of tenure over customary land and to explore a framework for potential inclusion of customary land in the formal registration process.

The report is in two Parts

PART 1 is a response to the specific responsibilities listed under the TA terms of reference (a copy is attached to this report).

PART 2 is a response to series of questions which were posed as an attempt to sharpen focus on the potentially emotive, and certainly politically sensitive, issue of Customary Land Tenure

The views and comments in the report are those of the Adviser.

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PART 1. TERMS OF REFERENCE

1.1 INTRODUCTION

It is important in the issue of lands in Samoa to first obtain some insight into the past to provide us a better understanding of the status of lands in Samoa today. My research attempts to take us back to the early settlers when they arrived in the early eighteenth century when all Samoan lands were owned, managed, and held under customary control, usage, and tenure.

Secondly, an overview of the time when Samoa was controlled by colonial powers attempts to demonstrate that even under those difficult times for Samoans, there was recognition of customary lands in Samoa to be controlled and managed by the Samoans themselves for the use and benefit of Samoan peoples.

Thirdly, the expose on the transition period from pre-independence, to preparation for independence, and finally to the time after independence forms the major part of this report. It strives to contend that the status of land in Samoa today is very much a product of the power struggle by the Samoans under these colonial administrations.

Emanating from this struggle are the questions of land tenure, types of lands in Samoa, status of lands, ownership, administration, management, and with the pressure of economic development pushed mainly by the extravagance of the rich countries with interests in Samoa and the usurping powers of globalization, come the added pressure of economic development pushing deliberately for ways to usurp customary lands under the guise of development.

This is the underpinning, in my view, of this work and I will try to be very frank and poignant in my earnest struggle to address the discourse with some bias towards the side of customary land owners whose perspective is often ignored by the authors of many writings about this issue of lands in Samoa.

The Discovery of Samoa and the Colonial Powers:

The Dutch navigator, Jacob Roggwein, was the first European to sight the Samoa Islands which were first referred to as Navigators' Islands. In charge of a "three-ship expedition" he discovered the three most eastern islands of Samoa (the Manu'a group) and gave them the name of Baumann Islands in honor of the captain of the ship "Tienhoven" who first saw them. Two French navigators, de Bougainville and Captain Edwards (1791) visited Samoa in the HBM "Pandora". La Perouse visited Samoa 19 years after de Bougainville. Samoa consists of ten islands – Savaii, Upolu, Tutuila, Manono, Apolima, Aunu'u, Nu'utele, Ta'u, Ofu, and Olosega. The three last named are generally embraced in the Manu'a group.

For years Samoa was a bone of contention among Britain, Germany, and the United States and it was only when these three countries entered into an agreement for the division of the islands that tribal wars ended, head-hunting disappeared, and order took the place of chaos. Upolu, Savaii, Manono and Apolima went to Germany. Tutuila and the Manu'a Islands went to the United States. Britain was compensated by concessions in the Solomon group.

On 1 January 1905 census, the total white population of German Samoa was 381 – 92 Germans, 89 British, 39 Americans, between 600 and 700 half castes, while the native Samoan population was about 33,000

The great hurricane of March 16, 1889 mark a new epoch in Samoa with the Berlin Treaty being the immediate result of this. On 14 June 1889 the general act of Berlin was concluded for

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the neutrality and autonomous government of the Samoan Islands Robert Louis Stevenson arrived in Samoa end of 1889 and died 3 December 1894.

During the German rule, there was a perceived respect for Samoan tradition and Christian principles and to take ownership of its own administration by Samoans themselves. In a speech on 17 August 1900, the first German Governor in Samoa, Dr Wilhelm Solf, said:

"...It is not the intention of the German Government to force you to adopt our morals and our customs; the Government has a regard for your old traditions and respects them in as far as they do not give offence to the precepts of Christianity and the well being and safety of the single man. The Government reposes the confidence in you that you are able to administer yourself under the supervision of the Governor, and there will be given such laws and ordinances as are to the best interests of the country and consonant, as far as possible, with your institutions"

But this did not last as one year later, the Governor in a proclamation dated 16 September 1901 forbade the Samoans from exercising the customs of local banishment, and usurped this power to be exercised by the Governor himself. The New Zealand Expeditionary Force arrived in Samoa on 29 August 1914 soon after outbreak of WWI, and took over Samoa as the first country in the Pacific taken over by the Allies and placed it under military rule but the German system of government was allowed to continue. The power that was usurped from Samoans by the German Governor was endorsed by the NZ Military Administrator through the proclamation of 20 March 1916 and regulation of 12 February 1918 stipulating the manner local banishment is to be dealt with.

Era of Land Claims:

In the mid 19th century, the USA, Germany, and the UK had all established consulates in the Samoan Islands with rights to acquire lands and in 1864 the great land rush began. Several companies claimed huge areas, as much as half the area of Samoa. As the country was under the German Administration, the Berlin Act of 1889 was introduced to terminate the years of rivalry and intrigue. It prohibited further sale of land to Europeans other than in the Apia area and only on approval of the Chief Justice. A land commission was also set up to solve all land claims which at the time amounted to more than twice the total land area of Samoa. Only 8% of the land claims proved valid, and hence registered as Court Grants. A constitution order was made by Germany in 1890 which prohibited further alienation of land except under official cases.

In 1905, a seven mile plantation district was established around Apia and Samoan agricultural land within this district could then be purchased with the Governor's approval. The Department of Lands was set up during this administration and was tasked to handle all the cadastral and engineering surveys that were required. The land registration was originally a function of the Supreme Courts but was transferred later to the Lands and Survey Department.

The Treaty of Berlin on Land Alienation:

The representatives of Germany, USA, and UK met at the Samoa Conference in Berlin on 14 June 1891 and concluded a treaty designed to ensure that the Native Samoans may keep their lands for cultivation by themselves and by their children after them. The treaty also enacted that henceforth from 14 June 1891 there should be a complete prohibition on all sales, mortgages and other disposition of Samoan lands to the citizens or subjects of any foreign country. It was also agreed that all lands for use by churches should revert to the original title holders when they were no longer needed for Churches purposes.

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The German Administration ended in 1914 and Western Samoa was conferred upon NZ as a mandate under the League of Nations. The New Zealand government then declared all customary land to be vested in the government as trustee which purported to have given a complete protection and prevention of the alienation of customary lands. The four islands of Savaii, Apolima, Upolu, and Manono was recorded to have a total area of 1095.1 square miles. The total population of Western Samoa as of 1 November 1971 was recorded as 146,635.

At this early juncture of the report, I want to include as preamble information some comments on the development aspect of Samoa in the last decade for the information of our Land Equity Team as this will serve well, in my view, to provide a better overview of the contemporary development progress of Samoa which will be useful for an overall assessment of the issue at hand.

The Samoa development context in the last decade:

One of the striking realities of the past decade has been the shift in the geographical distribution of the total population of the country. The table below summarizes these changes as identified by the census of population conducted and analyzed by the Samoa Department of Statistics. The absolute population total has increased by 9.64% over the period between the last two censuses, 1991 and 2001, although this figure is in turn influenced by net out-migration.

The most significant development relates to the increase in the overall number of people residing in the North-West Upolu area, with an increase of 35% over the reference ten-year period. Together with the designated Apia Urban Area, North-West Upolu is now home to 51.8% of Samoan residents. This has major implications for social and economic infrastructure development needs. It also has direct and tangible social impacts as more and more people reside outside a strictly village setting with its related traditional village administration and social governance.

The relatively slow and steady growth in population numbers for the Rest of Upolu, and a comparatively significant decline in the numbers residing in Savaii, also poses some serious developmental implications. The slow or negative population growth in some areas of the country should make available land resources for development however, customary and traditional rights, especially those that affect land tenure, and related weaknesses in individual property rights, will persist to make such a potential a continuing challenge.

The geographical distribution of the population also has implications for the costs of development. The Government of Samoa has a laudable goal of providing similar infrastructure and social services for people wherever they reside in the country. This approach has logistically "reduced" the size of the country, and has concurrently made it possible for most people, to access basic and essential services available only in the main townships such as Salelologa and Apia. Despite these rural development policies, people still "vote with their feet" regarding where they prefer to reside and the rural developments of the past two decades have yet to impact this urbanization trend.

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Population of Samoa

Census	1991			2001			% Change
	Male	Female	Total	Male	Female	Total	Total
Apia urban area	18,396	17,093	35,489	19,837	18,999	38,836	+9.43%
North-West Upolu	20,498	18,548	39,046	27,523	25,191	52,714	+35.0%
Rest of Upolu	21,991	19,722	41,713	22,384	20,090	42,474	+1.82%
Savaii	23,714	21,334	45,048	22,386	20,438	42,824	-4.94%
Total	84,599	76,697	161,296	92,130	84,718	176,848	+9.64%

Source: 2001 Census of Population and Housing, A Special Release of Census Selected Tabulations, Statistics Department

The following table shows the breakdown of GDP as estimated by the Treasury Department (now Ministry of Finance) for various productive sectors for the years 1998 to 2002 (recorded in the Central Bank of Samoa Bulletin, March 2004). The table provides the economic and social backdrop against which communities are impacted, and which form the basis of the discussions and conclusions made at the MDG Workshops.

Real GDP at 1994 Prices for 1998-2002 (SAT\$million)

At constant 1994 prices	1998	1999	2000	2001	2002
Agriculture	78.81	74.91	75.34	66.12	60.10
Fishing	53.26	49.66	49.65	53.14	50.58
Food/beverages/manufacturing	24.16	24.32	23.33	22.56	25.24
Other manufacturing	58.16	59.11	66.21	77.80	74.95
Construction	37.63	38.87	47.20	49.14	43.07
Electricity and water	16.76	16.34	17.64	20.67	23.88
Commerce	85.51	92.35	100.80	109.35	120.11
Hotels and restaurants	12.67	12.98	13.78	15.29	16.52
Transport and communication	66.53	70.72	78.40	87.95	92.97
Public administration	59.49	63.55	67.52	70.79	76.49
Finance and business services (net)	35.66	36.75	38.51	41.95	47.57
Ownership of dwellings	21.65	22.10	22.53	22.99	23.45
Personal and other services	41.92	42.72	45.38	48.63	50.38
Total Real GDP	589.21	604.36	646.31	686.37	705.29
Annual Growth Rate	2.7%	2.6%	6.9%	6.2%	2.8%

Source: Central Bank of Samoa Bulletin, March 2004

Note: Individual sums and totals may not add up due to rounding

There is a gradual shift of the economy towards the monetized sectors such as commerce, public administration, transport and communication, and other manufacturing although their contribution to GDP over the immediate past years has been uneven. In part, this reflects the volatility of some sectors of the economy, and the inter-relationships that impact each depending on resource allocations. A major influence, is the change in the contribution to GDP by subsistence activities, calculated by the Treasury Department to drop from 40.13% in 1995 to 24.99% in 2000.

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Showing persistent decline are the former mainstays of the economy: agriculture and fisheries. These are the productive sectors within which the bulk of subsistence productivity occurs. This trend may be indicative of the general steady move to a more commercially oriented and monetized economy. These trends are further driven by government policies of user-pay and cost-recovery principles to the supply of government services, and the increased need for money income subsequent to the introduction of the value added goods and services tax system.

Movements in the distribution of GDP among the various economic sectors may also have serious implications for income distribution. While total GDP has shown a persistently positive growth trend over the immediate past few years, its components appear tilting towards particular sectors and enterprises. The implications are more and more people will need to obtain cash employment to obtain a share of this growth. To be employable in a necessarily increasingly competitive labour market means general education and specialized trades and services training will become even more essential.

The following table shows the estimated changes in the real GDP sectoral composition between 1995, 1998 and 2002:

Sector Shares of GDP at Constant 1994 Prices

Sector	1995	1998	2002	2003
	%	%	%	%
Agriculture	16.6	12.9	8.5	7.1
Fishing	7.7	9.0	7.2	6.6
Food, beverages and manufacture	3.9	4.1	3.6	3.3
Other manufacturing	14.0	9.9	10.6	14.1
Construction	6.7	6.4	6.1	6.5
Electricity and water	2.5	2.8	3.4	4.3
Commerce	12.0	14.5	17.0	20.2
Hotels and restaurants	2.1	2.1	2.3	2.7
Transport and communication	9.4	11.3	13.2	12.9
Public administration	8.8	10.1	10.9	8.1
Finance and business services	5.4	6.1	6.7	9.1
Ownership of dwellings	3.8	3.7	3.3	2.8
Personal and other services	7.1	7.1	7.2	3.4
TOTAL	100.00	100.00	100.00	100.00

Sources: Minister of Finance 2003/2004 Budget Address and Central Bank of Samoa Bulletin, March 2004 and 2003 figure released by the Ministry of Finance.

Foreign aid, government borrowings overseas, and foreign remittances are the main resources that fuel the local economy. The following table shows the proportions of these resources compared with GDP for the years 1995 through to 2002. Consistently, foreign aid, government external debt and foreign remittances, in total, have exceeded GDP for those years. Government external debt, because they are often repayable over extended periods of time, is slightly different from the other two categories, which are unrequited payments often not requiring remittance of local resources offshore.

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Compared to the steady growth in GDP for the reviewed years, Foreign Aid inflows have been quite steady averaging 11.9% of GDP annually for the eight years analyzed. Government External Debt, on the other hand, averaged 72.6% with the latest figures showing a decline to 54%, while Foreign Remittances averaged 21.0%. Overall, these figures show that the economy has maintained a healthy balance between domestic economic production and these major fuels of economic activity.

These figures, highlight how it can be misleading to measure the spread of the wealth of a nation based on per capita income statistics. Official Development Assistance is normally channeled through government sources, and applied to government capital expenditure, of which only a portion reaches the general population. Much tends to be repatriated, yet it is counted as part of GDP and likewise the Government External Debt. Household surveys, therefore, can provide a better measure of household economic status and income level situations.

Foreign Aid, External Debt and Foreign Remittances as % of GDP

Year	1995	1996	1997	1998	1999	2000	2001	2002
Real GDP (SAT\$millions)	532.1	570.9	575.4	589.2	604.4	646.3	686.4	705.3
Foreign Aid (% GDP)	12.8	10.5	12.9	11.9	13.5	10.0	9.5	14.3
Govt. External Debt (%GDP)	77.7	72.2	74.4	80.2	73.9	74.7	73.3	54.0
Foreign Remittances (%GDP)	17.6	16.3	17.2	19.4	22.2	24.6	22.9	27.7
Total as % of GDP	108.1	99.0	104.5	111.5	109.6	109.3	105.7	96.0

Sources: Minister of Finance, Budget Address 2003/2004, and Central Bank of Samoa, Bulletins June 2003, December 2003 and March 2004

1.2. TERMS OF REFERENCE

1.2.1 Complete an overall review of the traditional land tenure and administration systems with emphasis on the present and future efficacy of these systems in providing security of tenure over customary lands in Samoa.

In the "*Samoa – The Making of a Constitution*" a committee set up to frame the constitution defined the unit of Samoan social life as the family, and not merely a simple biological group as Europeans understand the term consisting of parents and children, but a wider family group of blood and marriage or even adopted connections who all acknowledge one person as the matai or head of that particular family. Matais are chiefs and orators whose duties are leadership and care of the family under their control and who are entitled to the services and cooperation of all members of their families in return for their leadership. It is the duty of the matai to administer the family lands and to apportion it for the use of members in return for their services rendered to them as head.

The Fono of Faipule recognized in 1923 and the Samoa Amendment Act 1923 states: "*It shall be the function of the Fono of Faipule to consider such matters relative to the welfare of the Samoan people as of their own initiative they think proper or as may be submitted to them by the Administrator, and to express their opinion and make their recommendations to the*

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Administrator This Fono of Faipule was abolished by the Samoa Amendment Act 1957 with its 41 members to be the Legislative Assembly, elected in 1951, and sole law-making body in the country

On Economy and land Tenure, it was 'agreed' that a solution should be found to the problem of land tenure. The perception was that leasehold and freehold properties operated more successfully than cultivated Samoan title lands. The Samoan developer usually had only a short term goal since the matai would regain control over the plantation when the developer died. Customary lands could not be used as security for loans to assist the development of the properties. A decision of the Lands and Titles Court had confirmed that although the matai held the title to the land, the cultivation on it belonged to the person who worked it so when the person died the crops would go to the children who must continue to render services to the matai. If the children were to do that, the matai could not remove them from the land.

Some felt that land tenure system had not been an obstacle to some matais who reaped great benefits from their plantations on customary lands and considered that if it was difficult to change land tenure system, consideration be given to handing over surplus customary lands to Western Samoa Trust Estate Corporation (WSTEC) for development and any returns be for use by the government.

Samoan customary lands, according to law, could not be pledged for a debt or loan. Some merchants accepted customary lands as guarantee for a debt although the Bank would not, but the hope was expressed that the Bank of Western Samoa would assist.

There was some discussion and agreement to consider how customary land could be protected from alienation by those who were not Samoans so as to ensure that future generations of the Samoan people would not be deprived of their lands.

Samoan customary lands were not affected by death duties but the fruits of the land and freehold properties might be so liable. Samoans were liable for death duties on their freehold lands. It was agreed that the position in the law regarding leasing and/or alienation of customary land should remain. Leases of customary lands were allowed for 20 plus 20 years.

Discussion also considered those people permitted to use customary land on account of services rendered (tautua) to the matai and what protection was needed for dependants if on the death of such people the matai asked the dependants to leave.

It was thought that the greater security that could be given in those cases would be to lease the land to dependants and to give the power to the legislature to enact laws governing the granting of leases. The problem that could arise was that the matai could lease the lands to the immediate family thus depriving other people in the family from enjoying the use of the land. As well, if all the land were leased to the family of the matai it was possible that the family might refuse to render services to the matai as they themselves had security of tenure over their leaseholds and no matai would ever remove from the land any person who was related. However, that was possible with strangers after the death of the spouse and possible also with local Europeans rendering tautua and using customary land.

It was agreed that there was need to safeguard customary land but because of the increasing population some method should be worked out to allow leasing and required a resolution as that would be a progressive way to meet the problem of land tenure.

Although many Samoans wish to develop customary lands economically, there was still strong objection to any proposal that could endanger its ownership and threaten the customs of the Samoan people.

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The granting of leases upon the conditions that firstly they were subject and secondly to the continued rendering of tautua might hold back prospective Samoan developers as that could be a discouragement to them in the developing of their leases. The people leasing land should, for all intention and purposes, be given the full right to do as they wished on the land and develop it in a way they wanted and should be left alone until the lease expired. The matai could at that stage, before agreeing to a renewal, bring up the question of tautua and the qualifications of the proposed lessee should also be made very clear.

For villages with large areas of cultivatable land, they should lease only to their own people because if leased to outsiders the authority of Alii and Faipule of the village would extend to those people. The area of land leased was suggested to be limited to 16 acres.

As customary land was intensely protected in the constitution, it was felt that public land should also be extended some protection and in that respect government should be authorized to buy but not to sell public lands.

Partition, Distribution and Leasing of Surplus Customary Land:

Framers of the constitution suggested that in villages with extensive land areas, the land should be subdivided first to the people of the village and the rest made available for lease purposes. With the rapid increase in population, it was doubtful if any district would consider any such leasing arrangements to outsiders except there might be exceptions for small leases for trading stores.

In some villages virgin bush lands were under the pule of the Alii and Faipule; they would therefore be the people who would receive the lease money. However, in other places the pule was vested in one particular person that had been confirmed by the Lands and Titles Court. For that reason, the question arose as to who was to receive the rents from leases on undeveloped land remembering the idea of giving taulealea leases was for security of tenure to enable them to obtain loans for the development of their lease holdings.

The question of matai and land be considered carefully for the future prosperity of the country could very well depend on these two. It was felt that no customary land should be subdivided under any scheme whatever for taulealea. What would be the position if a taulealea needed permission to erect a permanent building on customary land and later decided to use it as a store? Would the matai be able to prevent that happening? The protection lay in the fact that unless the matai approved a license could not be granted.

Regarding the point that taulealea should no longer be obliged to render service once they had been granted leases, was a moot one as there were different types of tautua: it could be in money, in words, or in services. It was suggested that the word "lease" in that context was confusing the issue. The use of another term such as "granting of agricultural rights" to taulealea might be more fitting because the issue was to grant the use of land for agricultural purposes.

There should be a condition in the lease agreement that the lease could be cancelled if the lessee failed to carry out the proper use of the land. It was known that in some countries, banks would only give an initial installment of loan, with the balance handed over later if it was satisfied that the loan money was being used properly.

If there was no objection to unused customary land being leased to WSTEC for development, doing so would provide employment for village peoples who would then earn wages while the country received the benefit of the produce from the land. WSTEC could be of great assistance in that respect for the development by WSTEC of such unused lands would greatly help to increase the country's foreign exchange earnings.

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On the occasion of a renewal of the lease, a matai could always consider whether there was sufficient land for the family members; the renewal could be of the whole area or only a part of it. The leases should only be granted on the consent of the Alii and Faipule and the matai concerned.

Regarding the use of the word "lease" there was no objection to it being widely used since it was well understood, but the problem however was likely to arise from possible misunderstanding between several matais of a family where some may have a number of leases. The important point in leasing was for the people to realize that they could borrow money for development and that would encourage work on the land.

While the idea of leasing was good, it could have the adverse effect of breaking up the social system as it was possible that all taulelea in Samoa would be asking for leases, leaving none to render the normal services of tautua to the matai which were expected of them. It could also happen that the people holding titles by adoption or through marriage would lease lands to people of their own immediate connection with the result that when the suli moni (true heir) assumed the title there would be no land left for the family (aiga) to cultivate.

While the majority of opinions favored the granting of leases because that would enable loans to be obtained for land development, many felt that those be granted for the development of virgin bush land only, and not land already cultivated.

That could make it in line with the Samoan custom as interpreted by the Land and Titles Court and should enable a planter to borrow money which was not possible. As the proposal would affect Samoan custom, it was better to investigate the matter further.

1.2.2 Based on the observations and conclusions of the customary land tenure review, report on the appropriateness of extension of the land registration reforms to include customary lands.

In a the Samoa National Assessment Report presented to the Mauritius Small Islands Development States Review of the Barbados Programme of Action, the following facts were presented:

Land resources: The development of land resources in Samoa has principally been in the development and improvement of national databases and the dissemination of information to relevant groups, especially local communities, youth and women, for land-use planning and management. Information on estimates of the carrying capacity, economic and environmental value of land resources, along with appropriate decision-making tools, such as land/geographic information systems have all been part of the assessment and dissemination process. In the latter half of the last decade, management and control mechanisms such as policies and legislation came to the fore.

The government through Ministry of Natural Resources and Environment (MNRE) has developed national land information databases and attempts have been made starting with internal networking that links various databases for easy access within the MNRE that is mandated with the generation and storage of land related information. A website including relevant publications for the purpose of national and international awareness on the progress of Samoa's implementation of Multilateral Environmental Agreements and the Ministry's core functions and services such as land management, technical land services (surveying, mapping, valuation and drafting), Planning and Urban Management (moved to the Ministry of Works and

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Infrastructure in February 2005), Conservation, as well as forestry and meteorology which were shifted from the Ministry of Agriculture Forestry Fisheries and Meteorology, to the Ministry of Natural Resources and Environment recently in February 2005 has been established.

There is work in progress on the land capability/zoning systems for Samoa and the need to establish mechanisms for the sustainable allocation of land-based resources such as sand, aggregates, rocks etc. Traditional management systems, government institutions and development projects have been taken into consideration in the process of sustainable management and development of limited land resources.

Land in Samoa is divided into three main tenure; customary, freehold and government lands (include WSTEC lands) as shown in Table-2.

Table-2 Estimates of Land Ownership in Samoa in 1991

Type	Upolu		Savaii		Total	
	(ha)	%	(ha)	%	(ha)	%
Customary land	76,166	17	153,490	54	229,656	81
Government	19,758	7	10,626	4	30,384	11
WSTEC/SLC	9,499	3	4,476	2	13,975	5
Freehold	7,800	3	1,037	+	8,837	3
Total	113,223	40	169,629	60	282,852	100

In the rural communities, land remains primarily under customary ownership and a large proportion of it is under cultivation. A study conducted in 1990 (ANZDEC) produced land use capability maps of the whole country. The maps categorized Samoa's land into four main classes:

- 1) land with few limitations to agricultural use (39,600 ha);
- 2) land with moderate limitations to agricultural use and few limitations to forestry (121,700 ha);
- 3) land with severe limitations to agricultural use and moderate to severe limitations to forestry (59,400 ha); and
- 4) land unsuitable for agriculture or forestry (69,000 ha)

Samoa acceded to the United Nations Convention to Combat Desertification (UNCCD) on August 20, 1998. Reporting requirements under this convention have already been met with two reports submitted in the last two years consecutively. Samoa has prepared and/or reviewed land-use plans in conjunction with agricultural, forestry, mining, tourism, traditional land-use practices and other land-use policies, with a view to formulating comprehensive land-use plans and zoning so as to protect land resources, ensure sustainable and productive land-use and guard against land degradation and pollution that exceed the island's carrying capacity.

It is widely understood that the tenure system in Samoa, which gives more than 80% of customary land ownership to the Chiefs and Orators (Alii and Faipule) complicates any commitment from financial agencies to use these as collateral for lending. Absentee owners who could be residing overseas or in town may caveat the exchange of use of customary land in the rural areas or traditional villages. This has resulted in some of the customary land being left unattended to. Disputes over ownership of some land result in these land being overgrown with weeds and scrub. Fortunately though, when the village council conducts its clean-up for beautification of the village these overgrown lands are now also maintained. There are also

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village based reserves particularly in forestry where the villages are charged with maintenance of the forests.

A Sand Mining Policy was formalized in 2001 to provide guidance for management of sand and aggregate extraction from the foreshores of Samoa. Existing legal requirements are contained in Part VIII of the Lands Surveys and Environment Act 1989, which prohibits removal of sand or any aggregate from the foreshore, as well as disallowing any construction including reclamations within the foreshore without the prior consent of the Minister of MNRE and the Government Land Board. The Coastal Infrastructure Management Plans also provide guidance for the responsibilities of villages, and districts as well as the government, in ensuring that the sand resources are not being extracted beyond the carrying capacity of the foreshore so that in the long run, natural replenishment becomes elongated or even impossible.

The Planning and Urban Management Act 2004 approved last year by Parliament went through a hugely inadequate 'consultative' process which was a rushed attempt by the government to 'fulfill' its perceived global obligation on the necessity for broad consultation, wide public support and ultimately adherence by those who will be affected. This Act is expected to provide a legal framework for the management of and control of unsustainable types of land use. Particular types of land utilization forms will be closely scrutinized with the requirement for mandatory development consent based on an approved sustainable management plan which is still yet to be developed.

Included in these management responsibilities of the PUMA Act, is the Salelologa Township development on the island of Savaii. Government has acquired by proclamation under the Taking of Lands Act 1964, what many say as legally inconsistent and blatantly extravagant, close to 3000 acres of customary lands, with compensation still being legally challenged, to develop a physical infrastructure for the township of Salelologa which only needed some 110 acres.

One of the government objectives for this Salelologa township is to attract citizens of Savaii to remain on the island and spend their energies to develop its land and human resources. The PUMA Act 2004 was vested originally under the MNRE, but the government has in February 2005, not even a year after passing the PUMA Act 2004, transferred responsibilities to the Ministry of Works and infrastructures which very much contradicts the legal functions of that Ministry under the Public Works Ordinance 1959 dealing only with 10 principle functions to do generally with construction and maintenance of infrastructures and buildings.

Appropriate forms of land tenure are continued to be reviewed and encouraged, as well as improved land administration and a greater appreciation of the integrated nature of land development promoted in order to facilitate sustainable land-use, with the establishment of the National Land Use Policy.

In addition, the Land Management Division of MNRE administers the extraction of land resources such as; the reclamation of land from the sea and river banks and extraction of sand and aggregates. Coastal-based communities are increasingly becoming more aware of the effects of unsustainable sand mining, and are addressing this issue through traditional governance (e.g – bans). Issues arising from unsustainable sand mining have increasingly been recognized in various programmes (Climate Change, Marine Biodiversity conservation, and Coastal Infrastructure asset management).

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The increasing application of Environment Impact Assessment procedures to proposed sand extractions is still far from satisfactory and government needs to approve the long awaited EIA regulation for developers in order for future developments to be carried out in a more sustainable manner. Government also needs to ensure that when it too is the developer, it leads by setting a good example in ensuring it complies fully with the requirements of the PUMA Act 2004 and that independent EIAs are carried out and respected by it with reference to government developments.

It was further stated in Samoa's Report to the World Summit on Sustainable Development (WSSD) held in Johannesburg South Africa in 2002 that "*the proper utilization of land resources, including customary lands, according to their appropriate capabilities and vulnerabilities hold the key to good and sustainable future land use management in Samoa*". Little progress, however, has eventuated with regard to the sustainable management and proper utilization of land resources due to conflicting issues to do with land ownership especially as the majority is under customary tenure.

It has since been suggested that the following land assessment activities need to be undertaken:

- Develop and update existing land resource technical maps for the updating of information about land resource utilization in Samoa.
- Identification of areas of land degradation in Samoa, through the development of maps of areas that are in deteriorating conditions, such as fallow and dry lands.
- Develop national land use capability plans to assess the mechanisms required for sustainable land use management in Samoa.
- Develop a national policy on customary lands to enhance the Ministry of Natural Resources and Environment programmes on improving access to land use resources.
- Conduct an inventory assessment of customary land to find out the percentage of lands that are currently utilized and those left unused and determine the impact of customary ownership on such a distribution pattern. The government plays an important role in developing appropriate mechanisms that should be in place to utilize customary lands for the benefit of stakeholders
- The Ministry of Natural Resources and Environment to develop technical databases on soil types and geology of the islands landscape, based on existing and updated information on land use maps of Samoa to better find means of addressing issues on land use in terms of fertile land, wet lands and swampy areas and land degradation.
- The increased exploitation of land-based resources such as sand, aggregate, gravels and rocks and sustainable allocation of these land based resources are a concern.
- The Land Management Division of MNRE together with relevant stakeholders should look at establishing mechanisms that can sustain the utilization of these land based resources.

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- The government is to develop innovative ways for funding housing for low income people through the use of customary lands as collateral.

1.2.3 Using a participatory approach, engage stakeholders in a review of the policy issues that must be considered and develop options for formalizing customary tenure.

Interviews and discussion were held with a wide number of stakeholders and rights holders' groups of individuals, village communities, and government officials. Below is a record of some of their views and opinions.

Many are supportive and complementary to the strong objections to the issue of ownership of customary lands in Samoa being affected in any way by the ongoing and future push for economic development of this country.

It was also evident that many support finding ways to utilize unused lands, including customary lands, but an ongoing debate continues when it comes to customary lands where different opinions are voiced as to who should directly reap the benefits of the economic utilization of customary lands.

Some queries that came up included:

- Pulefaamau – pule over the land granted to a matai title on behalf of the whole family under that title – this still required clarification.
- Government lease lands from villages (eg. 100 acres) and again lease to developers with benefit going directly to the village owners of the lands. Will this be to village as a whole? Or would it be to an individual matai title?
- What about the question of ownership? This should never be involved! It should only be a question of utilization and economic return to the customary land owners, but never affecting the issue of ownership protected under the Alienation of Customary Lands Act 1965 (ACLA) – see below

Under the ACLA 1965:

- Beneficial owner in relation to any customary land or any interest therein includes any Samoan who is entitled in equity to occupy the same or to share in the occupation thereof or to have the income there from or a share in that income paid to or held in trust for him, or who is entitled in equity to any such benefit contingently or in reversion; and does not include any Samoan who holds any such land or interest only by way of trust, mortgage or charge
- Business purpose includes an agricultural and a pastoral business purpose
- Customary land has the same meaning as in article 101 of the constitution
- Article 101 – Land in Western Samoa
 - (i) all land in Western Samoa is customary land, freehold land or public land
 - (ii) customary land means land held from Western Samoa in accordance with Samoan custom and usage
 - (iii) freehold land means land held from Western Samoa for an estate in fee simple

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- (iv) public land means land vested in Western Samoa being land that is free from customary title and from any estate in fee simple
- Article 102 – No alienation of customary land – it shall not be lawful or competent for any person to make any alienation or disposition of customary land or any interest in customary land, whatever by way of sale, mortgage or otherwise howsoever, not shall customary land or any interest therein be capable of being taken in execution or be assets for the payment of the debts of any person on his decrease or insolvency: Provided that an Act of Parliament may authorize-
 - (a) the granting of a lease or license or any customary land or of any interest therein
 - (b) the taking of any customary land or any interest therein for public purposes

Valuation of Customary Lands: On this important issue, the ongoing discourse is on the query as to why it is the customary lands valued extremely lower than freehold lands! This questions the principles of valuation of freehold lands applied to customary lands when the very nature of customary lands under the ACLA forbids the sale or alienation of customary lands. Hence Samoans believe that the principle of 'market active' is flawed and deliberately exploitative and manipulative if applied to customary lands.

It is the views of Samoans that customary lands by its very nature with all the cumulative attributes of it being the source of life; culture; tradition; identity; spirituality; food and water; language; herbal medicine; health; sustainable livelihood; biodiversity resources; energy; forests; agriculture; birdlife; shelter and homes; the place for burying the umbilical cords which is representative of ownership, family, and inherent belonging to that land; everyone in the extended family has equal claim as heirs to that land whether resident on it or living outside of Samoa, and therefore has strong, inherent, and lifelong links to that land; and when family members die, the fact that they began life with their umbilical cords buried in that land, makes it more important and invests in a Samoan an obligation to that land and yearns that they are buried there and a way of allowing the family to continue even in death. All these attributes together, makes customary lands invaluable and no amount of money in the world, however large, can ever be considered adequate, comparable, or appropriate replacement value for any one atom or particle of customary lands.

Compensation for Customary Land: This is a non-issue for Samoans as no monetary or whatever form of compensation can ever equally, equitably, justifiably, and genuinely replace customary lands considered invaluable. If forced to be taken under the Taking of Lands Act 1964, for public purposes (which the Act defined for the first time in Samoa) this too in the views of many Samoans is also flawed and render inherent injustices to customary land owners and ultimately to Samoa if alienated in this way! The fact that all customary lands belong to all Samoans is seen by many as synonymous and commensurate with the notion of public lands.

There are glaring examples of recent proclamation of customary lands taken by the government under the Taking of Lands Act 1964, such as the lands in Salelologa, where close to 3000 acres have been 'taken' by proclamation under the Taking of Lands Act 1964 for the township proposed by the government in Savaii which proves that this flawed power can be exploited by the contemporary government authorities and cause direct and indirect injurious effect to the owners of customary lands. Even the government Mauritius report alludes to this query questioning its own action of taking this large area of customary lands for a township and states that the 110 acres would be the right action by government.

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Rental Rates for Leasing: A follow-up from this is the issue of 'rental' rates for leasing and giving licenses to customary lands as directly calculated from this flawed and manipulative valuation concept based on 'inactive property market' with respect customary lands. This is an issue of inherent and immense injustice on customary land owners, and poses the question of how one can give value to an invaluable communal and public asset.

The issue of 'equal share of economic benefits' from any possible 'arrangements' or 'agreements' that affect customary lands is another issue! How can this be done easily when the complex nature of 'family members' may mean including those direct beneficiaries residing on the land as well as those residing outside of the lands.

Foreign Direct Investment: The threat of Foreign Direct Investors (FDIs) being interested in developing customary lands is a huge issue. Under 'tied aid' when our governments are forced under conditionalities imposed on them by the developed world, transnational corporations, and rich companies with interests in Samoa customary lands, force constitutional amendments to relax or even do away with protective provisions of the ACLA 1965 and the relevant prohibitive articles of the Samoa constitution on our customary lands, Samoans should be concerned. The strong consensus has been that Samoans need to watch carefully the government policies that might be pushed by external interests to usurp the rights of the customary land owners in terms of ownership, management, use, and stewardship of their customary lands and existing customary land tenure.

The role of Lands and Titles Courts, Public Trust Office, the role of the Ministers, the concept of Native Lands Trust Board as operational in Fiji, the role of the Pulenuu, the role of Chiefs and Orators in villages, the role of other groups and sectors in the village communities – youth, women, churches, taulele'a, aualuma, komiti o tina, komiti tumama, autalavou, etc. all came up in our discussions.

There was also some who suggested the setting up of a Commission on Customary Lands with independent membership, and with integrity to deal with the issues of customary lands as they believe the Lands and Titles Courts are still subjected to foreign judiciary machinery that continue to usurp the rights of the Samoans and subject the decisions of the Lands and Titles Courts to that of the Supreme Courts.

Some also wanted to have all the articles of the constitution revert to the double requirement of not only two thirds of the Parliament members, but also requires a two thirds approval of a national referendum to allow any constitutional changes. In their strong views and opinions, there have been too many quick and loose changes made by our Parliamentarians in the last ten years to our Samoa constitution just because one major party and government have the numbers to change the constitution articles. Experience in the short time on the impacts that emanated from these amendments to the constitution have been drastic, politically driven, and drives manipulative and corruptive practices that the government of the day enjoy short term benefits that are only detrimental to the principles of good governance, transparency and accountability.

These strong views of those interviewed are linked directly to the potentially drastic possibility of the threats to our customary lands now posed by this loose power vested erroneously in the government just because they have the numbers to change the constitution. People now see the dangers of the government powers to do away with the institutional mechanisms to check on government and the constitutional changes with the

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Audit position, the enactment of the Special Posts Act now taken down further to lower levels other than the CEO positions, and many more, now expose Samoa and its resources to manipulation and exploitation by the governments, and could very well drive an externally driven agenda to meddle with the customary lands and tenure in Samoa. People want to ensure that the ownership of customary lands is NOT affected.

Other Comments and Observations

The following comments reflect the results of my investigation from interviews with villages and individuals, as well as desk reviews of existing reports and documents:

- Village Fono Act 1990 – the framers did not have the banishment of village citizens from the villages as part of the punishment by the village fono of their subjects – this was an exclusion from what was practiced by Samoans in the past
- 2 types of matai – tulafale (orator); and the titular (alii)
- Suli moni and suli fai – true heirs of the matai title and adopted heirs
- Succession to the matai title – Ole ala ile pule ole tautua (the way to the matai is through service)
- Extended family choose and elects the matais – the pule is with the people and the extended family and not the matai. The matai is the trustee for peoples
- Traditional land tenure – the consensus is not to touch the existing status of customary lands
- Customary land definition – maota, laoa, tuamaota, tualaoa, cultivated lands – residence of chief, orator, and surrounding lands which families depend on for sustenance.
- Pulefaamau – control of CL Part IV of LTAct 1981 – exclusive right to use and occupy CL subject to pulefaamau – such a holder could be a non-Samoan matai
- Pulefaamau could be used to gift CL pertaining to his customary title
- Records of pulefaamau in LTC but NOT registered in the land registry in MNRE
- Legal Frameworks – constitution section 3.2 classify lands, prohibits alienation of CL; 3.3 resolution of disputes as to status of lands (private, public, customary); 3.4 control role of LTC in functioning of CL system; 3.5 alienation of CLA –regulates leasing and licensing CL; 3.6 relationship between CL system and other lands system
- Constitution – art. 101 – classify all lands – 3 categories (freehold, CL, public); s.8 of LT Act 1981 – land deemed to be CL include (a) Samoan freehold pursuant to Samoa LT Protection Ordination 1934 (now repealed) – (i) which LTC declared to be held in accordance with customs and usage of Samoa people; (ii) a recital or declaration made pursuant to a government or other grant, will, conveyance, lease, deed, or document that such land be held in accordance with the customs and usage of Samoan people; (iii) land ordered to be CL by LTC following a petition that such land be declared as CL, or by the Commission created under the LT Investigation Act 1966
- Approx acreage (MNRE) – customary 565,000 acres (81%); freehold 57,400 acres (8%); public 77,100 acres (11%).
- No sale of CL – article 102 CL cannot be sold or mortgaged but permits granting of leases or licenses of CL, and for taking CL for public purposes;
- To amend Article 102 – requires 2/3 referendum; 2/3 MPs (article 109)
- All other articles require 2/3 MPs

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- Taking of CL for public purposes – Taking of Lands Act 1964 – sec. 23 (a) of TLA 64 – public lands be sold or leased by Minister of Lands
- Disputes regarding status of land – refer to Commission under LT Investigation Act 1966 (CJ, Director of Lands, + 3 members of whom one is a senior judge from LT Courts)
- Commission has same power as status under the Commission of Inquiry Act 1964
- LTC – created under Article 103 of constitution but Administration procedures under LT Act 1981
- Disputes on ownership of CL as to ownership and boundaries or matai titles – dealt by LTC – any suli can challenge right of a matai title, pule of title over CL, boundaries of CL – section 38 LTC Act allows any person to petition the court
- An efficient LTC is key to CL system
- LTC has its own appellate division and its President is CJ (new separate – Tuala Sale Tagaloa) – LTC is unique and separate from Supreme Courts – But decisions of LTC is subject to judicial review by Supreme Courts (notwithstanding section 71 of LTC Act 1981 that stipulates that no decision or order of LTC may be reviewed or questioned in any court)
- Alienation of CL Act 1965 (15 October 1965) – govern leasing and licensing of CL (provided under article 102 of the constitution) – contention section 3 prohibit some leases and licenses – “it shall not be lawful to lease or license any CL for any agricultural or pastoral purposes to any Samoan who is not for the time being holder of a matai title” – supporter of this were concerned about the fabric of Samoan society relating to tautua being compromised – others felt otherwise but passed in current form creating anomalies – i) prohibition only apply to Samoans (no restrictions to non-Samoans entering into leases or licenses for agric/pasture purposes, ii) not apply to companies which means Samoans can create a company and enter lease or license.
- Leases and Licenses (LL) of CL – alienation of CL – LL may be granted by Minister of Lands if in his opinion is in accordance with Samoan customs and usage, desires of the beneficial owners, in the public interest
- Duration of LL i) 30+30 years for hotels or individual purpose, ii) 20+20 years for all other purposes
- Process for establishing LL – owner apply to Minister; registrar of lands publish in Savali and no less than 3 months for objections by any Samoa (Savali not required if LTC acknowledge owner or if it is a renewal); objections lodged with registrar of LTC within 3 months; registrar LTC file petition to LTC and copy Director of Lands and owner; lease drafted, agreed to, executed and registered within 1 year; failure to register within 1 year can apply to Minister for extension; LL registered and entered by registrar of lands; money paid to Minister (unlawful to pay direct to owner); Minister surrenders lease in interest of owner. (note- forestry takes precedence over LL)
- Relationship with other land and other land systems – system of land registration in Samoa is deeds – registering instruments that affect title to land – legal estate in the land is derived from deeds and not upon entry in the land register – Deeds system is the one of ‘registration of title’ and not ‘title by registration’ as in Torrens!
- Land registration Act 1992/1993 (replaced the 1920 Land Registration Order 1920) – mechanism and procedures – Land Registrar is the Director of Lands (now CEO of MNRE) – section 17 of Act deals with registration of instruments affecting title
- Land Registration Act 92/93 apply to public lands, freehold lands, and CL leases

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- Section 11 of LT Act 1981 – registrar of LTC requires reference of judgment, order, declaration, to Registrar of Lands but not done.
- Sec 12 LT Act 1981 – require Registrar of Lands to register such judgments of LTC – but whilst law is clear regarding entering of judgment into register, this is NOT done – LTC keeps own records of judgment affecting CL and not available as public records (can only access if proof to Registrar of LTC re connection)
- The only record of CL in the Land Register relate to CL that are subject of leases and properly surveyed – to date there is no public system for registration of CL other than leased CL
- 40 (20+20) years of the Act means that it needs to be reviewed; i) Savali can be unfair as not many people read it; ii) role of Minister need reviewed as he is only involved when signing lease, etc. and conflict of interest (Min of Lands/Min of Forests); iii) security of tenure; iv) why not allow beneficial owner to enter into lease directly? And who should represent them in place of Minister? Independent Body?; v) CL process is a deterrent for investors, also the strengths of owners and faa-Samoa – everyone loose if delays mean investment do not proceed.
- Lease Stability – investor has 'a deal' once the lease is registered – but need to be robust enough in local context and over time and do not end up in confrontation between those signed and those claiming ownership and prevent investor from accessing the land; commercially inexperienced matais struck a poor bargain; owner not consulting fully with the wider family.
- Raising capital against interests in CL – common method is mortgage through security of land
- Options with CL usage – user has few durable rights as owner can alter arrangements and user loose access; not having access to raise capital meaning serious handicap in investing in significant agric or commercial venture and shuts off key source of capital in modern market economy – but there have been personal and group guarantee by members and not secured against CL
- Options for leaseholders – CL has better defined and more durable rights than user – two potential issues that reduce ability of investor to use CL lease as security are i) uncertainty whether mortgage can be guaranteed on lease of CL; ii) banks and lenders not confident if lease defaults
- Article 102 – not lawful for anyoneprohibits alienation of CL including mortgage over CL, and for payment of debts
- But could on a mortgage of a lease over CL where a leaseholder is responsible to the bank for debt (NOT the title holder) if – i) if leaseholder defaults, the bank steps into shoes of leaseholder but no more rights on land itself than leaseholder; ii) end of lease, the titleholder regains full possession of the land and include defaulted mortgage and where bank has stepped in – this means the title holder is not harmed by the leaseholder granting mortgage over lease of CL
- Article 102 of constitution provide Alienation of CL Act 1965 to govern granting of leases over CL – under this Act it is accepted that a leaseholder can transfer a lease
- Article 102 and ACLA '65 prohibits granting mortgage over leases BUT this does not prevent investors raising capital against leases – eg. The investor could; i) form a company, enter into a lease of CL, and offer bank mortgage over shares in company; ii) transfer lease to bank and transfer back after debt; iii) give the bank possession of lease document and bank to execute transfer if investor defaults

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- Possible Solutions – i) security of tenure is low with CL but could use pulefaamau, role of village fono; ii) leases process is an issue and the investor must be comfortable with lease to be respected and enforced; iii) advertise in daily newspaper and radio; iv) shorten the objection period; v) restrict who can file objections (exclude overseas?); vi) review the role of the Minister; vii) access to commercial and legal advice and require matais to receive independent legal advice before entering a lease and make available funding to a matai to do so and have leases recorded and easily accessible
- LT Process – review this; increase resources for this; proceed but hold payment in trust until issue of who should receive benefit is sorted; section 3 of ACL Act 65 preventing Samoans (only) to leases of agric/pasture – this is outdated and can be circumvented by a company to enter into lease (should repeal this); the time of 30+30 and 20+20 needs reviewed (?? Any longer extension will deny family members the use of this land for extended periods! Review of lease agreements?); should requirement of the LT Act 1981 regarding the Registrar of the LTC to refer decisions to Registrar of Lands for registration done?
- issues relate to – process of establishing lease; lease entered into force; investor consider 'legally binding' lease; investor expect this to be honored; yet potentially clash with fundamental understanding that current titleholder can determine, change, who access CL at any time; if risky, investor will not invest; if matai does not understand and honor the investor will less likely to engage; need continuing education
- Key messages include – once legal – the leaseholder should be given legal right to undisturbed possession and use but only for the length of lease; customize the lease in terms of time and arrangements; leaseholder may change without consulting owner
- Raising Capital – is weak with CL and the user find it difficult to raise capital and lender is reluctant to fund; group guarantee (small business??)
- Capturing the value of Improvements to the Land – negotiable with owner of CL and can enter into lease agreement as to who will get there and can be used (??) to query the 30+30 and 20+20 to give investor opportunity to recover on their investment

1.2.4 Assist the Land Legislation and Land Registration Advisers in an analysis of the current and future possible roles of the Land and Titles Court.

Constitutional Provision establishing the Lands and Titles Court:

It was clear in the constitutional provision establishing the Lands and Titles Courts that no customary lands should be sold. However, it was felt that there was no use the providing safeguards with regard to alienation of land if the land remained idle, especially when it was realized that the development of the land was needed for the prosperity of the country. It was felt that a relaxed policy should therefore be considered where government could lease, but not sell, pieces of lands to those people with capital. On the question of leases, land belonging to matai titles should be surveyed and land already cultivated should be registered under respective titles. Heirs of families could be allowed to lease blocks from the matais for a term of 20 years at a nominal rental to allow for their maximum development. Heirs could obtain loans on these leases to develop their holdings.

It was suggested that freehold lands sold back to Samoans should revert to customary land status.

Matai Title and Pule over Customary Land:

The law governing land should not be changed and some other procedure should be established for the granting of leases. In the future, if it were desired that there be a change in the land tenure system, it should be done by a special constitutional amendment. The government should also provide some protection for people owning freehold property in the event they sold it and then later turned to government wanting land to live on.

The decisions of the Land and Titles Court were based on family genealogies, customs and tradition and not on law. It was felt that the word pule over land in the constitution might cause some trouble to the Land and Titles Court in the conduct of cases and should be left out.

It was suggested that draft provision on that matter should leave open to the Legislative Assembly the prescription of conditions, if any, as to who should be eligible to be a matai. The wording of the provision should meet the practice where a Samoan who married into a family was allowed to have a say in that family's affairs if the aiga so wished. However, a European should not be allowed to do so.

It was realized that that would present a difficult problem - if full blooded European had been unanimously selected by his wife's family to be a matai that person should be allowed to assume the title no matter what colour, race or belief, so long as the person was a Samoan citizen. The provision should ensure that people holding honorary titles were excluded from holding of any pule over land or titles.

Resolutions for the Constitutional Convention:

Land and titles being the heart of Samoan society, the committee decided that a clear and fully comprehensive resolution should be prepared on the subject for consideration by the Constitutional Convention; the recommendation should be addressed to government and the Legislative Assembly to provide the legal framework required for the proper administration of customary land and titles and their protection in general, as well as providing the necessary machinery to safeguard the rights of people living on the land.

Four resolutions on that part were: The first, was to have the effect, if taken together with the resolution on individual voters roll, of making it possible to repeal the controversial Status Ordinance 1934 and that part of the Land and Titles Protection Ordinance 1934 which affects the question of status. The other resolutions were to deal with the other aspects of lands and titles including that of the rights to mineral deposits. In the discussion of those resolutions the committee gave particular attention to the feasibility of the establishment of machinery to handle appeals or re-hearings from decisions of the Land and Titles Court.

Lands and Titles Courts Process

- Review legal framework and process;
- increase resources;
- should proceed but payment held in trust until issue of who should receive benefits is sorted
- section 3 of ACLA 65 prevent Samoans (only) to lease for agriculture is outdated which can be circumvented by a company to enter in to lease (should repeal this)
- time of 20+20 and 30+30 should be reviewed (I am not sure about this!!! – it is also denying the family members the use of that CL the whole duration of this long term leases – is review periods and terms adequate for the title owner?)

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- should requirement of the LTA 1981 re Registrar of LTC referring decisions to Registrar of Lands for registration to be done be enforced?
President of the LTC, Tuala Sale Tagaloa - Wednesday 09 March, 2005 (with Kevin, Andrew, with two senior staff of the LTC)
- Discussed the issue of LTC registration of courts decisions with the Land Register which is not done at all
- Also the issues of Salelologa, the Appeals Courts decision on Salelologa, the pulefaamau, the valuation of customary lands, Minister's role in the lease of customary lands, the types of land ownerships in the villages, etc.

1.2.5 Conduct extensive consultation with all stakeholders to ensure the project is in harmony with traditional beliefs and community expectations.

Matafaa Consultation – 6 to 7 April, 2005 and Tiavea Village, 04 May, 2005:

Land to us is very special. Land is our life. It is our people's identity; our spirituality; it is our culture, our tradition, source of our language, our medicine, and our connection with the land is spiritual and natural. It is our most valuable asset; everyone owns land, use it, eats out of it, and is buried in it upon death. We have an interest in anything found on or associated with the land. It gives a sense of identity and 81% is owned communally under customary title ...transfer of right in land is understood as temporary regardless of the provision in the agreement laws, etc. Land dealings undertaken by central government without the agreements of the customary land owners are not recognized as valid.

Home is the local ward (family) with its cluster of villages, its ruling council (Alii and Faipule) of interested matais under the tutelage of the ward (tuua) and the extended family or network of relatives: uncles, aunts, grandparents, in-laws and their respective nuclear families, all living in walking distance from each other.

It is not however merely the people that constitute home. It is the inter-related community of the land, the plants, the animals, and the human community of the living, the unborn and the living dead existing in a dynamic equilibrium. The flourishing of the community is dependant upon the maintenance of equilibrium and harmony of the community. The disruption of the harmony leads to ecological disaster.

The inter-relatedness of the community receives expression in a variety of ways. Symbolically at the beginning of life it is enacted through the burial of the new born child's umbilical cord in the earth. At the end of life it is the burial of the person in one of the sacred groves that are scattered throughout the area.

Farmers need their land. They depend on it. Access to land is vital so that people can live and survive. A major instrument to deprive the poor of their land was the introduction of individual property rights and land titles so that land could be sold when people became indebted. To ignore communal land ownership and to introduce new land title was in almost the same way

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an important feature of colonial rule. The land should stay with the families and communities that inherit it.

The process of uprooting people and making their land available for investors and their projects continue today, in the name of 'development'. It usually benefits transnational companies and their access to resources. It dislocates people who would care for life in their communities because healthy livelihoods are pre-condition for their survival.

Land Exchanges between Families:

Some villages and families agreed to exchange scattered pieces of plantation lands to form larger holdings. In other communities, they helped draw up boundary lines in disputes. It would be useful and advantageous to properly record these exchanges and agreements.

Customary lands should not be sold by one Samoan to another but land exchanges should be allowed, provided both parties agreed and the exchange was arranged through the government. The Pulenuu to keep the register of such exchanges and dealt with by the government land board.

Sale of Customary Lands:

Opinions expressed that the measures adopted by foreign powers to protect customary lands were no longer necessary as Samoans were now controlling their own affairs and only Samoans were permitted to use customary lands.

Others felt that the land tenure system was, however, holding back economic development of the country and the land could not be used as security for loans to assist development. Economic development was important for the attainment of a higher standard of living and while Samoa was enjoying political freedom, it did not have economic freedom. It was suggested to consider permitting customary lands to be sold subject to the agreement of the whole entire family, and money obtained devoted to development purposes to benefit the economic well being of the whole family.

While some favored customary land being vested in the matai, there were lands known as village lands but not yet developed. Anxiety had been expressed over the question of selling, mortgaging, leasing of customary lands but it was understood that people had been told that whatever bush they cleared was theirs. This means that if this was to continue, one or two energetic people would get all the bush land available in their respective districts.

Others say that selling customary land with the agreement of all members of the family was intended to give everyone an equal share in the prosperity of the country. Local Europeans were financially better off than Samoans because Samoans were more restricted in obtaining means for development.

It was acknowledged that the ideal was equal sharing in prosperity. For then and for the long term land should be preserved for equal distribution to all concerned.

There was also consensus that not all people had the same ambition, children might not be as industrious as their parents and consequently the land which their parents had developed might go back into bush and the people of another generation would come and re-cultivate it. The ambitious person should not be prevented from intensifying efforts.

Some said that the sale of customary land between one Samoan and another should be allowed if done through proper government channels. The current system of leases was also quite satisfactory except for security offered for loans which should be directed only at the crops on the land.

Mortgage of Customary Land:

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If only Samoan citizens had the right to title and pule over customary land, that would afford enough protection in that area of concern. To allow the mortgage of customary lands would still be dangerous.

Some Samoans knew the value and use of money whereas others did not. Ways could be found where people could borrow money without committing customary lands such as loans on the security of buildings and so on.

An appropriate system could be worked out. A matai wanting to obtain a loan using a piece of land as security could be granted a lease over a long period. Some arrangement could be agreed whereby the Bank would lend the money on the security of the long term lease.

The hopes were expressed that the Banks would investigate requests for loans and allow loans when it was satisfied with the securities offered and confident that repayment would be duly made.

Many did not favor the idea of mortgaging customary lands as such land was not only for the use of the present generation but for future generations as well. The pule over customary land should remain with the matai but the cultivation of the land should belong to the one who was responsible for the cultivation which could be passed on to heirs provided they continued to render services to the matai.

Land for Church Purposes:

The lands given for church purposes were held in the customary manner and not in fee simple and should go back to the owners of customary lands if the churches cease to exist, and not sold off by the churches. It was the view of some that these lands should be leased to the churches at nominal rental; the land should not be given over for an indefinite period. Further, land so given should be allowed as long as there were adherents of that church in the village. Some felt that it would not be appropriate for workers of God to pay rent on church leases.

Record of Interviews with some key Individuals

Private Solicitor and Attorney:

- Not happy with a transfer from the Deeds system to a Torrens system. He believes that the Torrens system will not allow a detailed analysis of the issue of true ownership of lands in Samoa. The issue of land claims and court grants in the late 1800s was case in point where much have yet to be identified both in terms of actual lands and ownership. A Torrens system where registration of instruments is only proof of fee simple rights to lands will render injustices and can be inherently unfair if there were lapses in the trail of proof of ownership.
- Valuation was another key issue with respect customary lands. It was an issue that I too was struggling with as I still believe that customary lands are more valuable in Samoa than freehold lands. Toleafoa claims that this was the only outstanding matter in the Salelologa case with reference to the Courts of Appeal decision. He requested assistance to obtain some comparable studies in this respect from other countries with this type of land tenure. I asked him to give me the details of his request and I would try and consult with the CEO of Counterpart International in Washington DC, Mr Lelei Lelaulu, to recruit a consultant with experience in this area as I too would like to see justice in this area of valuation of customary lands in Samoa.

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- Toleafoa wants to see if there was some comparison with what is done in Australia with the Aborigines lands, in NZ with the Maori lands, in the USA with Indian lands. He was anxious that something be done before August 2005 when this case was brought before the courts again for a decision.
- The situation in American Samoa could be studied as a model where the Development Bank is now accepting customary land leases which are registered in the land register as collateral for loans – the bank uses registered leases to loan monies for development initiatives (eg. Building for rents, agricultural developments, shops, etc.) and if defaulted, the bank takes over the leases and run with the uses of those leases until the debt is fully recovered before the land is given back by the land owner. – be useful to interview land officers, development bank officers, court clerks, lease holders, and land owners. The customary lands cannot be sold.
- 'Back door entry' – there has been an alarming occurrence of this where the matai advertises a pulefaamau to gift customary lands to individuals and after the 3 months without any objection, proceeds with the 'gifted lands' to the individual which is then gone forever as Samoan Individual Lands. Any objectors later will have no chance of appealing the case as they failed to object in the 3 months when the pulefaamau was advertised in the Savali.
- Customary lands is the only matter requiring the double entrenched treatment by the constitution where article 109 requires 2/3 of Parliament and 2/3 of a referendum (see also article 102 – requiring 2/3 poll)

Samoa National Council of Churches

- Sili stopped the 'felling of tree' claim to land around 1969 but lands are now under the Alii and Faipule and all lands now come under the 'faamalumaluga' a A&F.
- If you are matai with a monotaga in Sili, you automatically receive a 25 by 25 (?? measurement) land allocated to you and your heirs which the village 'survey' using traditional methods and that will then be your land.
- Sili has 5 types of land ownership – first, the 'felling of tree' claim which is your own individual land whether you are a matai or a taulealea; second is the family lands where the matai has pule over for the family; third, is A&F lands o fanua ole nuu fai tele; fourth, are freehold lands; and fifth, are church lands (topago mo le lotu)
- Pulefaamau was granted by the tuua of the village in the past in terms of boundaries and disputes, now it is done through the Lands and Titles Courts and advertised through the Savali
- Land exchanges in the villages themselves are happening all the time but are not registered – for example where one family has a large land inland and little land in the village can exchange lands after consulting themselves and they proceed with this themselves in the villages and inform the A&F for their information and understanding in case anything queries this exchange in the future. There are also exchanges of customary lands in the villages where cattle are exchanged for lands (eg. Rev. Siatua in Gataivai where he has been allocated lands by the village – these lands become recognized by the village and used by Siatua for life! But is not registered.
- Registration of CL is good for finding boundaries and registering of ownership. But not if used for commercial purposes

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Immediate Past Chairman of the Village Mayors:

- Does not agree that there is much of the 80% of customary lands still remaining unused. With the event of chainsaw, fertilizer, weed killer, etc. people have been clearing large areas of customary lands and a study needs to be done to give some accurate figure on how much of the Samoa customary lands are remaining undeveloped.
- Referred to a study we did in 1993 where our committee responded to the question of customary land utilization and registration – it is needed but leave it until another time. The issue of registration of CL should be a priority as this would provide a baseline for future decisions on CL. This will also entail surveys of land boundaries between districts, villages, and family CL which proved to be a task outside the scope of government to address in terms of the scale of the work, the costs, and the problems with agreement on boundaries.
- He fully support the spirit of the Alienation of the Customary Land Act with respect the non alienation of CL. A lease itself will be a first step towards alienation of CL
- He contends that on CL it is not the matai that has pule over CL but the family members, o suli! - heirs here, in NZ, etc. tagata soo toto na auala ai le filifilia ole matai
- He is concerned with the push for development as this inevitably require the best lowlying lands and require communities to go to the rugged high lands for their livelihood dependencies. Aua le lagaina le maa e tasi aua e solofa ai le pa poo le paepae!
- A workshop run by Afoa Vaai and his consultancy company for the ADB revealed that those balmed to have adopted 'palagi' mentality that they were fia-palagi and do not like the faa-Samoa, etc. were all speaking against any proposition to have anything to do with the sale of CL
- Long term leases (20+20, or 30+30) still have the impact of denying the suli and aiga potopoto the right of access to the CL they own
- Could use group guarantee as done in the Housing Corporation instead of targeting customary lands
- E tupu tagata, ae le tupu eleele – do not meddle with CL
- Take away the system of extension officers as they do not help but instead go out and exploit the people in the villages who are already trying to make ends meet. This is the root cause of the many problems when not linking with the villages when they are never there, not seeking to mingle directly in the midst of the village life, and yet they are paid to do exactly that.
- Valuation of CL should consider the values and importance of attributes such as – malae fono, tupua ole nuu, tulaga maota ma laoa, tuugamau, tala tuu, tala mai le vavau, spiritual connection with the dead, oratory origins, cultural importance, social significance, environmental heritage, historical value, national significance, district credence, village hierarchy, value of crops, value of improvements, etc. Hence, the value of CL are much higher than freehold lands. (Let not the issue of compensation in the TL Act 1964 render inferior consideration on CL so that the government can afford payment of compensation – even more argument to ensure that CL remains as customary lands and not alienate in any form whatsoever! CL is invaluable and there is no monetary value that could justifiably or adequately compensate CL.

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- The persistence in pushing the registration and alienation of CL is commensurate with trying to fool Samoans, but we need to develop adequate traditional and Samoan intelligence to counter these external pressures to alienate customary lands
- Valuation of traditional knowledge, herbal medicine, biodiversity, loss of plants and knowledge becoming extinct, historical buildings, vintage value,

Secretary of the Constitution Committee:

- forest lands unused under the A&F but taulelea develop the lands and own it themselves and the matais were concerned about this as the issue of pule of matais are compromised and will therefore lose basis of faa-Samoa. Members want to find a way to develop lands but retain pule in matais. Amoa Tausilia took a private bill and he wanted leases – but still difficult because if taulelea given lease he will then benefit on the lease and not tautua to the matai. Public purposes was not defined in the constitution and only done in the TL Act 1964. New way suggested was to have the government involved as the middle representative to represent the CL owners and investors but never affect ownership!
- Aiono in Fasitoo, Toomata in Samata, Vaai in Vaisala are examples in point. This means that this can be done as these illustrations show and this was dangerous as the powerful individuals can own all the village lands
- Court case of Alipia Siaosi – coconut plantation (Alipia Tusitala) when he died the heirs were not allowed to benefit. The case saw it allowed to have heirs use the fruits of the lands and not the land itself.
- How to get moneys by Samoans to develop lands – mortgage was considered but companies had trust in matais re wire fences, etc. and they transfer lands
- Did not arrive at a good decision – different types of pules –
- Project in Aleipata – family matai and family agree to transfer lands to Lauofo – savali, signed by old matais, no objections, confirm in LTC – now it is as good as freehold property but cannot sell it- now can take to the Bank to loan funds for development – there are ways of handling use of CL and not affect ownership
- Vavau case – Warrick hotel developers approve development – but have not asked how this is handled as they are going through government – need to know how the government is handling this – that is the best way to do it as this is the only way not to part with the ownership
- TLAct 1964 schedule has what they consider ‘public purposes’
- Committee had illustrations – shops by taulelea – who owns? – if matais want to kick the taulelea off, they can do it but need a protection for this person
- Another problem – if you are a faiava, and they make you a matai, you have right – yes if suli moni come they are in trouble
- Pulefaamau – Salelologa (grand mother from Iva with connections in Salelologa near the wharf) – this was also addresses – was done in the villages itself amongst matais!
- ‘Gifted’ lands – transfer of lands – back door arrangements – happening in Salelologa – lease and bought in commercial prices and registered in Tuasivi but not in land register

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- Registration of CL – only in LT court cases before you register – but not done as directed by the ACLA 1981 not registered and the LTC not informing registrar of lands of decisions
- Falelatai case (wife)- formal survey needed from marks identified on the ground through stones – matais of Falelatai queried this but the LTC case confirmed ownership and surveyed then through the Chief Survey but need to know if this is now registered. Need a lawyer to register through registration documents.
- LTC and Registrar of Lands links not done at all with regards decisions of LTC
- Deeds system versus Torrens system –
- Adverse possession – Ah Fook lands in Savalalo done on adverse possession but handled through payment of monies to evacuate people – 40 years uninterrupted lands or 12 years??. Laufofo says it is 12 years as he has a case since 1976
- Sili – 5 types of land ownerships – own land felled, family lands, A&F lands, leasehold, freehold, church lands – lots of savanna lands – tutuli ai, fanafana ai in the past
- These days, ua fai lava ile malosi, faataumamafa le nuu, etc. Ua le toe alu ise faiga faavae e pei ona masani ai
- Our time in 1993, we siad that we need first to register CL which means surveys of boundaries before dealing with the issue of land tenure
- Conclusion is find ways to utilize CL but never deal with the issue of CL ownership
- Banks were given the task of finding ways to use CL leases to loan funds, but they were not interested
- Pago model where CL lease are used to loan funds – interesting to see how it is working or not working –
- Issue of tying up lands for a long time for leases when heirs want to use the lands and if they have better option to use the lands already leased
- Government in between to handle this – allow transfer of leases between government and investor and allow transfers between this and leave out the ownership of lands not to be affected
- Fiji system if dad dies, is the son the heir to the Ratu title?
- Share of benefits? – if leased from the village, the lease is between government to A&F – but conflict amongst A&F themselves – how to handle the lease agreement to make sure it is clear in terms of distribution of benefits – and a system can be worked out to make this work
- Faumuina lands in Aleisa and Tapatapao – Faumuina showed lands to people but all served the title Faumuina – each family had a day to serve food , etc. to Faumuina – (uncle given Tagaloa title by Faumuina because of his skills to fishing!)

Housing Corporation

- HC will take freehold lands as collateral for loans of over \$15,000
- HC do not take CL for collateral, nether lease on CL!
- Target low income earners for loans of up to \$15,000
- Use personal guarantees of income earners with regular source of incomes of immediate family members
- Group guarantee if all work an earn regular income

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- HC emanated from cyclone Ofa and Valerie
- Do not take chattels
- Limit of loans taken by HC is \$50,000
- Established relationship between client and HC is a powerful justification to approve a HC loan

1.2.5 Develop a forum for engaging stakeholders in the ongoing development of options for formalising customary tenure.

Key Messages

- Once legal, the leaseholder should be given legal right to undisturbed possession and use, but only for the length of the lease
- Customize lease – time, arrangements, review, rental, etc.
- Lease holder may change without consulting owner (???)
- Raising capital – weak tenure for user of CL – difficult to raise capital and lender reluctant
- Group guarantee for small business
- Holder of leases can mortgage the lease of CL to raise capital but should not compromise the title holder

Capturing the Value of Improvements to the Land

- Negotiable with the owner of CL and can enter into a lease agreement as to who will get these and use to query the 20+20 and 30+30 to give the investor the opportunity to recover on their investment

1.2.6 Assist in the preparation of a briefing paper for Cabinet on the proposed reforms.

I will be able to help when the project is closing towards the end of this year 2005, as I will need to liaise closely with the Land Legislation Specialist and Customary Lands Adviser on this aspect of my work. As well, the whole team requires a holistic overview of the overall work under Land Equity International so there is some alignment of our respective reports.

PART 2

Customary Land – Defining Questions

2.1 General Overview

Land to Samoans is very special. It forms the identity, spirituality, culture, tradition, source of language and medicine of the Samoan people. It is Samoa's most valuable asset, everyone owns it, uses it, eats from it, and is buried in it upon death. Land provides Samoans with a sense of identity and 81% is owned communally under customary title. Transfer of rights in customary land is understood as temporary and land dealings require the agreement of customary land owners.

The home is defined in Samoa as the local ward (family) with its cluster of villages, its ruling council (Alii and Faipule) of interested matais under the tutelage of the ward (tuua) and the extended family or network of relatives all living in walking distance from each other. The concept of home also includes all the inter-related land, plants, animals, and the human community of the living, the unborn and the living dead. The flourishing of the community is dependant upon the maintenance of equilibrium and harmony in the community.

Land is the primary source of food and shelter for most Samoans. Access to land is therefore vital to the physical survival of the Samoan people. Customary tenure has traditionally provided families with access to and control over land and resources. It has provided a level of security to farmers who rely on land for their subsistence and livelihood. In addition, customary lands have an important cultural and spiritual role. People are intimately connected to their ancestral lands and these lands are the basis for many rituals and ceremonies. One example of this is the traditional burial of every new born child's umbilical cord in the earth of their customary lands.

With the advent of colonisation, individual property rights have been introduced to Samoa. These private land rights are able to be bought and sold, they can be used as collateral for obtaining loans and they are publicly recorded in a central register maintained by the state. Many customary land holders are wary of private property rights. They fear the sale or repossession of customary rights and the loss of family lands. They are hesitant about making land available to investors who they believe are more likely to exploit Samoa's natural resources for short term profit. Customary groups are also wary of being dislocated from areas where they have a spiritual connection to the land. The introduction of private systems of land tenure not only threatens individual access to land but also the social and political structures which control the allocation and management of customary lands.

This study examines the key principles of customary tenure and its positive and negative features. It examines the possibility of strengthening customary systems to provide more secure tenure and to maximise the interests of customary groups.

2.2 The Key Principles of Customary Land Tenure in Samoa

The Constitution, Article 101 classifies all lands in Samoa into 3 categories - freehold, customary land and public. Section 8 of the Land Titles Act 1981 specifies that land deemed to be customary land includes (a) Samoan freehold pursuant to Samoa Land Title Protection

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Ordination 1934 (now repealed) (i) which the Land and Titles Court declared to be held in accordance with customs and usage of Samoa people; (ii) a recital or declaration made pursuant to a government or other grant, will, conveyance, lease, deed, or document that such land be held in accordance with the customs and usage of Samoan people; (iii) land ordered to be customary land by the Land and Titles Court following a petition that such land be declared as customary land, or by the Commission created under the Land Title Investigation Act 1966.

One of the key features of customary land in Samoa is that it can not be alienated or dispossessed. Article 102 of the Constitution directs that customary land cannot be sold or mortgaged. Customary lands are protected from alienation by non-Samoans to ensure that the Samoan people do not lose their lands to foreigners. Under the Berlin Treaty 1891, there may be no sales, mortgages, or other dispositions of Samoan lands to foreigners. Customary lands may not be sold by one Samoan to another but land exchanges are allowed provided both parties agree to the exchange and the exchange is arranged through the government. The government's acceptance of land exchanges means that holdings may be consolidated and Samoans can relocate for economic or personal reasons.

While customary land can not be bought or sold, Article 102 of the constitution does permit the granting of leases or licences over customary lands, and the acquiring of customary lands for public purposes. The Alienation of Customary Land Act 1965 governs the granting of land leases and licenses by the Minister of Lands. The Minister of Lands will only grant leases or licenses if he believes it is in accordance with Samoan customs and usage, the desires of the beneficial owners and the public interest. Once granted, customary land leases are allowed for a fixed term (30+30 years for hotels and individual purpose or 20+20 years for all other purposes) and can be renewed at the end of that term.

The government can take customary lands for public purposes but compensation should be paid for such lands. Determining the value of customary lands and appropriate levels of compensation is subjective and can be a source of dispute and contest in Samoa. Many customary land owners believe that customary lands are worth more than freehold lands because of the spiritual, medicinal and ecological values which market valuations fail to consider.

Customary lands can not be used as security for loans. Article 102 of the constitution prohibits alienation of customary lands including mortgages over customary land and alienation for payment of debts. Mortgages can, however be obtained by non-Samoans or companies, over a lease of customary lands because in this case the leaseholder is responsible to the bank for debt, not the title holder. If the leaseholder defaults, the bank steps into the shoes of the leaseholder but has no more rights to dispose of the land than the original leaseholder. At the end of the lease the titleholder regains full possession of the land and is not harmed by the leaseholder granting mortgage over the lease of customary land.

There is some confusion and ambiguity under the current law with Article 102 and the Alienation of Customary Land Act 1965 prohibiting the granting of a mortgage over leases to Samoans but not preventing investors from raising capital against leases. For example investors can i) form a company to enter into a lease of customary lands, and offer bank mortgage over shares in the company; ii) transfer the lease to the bank and transfer it back after the debt is repaid; iii) give the bank possession of the lease document and allow the bank to execute transfer if the investor defaults.

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The matai administers customary lands and is responsible for apportioning it for the use of family members in return for their services (tautua). Family members render services to the matai as head of the family and in return for the use of customary lands. The beneficial owner of customary land or of any interest in customary land is therefore any Samoan entitled in equity to occupy or share in the occupation of that land. Beneficial owners may derive income from their share in customary lands or they may have that income paid to and held in trust for them. People holding honorary titles are excluded from holding any pule² over customary lands and titles.

Disputes over ownership, property boundaries or matai title of customary lands are dealt with by the Land and Titles Court. Any heir (suli) can challenge the right of a matai title, pule over customary land or the boundaries of customary lands. Section 38 of the Land and Titles Court Act allows any person to petition the court. The Land and Titles Court is administered under the procedures of the Land Titles Act 1981 and is composed of a President and a team of Samoan judges based on Samoan customs. Any appeals are heard by the Chief Judge with a new team of Samoan judges. Decisions of the Land and Titles Court are subject to judicial review by the Supreme Courts, notwithstanding section 71 of Land and Titles Court Act 1981 that stipulates that no decision or order of Land and Titles Court may be reviewed or questioned in any court. The only record of customary land in the Land Register relates to customary lands that are the subject of leases and properly surveyed. To date there is no public system for registration of customary land other than leased customary land. Changes to customary lands and tenures in the Samoan constitution are subjected to a two-thirds majority vote of members of Parliament, as well as a two-thirds vote of a national referendum.

Samoan customary lands are not affected by death duties but the fruits of the land and freehold properties might be so liable. The matai may grant people permission to use customary land on account of services rendered (tautua) to the matai. The Land and Titles Court has determined that although the matai holds the title to this land, the cultivation of it belongs to the person who works it and when that person dies the crops will go to the children who must continue to render services to the matai. If the children comply with these services then the matai can not remove them from the land.

2.3 Negative Features of Customary Tenure

While customary tenure provides a reasonable level of tenure security at the local level it does not provide a high level of security to investors. Customary land owners find it difficult to raise capital and lenders are reluctant to fund investments without guarantee of return. The constitution prohibits the use of customary lands as security for loans thus limiting the assets against which Samoans can borrow money for the development of agriculture and commercial ventures. Land is a key source of capital in a modern market economy and the ability to mobilise this capital is important to development. Private land rights are one way of mobilising land assets but other methods which secure loans under personal and group guarantee or which are based on mortgaging of land leases provide possible alternatives.

In exploring these alternatives the land lease option has much appeal, however its application has not been without its problems. Firstly, there has been a lack of easy and affordable access

² Pule is authority over the land granted to a matai title on behalf of the whole family under that title

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to commercial and legal advice. It is imperative that matais receive independent legal advice prior to entering a lease. In the past, unavailable funding to help commercially inexperienced matai's negotiate and record leases has resulted in a poor deal for customary land owners and later confrontation and contestation over those signed and those claiming ownership. There have also been cases where the owner has not consulted fully with the wider family leading to discontent and dispute.

Secondly, the restrictions on who can enter into a lease have resulted in some contention. The constitution specifies that "it shall not be lawful to lease or license any customary land for any agricultural or pastoral purposes to any Samoan who is not for the time being holder of a matai title". The basis for this ruling was concern that the fabric of Samoan society relating to tautua was being compromised. However, the Alienation of Customary Lands Act 1965 has created current anomalies whereby i) prohibition only applies to Samoans (no restrictions to non-Samoans entering into leases or licenses for agric/pasture purposes) and ii) restrictions do not apply to companies. This Act is outdated and can be circumvented by a creating a company to enter into a lease. These lease agreements need review.

Thirdly, the duration of leases (20+20 years and 30+30 years) also needs review. The lease period should be long enough for lessee's to obtain finance and benefit from investments and improvements made to the land but they need to be balanced against the needs of family members who should not be denied the use of customary lands for more extended periods.

Fourthly, the process for establishing land leases is cumbersome and time consuming. The owner must apply to the Minister, this must then be published in Savali (which few people read), there is a long objection period of 3 months during which time anyone can file an objection with the Land and Titles Court. This places the owner at risk from numerous spurious claims and delays and the court backlog can make delays quite significant (i.e. many years). The Registrar of the Land and Titles court then files a petition to the Land and Titles Court, copying the Director of Lands and the owner. The lease is drafted, agreed to, executed and registered within one year. If the owner fails to register within one year they can apply to the Minister for an extension. The lease is registered and entered by the Registrar of Lands, the money is paid to the Minister and the Minister surrenders the lease in the interest of the owner. The drawn out lease process is a deterrent for investors and owners with everyone losing if delays mean investment does not proceed. The role of the Minister in this process is cumbersome and unclear. He is only involved when signing the lease and when there is a conflict of interest (e.g. between the Ministry of Lands and the Ministry of Forests). There is argument that the beneficial owners should be able to enter into leases directly and that they might be better represented by an independent body.

Once a lease has been established and registered the investor must feel comfortable that the lease will be respected and enforced. The security of the lease needs to be robust enough in the local context that over time it will not end up in confrontation between those signed and those claiming ownership and prevent the investor from accessing the land. There have been problems in the past with ill-informed matai's later disputing unfair lease agreements. Contestation and instability of lease rights will reduce the confidence of investors and it is important that the Land and Titles Court deals quickly and transparently with any appeals. It is still largely uncertain what happens if a mortgagee defaults and this also need to be resolved to encourage future investment.

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Other problems with customary tenure have begun to arise as social and economic opportunities increasingly move away from customary lands to the capital Apia and offshore. Living patterns are changing and more Samoans are now residing overseas or in town as absentee owners. These absentee owners still retain considerable control over customary lands and may caveat the exchange of or use of customary land in the rural areas or traditional villages. This has resulted in some customary lands being left unattended to and disputes over ownership of some lands resulting in land being overgrown with weeds and scrub.

It is inherently difficult to value customary lands. Market valuations give customary lands a low value because of their lower tenure security and the restrictions on their sale and lease. Customary land owners however frequently argue that customary lands have a higher value because of their spiritual, ecological and medicinal values which are difficult to price in monetary terms.

The lack of surveys, demarcation or definition of customary land boundaries has also been seen as a negative feature of customary tenure. The lack of land boundary definition can lead to disputes over boundaries, particularly when customary lands are found to be rich in valuable natural resources. The lack of surveys also makes it difficult to define areas for lease.

Edit note: User rights – there is no mention of there being problems with instability of CL use rights. It is argued that as long as the family works the land and provides services to the matai they will have access to customary land and this is supported by the Land Title Court(LTC). But – it must be wondered whether this will change as more family members move closer to the cities and migrate overseas and therefore can't work the land. Perhaps in this case their remittances are considered 'services' to the matai and they retain their traditional rights that way.

2.4 Positive Features of Customary Tenure

Customary tenure has many positive features which have made it a successful form of land administration in Samoa for many centuries. Central to its success has been the flexibility of customary systems to adapt to changing community needs. Customary tenure provides all family members with inherent land. This land is theirs for life and they have equal shares and rights to its use, control, management and ownership. Customary land is the source of sustainable livelihood for all family members on a collective basis and it also allows individuals to develop under the allocation of land to them by matais.

Under customary tenure, all Samoans are assured that the economic power of money does not take over their rights to ownership of their inherent customary lands. Whether they reside in Samoa or overseas, they are still the rightful heirs of customary land attributed to their respective families and they are not denied these rights by others.

The matais, as heads of families and villages, can be powerfully used as an avenue for strong economic development if all the family and village members are adequately consulted and agreement is given by the whole family (aiga potopoto) and village citizens. The family can provide a powerful force for collectively contributing to development activities.

Customary tenure systems do not just have an economic role in managing scarce land resources, they also sustain many Samoan values and cultures. The matai has a political role as an 'institution' with powers vested on him/her by the collective authority of the whole family.

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Indigenous Samoan political structures are centred on the allocation and management of customary lands. They require united family consent on development decisions affecting the use of customary lands and natural resources. Traditional structures of power and decision making have worked in Samoa for generations to deliver sustainable use and development outcomes. Customary tenure provides a range of cultural, ecological and survival benefits. The principles of democracy, transparency and sustainability promoted by customary tenure systems provide sound lessons for any future land administration policies Samoa.

Customary tenure in Samoa deals with disputes over ownership and boundaries of matai titles by referring them to the Land and Titles Court. Any suli can challenge the right of a matai title and nay person can petition the court.

The option for leasing of customary lands is seen by many customary owners as a positive feature of customary tenure. It enables investment and access to credit whilst protecting customary land owners and family members from permanently losing family lands. More flexibility in negotiating the terms and length of the lease would also be beneficial.

2.5 Are Customary Land Owners Disadvantaged by the Customary Tenure System?

It is suggested that there are some disadvantages, particularly for family members who would like to relocate and are unable to sell their land. Their only option is to transfer land and it can be imagined there would be difficulty finding other Samoans to transfer with, especially if one piece of land is better located (i.e. closer to Apia) than another. It also means Samoan's who migrate internationally can't sell their land to get the capital for investing in new property elsewhere. (reference to Tim O'Meara's paper which reiterates these problems).

Some other possible disadvantages:

- The lack of representation of women among matai
- Matai's hold a considerable degree of power which may be misused or abused for individual economic gain at the expense of the family
- The use rights of family members are not formally protected or recorded
- Customary systems are not egalitarian – they maintain hierarchies and power relations which advantage some family members over others (in particular they advantage men over women and matai heirs over non-matai heirs)

In addition, there are the negative features listed above, i.e. lack of access to credit, disputes over boundaries and ownership, lower economic value of customary lands.

2.6 Is Security under the Customary Tenure System under a Present Threat?

International investors and proponents of economic development are putting increasing pressure on Samoa to adopt individual freehold tenure. As valuable natural resources decline and population pressure increases, customary lands become increasingly valuable and external pressures for their maximum economic utilisation increase. This is especially noticeable in lands surrounding Apia and on lands which possess a wealth of natural resources (mineral deposits and forests). Lucrative contracts for short term development pressure customary owners to accept short term profits over long term sustainability. Ill-defined property

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boundaries, lack of public records on customary ownership and insecurity over customary land rights put customary owners at risk of exploitation.

In addition to the economic pressures threatening customary lands there have also been a number of social changes which threaten customary tenure. The most prominent of these has been the trend towards rural-urban migration. Samoans are being attracted to the capital and to international destinations far away from their customary lands. Migration is breaking down the traditional hierarchies and responsibilities of family members under customary tenure. It is threatening the social fabric upon which customary tenure is maintained. Absentee land owners find it difficult to participate in family decision making and are distanced from the impact of decisions about the sustainable management of their land. Because they can not sell customary land, this land has often been neglected and underutilised whilst they are away. It is not surprising then that these absentee owners are frequently the ones who are lobbying for privatisation of customary lands.

While the security of customary tenure is under threat, customary systems have proven to be resilient and dynamic over time. Creative measures are needed to improve the security of customary tenure and at the same time to promote the economic interests of customary owners.

2.7 New Initiative:

<http://www.adb.org> Under the heading of Thematic Priorities of the ADB and Samoa Development Bank – *Insecure land tenure, inefficient public enterprises, and regulation that make it difficult to transact domestic and international business are important constraints to private sector development. The Government has indicated that it will devise a strategy to improve access to customary land and public land, and use of customary land as collateral. This is a complex and sensitive issue and it will take time to build community awareness and acceptance for this concept and its practical implementation. These issues and constraints are expected to be addressed during the implementation of the Small Business Development Projects and associated TA.*

As well, the Samoa Strategy and Policy Dialogue states *“...the strategy reflected the most common aspirations of vulnerable and disadvantaged communities based on ADB’s participatory poverty surveys – employment, quality of and access to basic social services and education, and access to finance and land.....It also included dialogue on the policy and legislative environment for business development, specifically on legal impediments to the economic use of customary land, improving debt recovery mechanisms, and facilitating secured transactions.*

2.8 Concluding Comments:

The following are comments and observations which reflect the personal views of the Adviser³:

- As Samoans we need to continue to advocate against any threat to our culture. We have already lost so much of our Samoan values and we need to encourage the cultural renaissance in the Pacific.

³ A series of personal comments and observations were provided by the Adviser as background for the edification of the LEI TA Team. An edited extract only is included here.

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- Under national development policies and programmes of many of our countries, Samoa included, reference to 'matais' and 'village chiefs' need to be considered in its cultural context. The 'matai' is often alluded to as the person, instead of it as being an 'institution' with powers vested on him/her by the collective authority of the whole family 'aiga potopoto'. Hence, the question of decisions affecting indigenous peoples such as Samoans emanated from 'matais' necessarily requires the united family consent and thus any development approaches to use customary lands and natural resources rightly requires a prior consultation with the peoples of the tribe, family, etc. This is consistent with the prior informed consent principles that we as indigenous peoples and local communities are pushing and adequate consultation we require before anything happens on our lands. Unfortunately, the 'matai as a person' has often been exploited by developers and the matais themselves for their own personal advantages to then 'legitimize' their taking advantage of our resources, without taking responsibility of the issue of the 'matai' as an institution where he/she is only there because of the trust given by the family.
- In the related matter of the important role that needs to be continually promoted through community-based biodiversity conservation, our focus should be on ecology, cultural importance, and survival of customary lands and rights, instead of following the rich western countries where their interests vests in uniqueness, scientific, biotechnology, and endemism.
- On the issue of the defense of customary lands, consideration should be taken of paper by Jim Fingleton on "Privatising Land in the Pacific – A defence of customary tenures" – see www.tai.org.au

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25. The Contextual Theology of South Africa

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PEOPLE INTERVIEWED:

1. President of the Lands and Titles Courts
2. Laufo Meti Meredith
3. ACEO of Justice
4. CEO of the Housing Corporation
5. Immediate Past Chairman of the Pulenuus (Village Mayors)
6. General Secretary of the National Council of Churches – Rev. Fepai Kolia
7. Law Society Representatives (President and members)
8. Toleafoa Solomona Toailoa – Barrister and Solicitor
9. Lealaiauloto Pusi of Avao Savaii
10. Moananu Isaako of Ptamea Savaii
11. Lauafia Malaki of Fomaluga Savaii
12. Malae Faaletonu of Satitua Upolu
13. Moemoefano Amalamo of Saleaula Savaii
14. Alii ma Faipule of Matafaa (Talaolevavau L, Unasa Tui, Samaila Paniani, Muaaufaalele Iafeta, Fenunuti Faasipa, Pasina Pati, Mauga Tanumapua, Tupai Tuala, Taumafono S, Vaafusuaga F, Unasa Siave, Unasa Asa, Mase Emani, Suemalo Iupeli, Oloamanu Leo, Fualau, Unasa Perenise, Samaila Filia, Unasa Suluifalamalu, Unasa Iulia, Sui o Tina o Faufagalupe Tuala.
15. Alii ma Faipule o Tiavea-tai (Seiuli Tauemu, Puipuifatu Tupu, Tolu Iosefa, Leota Paulo, Taiao Kapeli, Lailu Faaiu, Talo Petelo, Mafiti Naoupu, Falefa Siuele).
16. Taulele'a – Salu Seuava, Iona Maiava, Senio Taiao, Faapusa S, Ekuati N, Lafoga S, Kitona A, Elia M, Tino L, Fia'ai K, Amosa M, Tamoto S, Sime M, Samuelu E, Manasa L, Niki T, Alai T, Iosua E, Viliamu I.
17. Faletua ma Tausi – Saolotoga S, Avea K, Apoua T, Ula L, Alefa T, Mela S, Siala M, Pua L, Salisi E, Sue T, Suia I, Tauese T, Tinaima M, Segia S, Paulia T, Galo K, Faananafu F, Onosai E, Siniva S, Faalogoifo S.

Adviser Terms of Reference

Services required

The overall purpose is to develop an understanding of the traditional systems of tenure over customary land and to develop a framework for possible inclusion of customary land in the formal registration process.

Specific responsibilities will include the following (and will be confirmed during the project inception period):

1. Complete an overall review of the traditional land tenure and administration systems with emphasis on the present and future efficacy of these systems in providing security of tenure over customary lands in Samoa.
2. Based on the observations and conclusions of the customary land tenure review, report on the appropriateness of extension of the land registration reforms to include customary lands.
3. Using a participatory approach, engage stakeholders in a review of the policy issues that must be considered and develop options for formalising customary tenure.
4. Assist the Land Legislation and Land Registration Advisers in an analysis of the current and future possible roles of the Land and Titles Court.
5. Conduct extensive consultation with all stakeholders to ensure the project is in harmony with traditional beliefs and community expectations.
6. Develop a forum for engaging stakeholders in the ongoing development of options for formalising customary tenure.
7. Assist in the preparation of a briefing paper for Cabinet on the proposed reforms.