

The Community Land Titling Initiative: An Investigation into the Protection of Customary Land Claims

Rachael Knight*

Executive summary

In the current context of growing land scarcity in Africa, securing and enforcing the land rights of rural communities is becoming increasingly urgent. In particular, efforts to protect common and reserve areas are critical, as common properties and village lands not under cultivation are often the first to be allocated to investors, elites and state development projects. Various African nations have passed land, forestry and natural resources laws that make it possible for rural communities to register their lands as a single legal entity and operate as decentralized land administration and management bodies. This strategy has the power to protect the full extent of community lands according to customary paradigms and boundaries. However, due to myriad political, financial and capacity constraints, these laws are often not widely or successfully implemented. Moreover, very little is known about how community land titling processes impact intra-community dynamics, and how the land claims of vulnerable groups within communities are affected by such processes.

This chapter discusses findings from a two-year intervention entitled the “Community Land Titling Initiative” undertaken in Liberia, Mozambique and Uganda. The intervention’s goal was to gather information on: i) the type and level of support that communities require to successfully complete community land titling; and ii) how to best facilitate the protection of vulnerable groups’ land rights in the context of decentralized land management and administration. To investigate these issues, groups of communities were provided with different levels of legal assistance while they followed their nation’s legally-mandated process of community land titling. All groups’ progress was monitored, and the results were compared and analyzed to understand how the international development community, governments and national non-government organizations might better facilitate the implementation of community land titling legislation.

* This chapter is based on preliminary project findings. A further report with detailed qualitative, quantitative and statistical analysis will be released in mid-2011. The author would like to thank and acknowledge the directors and staff of the International Development Law Organization’s (IDLO) in-country partner organizations: Silas Siakor, Ali Kaba, Rowena Geddeh Titus Zeogar and Jacob Hilton of the Sustainable Development Institute in Liberia; Judy Adoko, Teresa Eilu and Simon Levine of The Land and Equity Movement in Uganda; and Adla Salomao, Issufo Tankar, Dilaria Marenjo, Nelson Alfredo and Antonio Consul of Centro Terra Viva in Mozambique. Without their hard work and dedication, this initiative and all related research findings would not have been possible. The author would also like to thank Thomas McInerney and Erica Harper of IDLO for their wholehearted support for this work. The author would also like to note that the views expressed, and any errors or omissions, are entirely her own.

Introduction and background

In many African nations, the state retains the ultimate title to land. Individuals and groups may hold rights of use or possession over land, but do not enjoy actual ownership. Within this context, land tenure can be defined as the way that land is held by individuals or groups. A number of individuals can hold different tenure claims and rights to the same land. These claims can be formal (state-based), informal, customary, or religious in nature and can include leasehold, freehold, use rights and private ownership. The strength of one's land rights may hinge on national legal definitions of property rights, local social conventions or other factors. Land tenure rights may include the freedom to: occupy, use, develop or enjoy land; sell or bequeath land; lease or grant use rights to land; restrict others' access to land; and/or use natural resources located on land.

'Land tenure security' describes the extent to which land users can be confident they will not be arbitrarily deprived of the bundle of rights they enjoy over particular lands. It is the reasonable guarantee of ongoing land rights, supported by a level of certainty that such rights will be recognized by others and protected by legal and social remedies if challenged. Legal systems — state, customary or religious — define the rights and obligations of individuals, families and communities with respect to land and determine how land rights are to be administered and enforced. How and whether the relevant legal system acknowledges one's land rights is the basis for land tenure security.

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

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

In such contexts, the question of how to best promote tenure security raises complex issues. Titling land held by families and communities under customary law is the most obvious means of protecting communities' land rights from encroachment. However, individual land titling schemes have generally proved inadequate to protect the full range of usufruct rights typical of customary land management systems described above. Individual titling is generally not designed to take into account communal or secondary rights over land, such as rights of way, common pool resource claims, or the migratory routes of nomadic groups and hunter-gatherers. As a result, these rights remain unrecorded and may be lost. In some cases, individual titling schemes have led to increased inequity and disenfranchisement of vulnerable groups. A particular concern is the loss of women's land rights where formal title documents are issued only in the name of (usually male) household heads.

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

In these situations, titling land held by families and communities under customary law may be necessary to protect land rights from encroachment. A possible method is to allow communities to register their lands as a whole by reference to customary boundaries, and then empower them to control and regulate intra-community land holdings and usage.

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

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

While various African governments have passed legislation that facilitates community land titling, in most cases, these laws are not being fully or well implemented. Reasons for this include: poor community awareness of their rights; insufficient government capacity; overly complex and bureaucratic processes; opposition by government and the elite (who may lose their power and authority to control land); the prohibitive costs of and time involved in titling and registration processes; the high level of technical expertise and resources involved in land surveying, titling and registration; and the inter- and intra-community disputes that arise during the process of determining community boundaries.

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

1. Customary land tenure and legal pluralism

1.1 Customary land tenure

In rural areas, particularly where state administration and infrastructure are absent or inaccessible, customary legal systems are often the primary means of enforcing community rules and resolving land-related conflicts.² It is impossible to comprehensively define the nature of these systems. First, the governing principles and rules are not static but constantly evolving in response to cultural interactions, socio-economic and demographic shifts, political processes and environmental change. Second, customary systems are unique to the communities in which they operate. It may be argued that the reality of the custom practiced can never be known by someone not living and functioning within its precepts.³ However, while the custom regulating land use and management varies between and within countries, provinces and villages, a number of common characteristics can be identified.

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

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

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

Land rights and resource rights are directly embedded in a range of social relationships and units, including households and kinship networks [and various levels of 'community']; the relevant social identities are often multiple, overlapping and therefore 'nested' or layered in character (e.g. individual rights within households, households within kinship networks, kinship networks within wider 'communities'); [land rights are inclusive rather than exclusive in character, being shared and relative]. [They] include both strong individual and family rights to residential and arable land and access to a range of common property resources such as grazing, forests and water ... Rights are derived primarily from accepted membership of a social unit, and can be acquired via birth, affiliation or allegiance to a group and its political authority, or transactions of various kinds (including gifts, loans and purchases). ... Access to land (through defined rights) is distinct from control of land (through systems of authority and administration).⁶

Customary land management and administration systems may also reflect and be shaped by three factors. First, intra-community and intra-family power relationships: the socially embedded nature of customary land rights means that the strength of one's land claims may be influenced by various cultural and societal factors including intra-family dynamics, an individual's place in the community, or his or her capacity to navigate various relationships and social forces.⁷

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

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

Finally, it is critical not to conflate the term 'customary' with 'communal'. Customary refers to the *system* under which land is held, while communal is the *way* in which *some* of that land is used. Alden Wily explains: "Customary domains are territories over which the community possesses jurisdiction and often root title; ... [within such domains] a range of tenure arrangements typically apply."¹⁰ In contrast, common properties are "properties which are owned by all members of that community in undivided shares [claims to such properties are] defined by virtue of membership to the group."¹¹

1.2 Legal pluralism and tenure security

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

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

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

2. Current trends impacting African land tenure security

As explained above, growing land scarcity and associated increases in the value of and competition over land have led to an overall weakening of the land rights of rural communities. Various forces are contributing to this trend. First, population growth, climate change, environmental degradation and

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

Second, governments are increasingly granting large land concessions to investors for agro-industrial enterprises, hunting and game reserves, ranching, tourism, and forestry and mineral exploitation.¹⁴ In some cases, the aim is to foster commercial, agricultural or industrial growth to improve national GDP and living conditions. In other cases, officials transfer land illegally and/or for personal profit. The land appropriated is often held by rural communities that operate under customary law and have no formal title that could be used to contest such grants.¹⁵ For example, pastoralists often require large tracts of land for herding livestock. Governments at times argue that since pastures have low food production levels, it is in the public interest that they be converted to commercial farmland.

Third, increases in land values create incentives for individual rights holders to sell land for personal gain in violation of either statutory laws (for example, where land is sold by one family member without the knowledge or permission of other rights-holders), or customary rules (for example, local leaders redefining their customary stewardship of land as 'ownership' rights, and subsequently selling common lands for personal profit).¹⁶ In this context, individuals who have knowledge, power, access to decision-makers and wealth fare better in the outcome of resource struggles. Such asymmetrical relationships are also embedded in community-level social relations, including gender dynamics within families, class relations between individuals within communities, and cultural differences between ethnic groups. In practice, this means that vulnerable groups and those with weaker land claims including women, pastoralists, tenants,¹⁷ people living with HIV/AIDS and other marginalized groups are at the greatest risk of losing land. A prime example is rights holders terminating the use rights of tenants, often unilaterally and sometimes violently and without notice, in order to sell or rent land to richer families or urban investors.¹⁸ There is also evidence of 'distress sales' among families living with HIV/AIDS: as primary income earners fall sick and are unable to work, and as money is needed for medicines and funeral expenses, families are forced to sell land (often below market value).¹⁹

These trends have in some contexts precipitated a breakdown of the customary rules that govern the equitable and sustainable use of common resources — rules that have functioned in the past to protect the land rights of vulnerable groups.²⁰ Mathieu et al write:

These new land tenure practices ... reflect a period of uncertainty, a time of "hesitation" as people find themselves between two systems and two periods: a time not long ago when customary principles were the point of reference; and an uncertain future, in which new rules and norms seem inevitable, including the commercialisation of land. The stability of long-standing customs seems to be weakening in many places, and yet tradition is still very much alive and meaningful for the communities concerned, as a source of legitimacy and the binding element in social relationships.²¹

For example, while scholars disagree on the relative strength of women's land claims under customary systems,²² the consensus is that as land becomes scarcer, customary safeguards concerning women's rights to land are being eroded. Evidence has emerged that, when land is scarce, customary leaders and families move away from more flexible systems of land holding (which take into consideration women's needs to support themselves and their children) to more rigid interpretations of women's land claims. In some areas, families are reinterpreting and rediscovering customary rules that undermine women's land rights.²³ In short, despite the strength and inherent negotiability of kinship-based land claims, in the context of land commoditization, women often lose their bargaining power among their husbands' kin and within their own families.²⁴ Woodhouse notes: "When competition for land intensifies, the inclusive flexibility offered by

customary rights can quickly become an uncharted terrain on which the least powerful are vulnerable to exclusion as a result of the manipulation of ambiguity by the powerful.”²⁵

Further, as land belongs to the state in much of sub-Saharan Africa and therefore may not be conventionally bought and sold, increases in land value have led to the evolution of unregulated black and ‘grey’ land markets. These markets facilitate the transfer of land in violation of either statutory or customary rules through a range of financial transactions — from rental agreements, to sharecropping, to outright sale and purchase.²⁶ Such illicit land transfers fail to provide adequate protection both to buyers and to families of sellers, who may not be aware of or who may be adversely affected by the sale of their lands. Moreover, they are rarely accompanied by legal proof of purchase or ownership, and there is often uncertainty concerning the terms and conditions of the exchange. Some land sellers take advantage of the covert nature of the proceedings to engage in fraudulent practices such as making multiple sales of the same land or selling family-held land without the consent of other rights-holders.²⁷

3. The limitations of individual land titling within rural customary contexts

Various African nations have experimented or are currently experimenting with programs of systematic individual land titling and registration. The rationale — originally put forward by the World Bank and later re-emphasized by the Peruvian economist Hernando de Soto²⁸ — has been that individual titling can safeguard the land rights of the poor, provide a mechanism through which small-scale farmers can use land as collateral for credit, and foster commercial enterprises by bolstering investor confidence in national land tenure security. Such efforts began in post-colonial Kenya and continue today in Uganda, and the United Republic of Tanzania, among others.

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

- Powerful individuals can use their wealth, knowledge and/or influence to acquire unregistered or ‘free’ land, exacerbating power concentrations and class distinctions.
- Formal land titling and registration may encourage ‘distress sales’ in times of hunger and extreme poverty.
- Structural obstacles such as the location of government offices, complex administrative procedures and the costs associated with land registration procedures can limit the participation of disenfranchised groups, and unless specific measures are taken, ethnic minorities and women may be excluded from titling efforts.
- Fear of land taxation or of compulsory government land acquisition (facilitated by land registration) dissuade the poor from registering their land claims.
- Where land rights are registered under the name of the male head of household, women’s land holdings may go unrecorded and be lost.
- Where land registration fails to record communal or secondary land use rights such as rights of way or common pool resource claims, these rights can be lost.
- Where land registration does not record the migratory routes of nomadic groups and hunter-gatherers, or the overlapping and shared use claims of pastoralists and sedentary communities, these rights can be lost.
- Due to the complexity and high cost of cadastral mapping, combined with insufficient government capacity, mapping has often gone unfinished, undermining tenure security.
- Where the costs of titling land are prohibitively expensive, landholders (particularly the poor) can be encouraged to engage in informal, unrecorded and thus unprotected land transactions.²⁹

In response to such findings, the World Bank and other multilateral development agencies have slowly moved away from mandatory titling and registration schemes to embrace the potential of

customary law to mediate land relations at the local level. The World Bank actively supports efforts to decentralize land administration systems and has publicly advocated a greater role for customary land tenure practices.³⁰ This move follows recognition that if they are to be effective, efficient and considered socially legitimate, land tenure systems must be grounded in local and traditional land management practices. Policy-makers also increasingly understand that reliance on customary administration and management practices is often a simpler and less conflict-prone route to the eventual titling, registration and privatization of land ownership (which the World Bank still views to be a precondition for investment and economic growth). This approach is appealing to development actors more broadly because it is deemed consistent with the strengthening and democratization of local politics and the promotion of bottom-up initiatives. The World Bank Policy Review Report (2003) holds that:

Customary systems of land tenure have evolved over long periods of time in response to location-specific conditions. In many cases they constitute a way of managing land relations that is more flexible and more adapted to location-specific conditions than would be possible under a more centralized approach ... [and] in a number of cases, for example for indigenous groups, herders, and marginal agriculturalists, definition of property rights at the level of the group, together with a process for adjusting the property rights system to changed circumstances where needed, can help to significantly reduce the danger of encroachment by outsiders while ensuring sufficient security to individuals.³¹

More recently, the World Bank and other bilateral and multilateral stakeholders have recognized the potential risks and adverse effects of the new trend of governments granting large-scale land concessions to foreign investors, including "displacement of local populations, undermining or negating of existing rights, corruption, reduced food security, environmental damage in the project area and beyond, loss of livelihoods or opportunity for land access by vulnerable groups and women, nutritional deprivation, social polarization and political instability".³² In response, the World Bank, the Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) issued seven Principles for Agricultural Investment that Respect Rights, Livelihoods, and Resources.³³ Principle 1 is to ensure that existing rights to land and associated natural resources are recognized and respected. These agencies suggest that:

It is important to recognize that there are few areas truly 'unoccupied' or 'unclaimed,' and that frequently land classified as such is in fact subject to long-standing rights of use, access and management based on custom. Failure to recognize such rights, including secondary ones, will deprive locals of key resources on which their wealth and livelihoods depend ... Recognition of rights to land and associated natural resources, together with the power to negotiate their uses, can greatly empower local communities and such recognition should be viewed as a precondition for direct negotiation with investors. Specific attention to land rights by herders, women, and indigenous groups that have often been neglected in past attempts is critical to achieving a fair, inclusive outcome.³⁴

In nations where rural communities hold, administer and manage land according to custom, the questions then become: how to best recognize existing customary land claims and how to best ensure that customary land rights are respected, i.e. successfully claimed and protected? Community land titling may provide an efficient, effective and equitable answer.

4. Community land titling

In recent years, several African states have drafted laws that place custom at the centre of rural land administration and management. The impetus for such measures may have been to, *inter alia*:

adopt laws that derived from a genuinely African perspective; extend state influence to the customary domain while harnessing the governance structures already in place; strengthen the land claims of the poor; find efficient, cost-effective models for rural land management in post-conflict and resource-scarce contexts; and foster national growth and economic development. Ghana and Botswana were the first nations to undertake this effort soon after their independence, and since then, a number of countries including Namibia, Niger, Uganda, Burkina Faso, Mali, Lesotho, Malawi, Swaziland, Mozambique, the United Republic of Tanzania, South Africa, and others have followed.³⁵

In several nations, laws make it possible for rural communities to register their lands as a whole according to customary boundaries and formalize communities' land administration and management practices.³⁶ Under such laws, communities may control, regulate, receive and distribute benefits related to the common lands.³⁷ In some countries, land laws designate the community as the lowest unit of local government, both downwardly accountable to community members and upwardly accountable to the district government. Under other laws, communities may be required to establish themselves as a private legal entity capable of holding collective land rights, or as a body corporate that holds resource rights on trust for the members of their community and can transact with outsiders.³⁸

4.1 The benefits and drawbacks of community land titling

Integrating statutory and customary landholding systems through community land titling can yield significant benefits. First, it is a means of enhancing the tenure security and safeguarding the livelihoods of rural communities. By facilitating the recognition of communal, overlapping and secondary land rights, it provides particular protection to poor and vulnerable community members who may not have their own land. Moreover, in areas where much of the land is held communally according to custom and includes common resources such as forests, grazing lands and water sources that are critical for community members' survival and livelihoods, titling or registering the community land as the 'meta-unit' (or documenting the 'tenorial shell') may be the most efficient and equitable means of protecting rural communities' land claims. Importantly, it has the potential to safeguard an entire community's land at once, and may therefore be a faster and more cost-effective means of tenure protection than individual titling.

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

Third, land laws that allow for community land titling and that devolve land administration and management to the community level are often designed to protect community land claims and create tenure security while allowing for investment in rural areas, ensuring that development will be sustainable, integrated, and beneficial for local communities. For example, land laws in Mozambique and the United Republic of Tanzania establish that investors who wish to acquire land for development projects must negotiate with the communities who hold the ownership or use rights over that land and enter into rental or profit-sharing agreements in return for land use. Such arrangements have the potential to protect community land holdings and livelihoods, facilitate investment-related economic growth, and boost government tax revenues. Further, it is expected that where communities freely enter into such agreements and benefit from an investor's presence, they will be less inclined to mount legal challenges (clogging up the legal system) or engage in acts of resistance such as sabotage.³⁹

However, community land titling efforts, if not carefully performed, have potential drawbacks and dangers. As described above, under systems of community land titling, land management and

administration are necessarily devolved to communities themselves. When land administration is placed at the local community level, without proper oversight and supervision by government officials or the establishment of intra-community safeguards, there is potential for elite capture, corruption and the exploitation of vulnerable groups. In such situations, land management associations may be dominated by local power-holders, and community decisions relating to land titling and management may entrench class differences or perpetuate discriminatory practices.⁴⁰ A key risk is that local leaders' negotiations with investors may favour these leaders above community interests, and the economic benefits accrued may not be distributed equitably. Moreover, community members with more tenuous land claims, particularly women, widows, orphans, long-term tenants and pastoralists, are at increased risk of having their rights to land violated or losing land.⁴¹

The high vulnerability of women's land claims is of particular concern. As described above, in some contexts women may have little decision-making power within their family or be unable to contest violations of their rights through customary institutions. Even when women's land rights are protected under statutory laws, they may face multiple barriers to claiming and protecting these rights. First, customary dispute resolution systems may not uphold statutory provisions. Second, women may lack the economic independence and resources necessary to pursue a legal action through formal channels and/or be at risk of social or physical sanction for engaging non-customary processes. Finally, if women do seek to defend or claim their land rights through the formal state system, they may face discrimination or be at increased risk of exploitation.

4.2 Poor implementation of community land titling laws

While several countries have passed legislation facilitating community land titling, in most cases these laws have not been well or widely implemented. For example, since the *Uganda Land Act 1998* (chapter 227) was passed in 1998, not one community has successfully applied for and received a freehold title to Certificate of Customary Ownership for their community lands.⁴² In Liberia, no rural community has secured title to their lands under the *Public Lands Law 1972-1973* (Title 34 of the Liberian Codes Revised) since 1988.⁴³ In Mozambique, although many communities have undergone the legally mandated delimitation process and have been granted a formal 'right of land use and benefit', this has not provided sufficient protection; communities continue to be pressured by local administrators and investors to agree to private ventures being built on their lands without equitable rent, partnership status or profit shares. Some of the reasons for poor implementation are explored below.

4.2.1 Procedural complexity and weak institutional capacity

Legislative and procedural requirements may be inconsistent with the realities of community life or require evidence that customary rights holders cannot provide. In some countries, for example, land claimants need to demonstrate visible proof of use of and investment in land, such as planted trees, standing crops, or residential structures. This is difficult for pastoralists whose livelihoods require them to range over vast areas, upon which they often do not leave permanent proof of their presence or claims. It may also be difficult for agricultural communities that maintain undeveloped forests for hunting and gathering, and fisherfolk communities who rarely mark the beachfronts that are integral to their livelihoods and survival.

Second, where laws prescribe complex and multifaceted claims procedures, there is a higher likelihood that titling applications will not be processed correctly or within the legally mandated time limits. This is exacerbated in contexts where titling processes involve the approval of multiple government actors, ministries, or departments. For example, in Liberia, the current legal process for granting rural communities deeds for their lands provides a series of strict one-year time limits that communities must adhere to, while also mandating that the application must pass through the President's office twice, that the President must issue an Executive Order approving the land survey, that an application must go back and forth from the county headquarters to the national capital more than twice, and that officials from three different government agencies must sign their approval of the application. Alternatively, loopholes that establish one government body as

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

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

4.2.2 Government corruption and emphasis on investment

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

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

For example, research conducted in Mozambique into the nature of community-investor negotiations revealed instances where consultations consisted of only one meeting lasting a few hours, with no time provided for community members to discuss the matter among themselves.⁴⁴ Further, the borders of the land to be conceded were rarely walked or otherwise physically verified.⁴⁵ Calengo, Monteiro and Tanner conclude that such consultations are conducted merely to give the "process a veneer of legitimacy by showing that local rights are apparently respected".⁴⁶ They note that communities may also be unaware of their right to reject a proposed agreement, feel pressure from District Administrators to consent, or be "persuaded by authorities that all investment is good, or ... told that they have little choice as 'the land belongs to the State'".⁴⁷

155

A related problem is that officials responsible for interfacing with investors often have little or no downward accountability to rural communities. They may be directed by their superiors to promote national development and therefore be more focused on fostering investment and economic growth than on ensuring that communities are equitably compensated for the loss of their lands. With respect to Mozambique, Calengo, Monteiro and Tanner found that, in many cases, "it is clear that officials see their job as helping investors get the land they need, and do not accept that local rights are 'real' in the sense that they give locals secure private tenure that cannot simply be taken away."⁴⁸ Similarly, Durang and Tanner have found that:

While the consultation should result in some compensatory benefit for local people, this is very much a secondary objective for the land administration services compared with the need to secure a community 'no-objection' and give the investor his or her new [right of land use and benefit within the time limit of] less than 90 days.⁴⁹

4.2.3 Lack of political will

Community land titling laws necessarily devolve powers of land administration and management from central and mid-level officials to rural communities, mandating the transfer of authority and control over (often) increasingly valuable and sought-after land. The executive and administrative officials whose powers have been curtailed often resist such change. Ouédraogo writes:

Nor should we overlook the lack of political will shown by the administrative authorities in implementing legislation favourable to local land rights. Either no practical steps are taken to implement the law or, worse still, the administrative — and even judicial — authorities ... are sometimes persuaded to take decisions which fly in the face of the law.⁵⁰

Commenting on this phenomenon in Uganda, McAuslan argues that: “[a]ny fundamental changes in [land] laws, particularly changes designed to remove powers from ... public officials, are likely to be opposed by those officials unless they can see some specific benefits flowing to them from the reforms.”⁵¹ In Uganda, the *Land Act 1998* grants ownership over all customarily-held lands to individuals, families and communities, regardless of formal documentation, and vests responsibility for land management in District Land Boards that are “not [to] be subject to the direction or control of any person or authority.”⁵² According to McAuslan, government officials who previously controlled such land and registration processes felt marginalized and obstructed implementation of the law:

Overnight, officials were stripped of their powers of land management, which were vested in district land boards. Even worse, the inherent powers of land management that are inseparable from land ownership also disappeared from the public domain and became vested in millions of peasants and urban dwellers. Perhaps most shattering of all was that the loss of powers was accompanied by loss of control over resources — funds hitherto available to the centre were to be allocated to the districts. What, then, was to be the future role of the officials, and what access would they have to public and donor funds?⁵³

Something similar has been observed in Mozambique; Negrao found that successful implementation of the *Land Law 1997 (Lei de Terras)* was obstructed by “resistance from employees in the title deeds offices to accept the new law ... [because] they would no longer have the monopoly in the decision-making regarding land adjudications.”⁵⁴

4.2.4 Lack of legal knowledge and poor access to justice

The potential beneficiaries of community land titling may have only a vague conception of the legal constructs that exist beyond the customary rules governing social relations within their communities. Poor awareness of their land rights may stem from a variety of practical and social factors. First, information dissemination on applicable laws may not extend to rural populations. Where information is disseminated, laws may not be translated into local dialects or include alternate forms of media designed for illiterate populations. Further, laws may contain technical language that is difficult for persons without formal or legal education to understand and follow. Finally, where information on the applicable law is made available, it may not specify rights and obligations, or provide populations with insight into how to claim, defend and enforce such rights.

Even when potential beneficiaries of community land titling are aware of their rights, they may have difficulty accessing and enforcing them. First, administrative and legal processes are often unaffordable for the rural poor. There may be separate fees associated with each step of the administrative process, including obtaining necessary documents, making photocopies and filing applications. Rights-holders also must bear the costs of travel to courts or government offices, the loss of income that may result from being absent from one’s livelihood while pursuing an application, and, in the case of land titling, the high cost of surveyors’ fees. A second factor is time. Administrative processes can be lengthy, and the time required to overcome bureaucratic obstacles

may be difficult to predict. Moreover, people living in poverty may not have time to invest in activities beyond those required for day-to-day survival. Where government offices are located in urban centers, time and cost constraints converge to prevent the rural poor from accessing them. Third, high rates of illiteracy among the rural poor decrease their ability to navigate administrative procedures, which are often based on written documentation and the completion of relevant forms. Likewise, individuals who do not speak the official national language may be unable to successfully complete the necessary administrative processes. Finally, legislation may prescribe complex processes that are difficult for the poor and less-educated to navigate or that require evidence that customary rights holders cannot provide.

5. The community land titling initiative

5.1 Research methodology

To generate new knowledge concerning the possibilities and limitations of community land titling, an initiative was launched to gather information on the type and level of support that communities require to successfully complete community land titling processes, and that which facilitates the best protection vulnerable groups' land rights in the context of decentralized land management and administration. The intervention was implemented between September 2009 and March 2011 in 60 communities in Uganda, Liberia and Mozambique. This work was undertaken in partnership with Land and Equity Movement in Uganda, the Sustainable Development Institute in Liberia, and *Centro Terra Viva* in Mozambique.⁵⁵ In each of these countries, although legislation facilitating community land titling is in place, it has either not been widely implemented, or governments' promotion of international investment in rural areas has resulted in community land rights remaining at risk.

The research methodology employed involved providing groups of communities with different levels of legal assistance with respect to community land titling, and then observing these communities' progress through the various steps outlined in the relevant laws and regulations. In each of the three countries, the 20 communities which requested to participate in the project⁵⁶ were randomly assigned to one of four different treatment groups, as described below.

Monthly legal education and training: Five communities received monthly three-hour training sessions over a period of 14 months. This training was provided by a field team composed of a lawyer and a community mobilizer/technician. All community members were invited to take part in these training sessions and specific measures were adopted to ensure the participation of women.⁵⁷ Country-specific training methodologies were developed to ensure that the information was transmitted in a culturally appropriate manner, taking into account literacy levels and the time and resource constraints of different community members. The training was designed to teach communities about their legal rights and their country's community and titling procedures as well as how to successfully undertake and complete each stage of the community titling process. The training included information on and capacity-building with respect to *inter alia*: national laws on women's land rights, inheritance and natural resource and conservation law; the available legal services and how to access them; the position of customary law within the statutory legal framework; the practical skills required to title lands, boundary harmonization documentation techniques; and conflict resolution skills. Training methodologies employed included role-plays, dramatizations, practice exercises and question-and-answer sessions. The groups also were assigned 'homework' to complete before the following month's meeting related to the step of the process the community was undertaking at that moment.

Paralegal support and monthly legal education and training: Five communities in each country received the monthly legal training described above, as well as the added support of two community-based and elected "land paralegals".⁵⁸ The paralegals received an initial two-day, in-depth training covering the topics detailed above, plus additional training in meeting facilitation, the inclusion of vulnerable groups, and strategies for aligning customary rights with national laws and

human rights principles, among other topics. Paralegals were required to attend monthly three-hour training sessions with the project field team, during which they reported on their progress, were provided with the opportunity to ask questions and request support, debrief on any obstacles confronted or challenges faced, and receive general support and supervision. The paralegals were also provided with phone credit and encouraged to call and send SMS messages to the legal team with questions on an as-needed basis.

Full legal support and monthly legal education: Five communities in each country received the monthly legal training described above, as well as the support of the project lawyer and field team throughout the community land titling process. This support included: assistance during conflict resolution meetings, help with boundary harmonization efforts; assistance drafting and revising community constitutions/by-laws and land and natural resources management plans; and support in the preparation and presentation of the required forms to relevant authorities.

Control communities: Five communities in each country were assigned to control groups; these communities attended one meeting where they were provided with copies of their country's land laws and regulations, as well as a guide and other relevant training materials on how to follow the community land titling process. To encourage these communities to go as far as possible through this process, they were advised that should they successfully complete the requisite steps, the project would cover the costs associated with the formal surveying of their lands, which is a near-final step of each country's legal procedures (this particular incentive was created to allow researchers to differentiate financial from procedural obstacles to community progress).⁵⁹

Each community's progress was monitored by: observing and documenting community meetings; observing and recording community interactions with land administrators; recording obstacles confronted and their resolutions; and tracking and documenting inter- and intra-community conflicts.⁶⁰ In addition, a baseline survey of 2,225 individuals (covering all three countries)⁶¹ was administered to determine the conditions prevailing in the communities before the titling processes began. A post-service survey was administered to the same respondents at the conclusion of the project. The survey data were supplemented by focus group discussions held at the beginning and conclusion of the project (separately targeting women, community leaders and youth) with the objective of adding narrative content to the close-ended answers in the survey and assisting in the analysis of the baseline survey responses.⁶² The objective of these processes was to statistically determine the changes that had occurred during the course of the project and to measure the various impacts of the intervention.

The following overview is not intended to be an exhaustive description of the project's findings. Instead, it gives insight into communities' experiences during their efforts to successfully complete their country's community land titling procedures, as well as some observable impacts of these efforts.

5.2 Community processes: Key learnings

While community land titling procedures varied between the three study countries, there were certain analogous components of the community land documentation processes; in all three nations, communities were required to complete the following steps: i) map-making and boundary harmonization; ii) community constitution and by-law drafting and adoption; and iii) community land and natural resources management plan drafting and adoption.⁶³ This following section highlights significant challenges encountered and how they were overcome, and then briefly outlines some of the key lessons learned.

5.2.1 Boundary harmonization

One of the first steps of the process of community land titling is for communities to define the physical limits of their land through map-making exercises and boundary harmonization discussions with neighboring communities. In each country, boundary harmonization proved the

most challenging aspect of the community land documentation process, principally because it forced communities to address and resolve existing boundary disputes. The process of harmonizing each boundary took from one day to one year, depending on the complexity of the dispute. A community's inability to harmonize its boundaries was often the single reason that it could not complete the titling activities. Every community in Liberia and Uganda, for example, had at least one land conflict or disputed boundary that needed to be resolved.⁶⁴ Moreover, in certain contexts, the process gave rise to *new* boundary disputes; the exercise of drawing definite and permanent boundaries at times created situations in which community members jockeyed to claim as much land for their families or communities as possible before the boundaries were finalized. This particularly occurred when community members suspected that the land in question contained valuable natural resources. Despite such challenges, most communities managed to harmonize their boundaries and formally and informally document them, either by signing memorandums of understanding describing the agreed boundaries with their neighbors, planting boundary trees along borders and drawing maps of the boundaries, or working with government technicians to establish the limits of their lands using GPS.

Communities employed a variety of negotiation tactics and compromise strategies to resolve boundary disputes. These included: dividing contested lands down the middle; agreeing to share the land (marking it on formal documents as owned by both communities, with reciprocal use and access agreements); and allowing the disputed areas or households being claimed by two neighboring communities to choose their preference of which community they wanted to be part of. One important factor impacting communities' dispute resolution efforts seemed to be their strong desire for 'papers' to protect their land claims; this often encouraged them to address the conflict and come to peaceful resolutions. Communities that were prepared to make concessions or compromises to swiftly resolve their boundary disputes were able to move more rapidly and productively through the land documentation process. These communities' capacity to compromise largely stemmed from their appreciation of the bigger picture: for example, they tended to be willing to sacrifice a few hectares in order to be able to document their remaining few thousand hectares.⁶⁵ In contrast, when communities were not genuinely interested in resolving the boundary conflict, the harmonization process aggravated tensions and led to further conflict. In some communities, protracted boundary disputes were related to the presence of powerful local or urban-based elites who had an interest in maintaining the conflict so as to allow them to claim more land for themselves before the land was titled.

The research also found that the composition of the 'boundary negotiation team' was important; boundaries were most quickly and peacefully harmonized when traditional leaders were involved, allowing for ancestors to be consulted,⁶⁶ and where the team was composed of both community elders and youth since these groups engaged different negotiation tactics stemming from different generational relationships to land.⁶⁷

Some conflicts proved too complicated or entrenched for communities to resolve on their own, and on several occasions the legal team was called in to mediate a long-standing land dispute between communities. In some instances, the team called in clan leaders and government officials to help intervene in protracted disputes.⁶⁸

Successful boundary harmonization processes may also have positive auxiliary effects in terms of fostering peace between communities and increasing community members' sense of obligation to conserve natural resources. The research found that, for many communities, having secure, undisputed boundaries created an increased sense of tenure security, particularly where a community felt threatened by encroachment by its neighbors, rather than government or outside investors. Respondents in all three countries reported that they felt more secure after harmonizing and agreeing disputed boundaries. They also reported that the boundary harmonization efforts, in combination with the mapping exercises (which included mapping all natural resources located within their communities), helped them to understand the limits of their lands and resources, and to recognize that these resources were not infinite.

5.2.2 Drafting and adoption of community constitutions or by-laws, and land and natural resource management plans

Other steps in the community land titling procedure include establishing rules for community land administration through the drafting and adoption of community by-laws or a community constitution, and to create land and natural resources management plans.⁶⁹ In Mozambique and Liberia, the land and natural resources management plan must also include a zoning plan for future community development.

Although community members reported that they found the process of discussing, debating and deciding their community's rules to be an overwhelmingly positive experience, these processes proved challenging for various reasons.

First, communities had problems integrating new governance concepts into their customary frameworks; for example, in Uganda it was difficult for them to envision and formulate processes for dissolving a Community Land Association. Communities also tended to leave out — or address only in the most skeletal fashion — key topics, such as local election processes, the duration of a local land body representative's time in power, and the various functions and responsibilities of each representative. Only those communities receiving full legal support were able to arrive at a sufficient level of detail in these parts of their community by-laws and constitutions.

Second, making the transition from oral to written rules proved challenging for most communities. While community members tended to know their land use and management rules in great detail, and were able to recite them extensively when prompted, when presented with a written list of the kinds of topics that their community by-laws or constitutions should contain, community members tended to become blocked and not know what to write down. In Uganda, the Constitution outline, set out in the Implementing Regulations of the *Uganda Land Act 1998*, was simply too difficult for rural communities to complete; it required too much detail and involved technical knowledge that communities often did not have. Across all three nations, the more loosely the legal teams explained what should be included in rules or by-laws, the more easily communities were able to write down the first draft of their rules.

Moreover, these exercises revealed how rule codification processes present certain dangers; when reducing community rules to writing, what is not written can be lost. In particular, more inclusive rules and practices may at times be 'forgotten' if the beneficiaries of such practices are not present to remind the group of their existence and lobby for their inclusion. Alternatively, practices that benefit vulnerable groups may be intentionally omitted if these groups are not present to ensure that such rules are included, or if the group of individuals writing the rules are not representative of the community. For example, even though women's land rights are protected by a variety of customary edicts and practices, the articulated rule in many African cultures is that land passes through the male bloodline. Any discussion about current rules therefore needs to be delicately handled to ensure that the transition from oral to written does not undermine — by omission — more inclusionary practices.

These exercises clearly demonstrated that participatory processes for facilitating community discussion of rule frameworks are essential and that specific steps must be taken to ensure that the voices and interests of vulnerable groups are heard and that their rights are captured and protected in constitutions. To ensure that women attended and actively participated in these debates, the legal teams found it necessary to convene separate meetings for women, during which time they could discuss and consolidate their interests and ideas in advance of the general community meetings scheduled to discuss their by-laws and constitutions. Where effective, it was found that communities' public discussion of their rules provided women with the opportunity to question those that discriminated against them in an open forum. In some communities, their questions led to a change or modification of certain rules.

The research also found that the by-laws clarification and adoption process created the space and time for community members to reflect publicly on existing rules — as well as the underlying reasons for these rules — and to question their merits. In many cases, this was the first opportunity for communities to openly discuss their laws; past practice was for community leaders to set rules. Focus group members in Liberia explained:

It was done in a clan meeting. We met in a big meeting and talked about the laws. We stayed for two days; people disagreed and agreed. It really helped us come together closer and make us to know each other;⁷⁰

The rules were decided in clan wide meeting, by the citizens of the clan. Everyone took part and agreed. It was the first time we had a discussion like this, so it was good we all took part.⁷¹

These statements suggest that participatory rule-drafting processes may help to open up a space for more active civic participation in local governance in rural contexts, and may be an important component in democracy-building in post-conflict environments. Classens writes: “To counterpose democracy and tradition as opposites of one another hides more than it reveals. In many traditional societies the intricate rules, precedents and procedures which have been built up over generations ensure far deeper levels of public participation and debate than the mechanism of elections can achieve on its own.”⁷² Such conclusions may also be applied to the process at hand; custom and democracy need not be inherently contradictory concepts.

Again, the drafting process resulted in positive auxiliary effects. Across all countries and in almost all communities, it contributed to improved local governance and strengthened land rights for vulnerable groups.⁷³ In particular, by-laws helped to define the roles of community leaders and enhance their downward accountability to community members, build consistent norms, and establish clear penalties for infractions. Previously, the consequences for infractions were often unknown or arbitrarily applied by a community leader; following the process, penalties are written down and can no longer vary according to the power/lack of power held by the person who committed the infraction.

The process of ensuring that their by-laws or rules aligned with national law may also have helped to strengthen the rule of law and merge formal, government law with local, customary law. When crafting their community by-laws or constitutions, communities actively considered the national laws of which they were aware. For example, it was observed that while community members might not have known the full content of a particular national law, they were able to recognize when a community law contradicted it and, in many cases, they protested.

Finally, the process of drafting the land and natural resource management plans helped communities to recognize the finite nature and intrinsic value of their common pool resources such as forests and waterways. Communities crafted new rules to conserve these resources, such as identifying and setting aside reserved areas particularly forests, as well as ‘remembering’ and reinforcing old rules that mandated their sustainable use. Communities also began to contemplate setting aside areas that no one was yet farming or logging as ‘reserve forests’ for future use.

161

5.3 Findings: Preliminary answers to central research questions

This intervention was designed to build knowledge on the type and level of support that communities require to successfully complete community land titling procedures. It also aimed to understand how to best facilitate the protection of the land rights of women and vulnerable groups in the context of decentralized land management and administration. While the final statistical analysis is yet to be completed, several interim observations can be made.

First, across all three countries, communities that received “paralegal support and monthly legal education and training” had the most success in completing the registration process. A particular

observation was that community members' trust in paralegals helped to create momentum from within; they played a large role in galvanizing community participation in the project and created a sense of ownership of the process. For example, in Liberia, communities estimated that they spent between 100 and 150 hours over the course of the project in meetings to complete the necessary work. Only a fraction of this time was spent with the legal team; these communities ran their own meetings. In contrast, those communities that received "full legal support" tended to adopt a more passive, less community-driven attitude towards the process; a common attitude was that the lawyer would arrive and handle the required activities for them.

A second observation is that carefully trained and closely supervised paralegals are having a positive impact not only on their communities, but also on neighboring communities. There appears to be increased information flowing to "control" and "education-only" communities that have a neighboring community led by a paralegal.

These findings suggest that training and supervising local, elected community paralegals may be a low-cost, efficient and effective way to support large numbers of communities through the land documentation processes. Moreover, that community land titling might best be supported by paralegals who have direct contact with and are supervised by a legal and technical support team. This would certainly be more cost-effective than providing "full legal support", because the legal team would not have to travel daily to meet with communities. A lawyer would still need to continue to visit the communities to address obstacles, mediate and resolve boundary disputes, provide a deeper level of legal education when necessary, answer questions, and keep community momentum going — but this would not necessarily be a monthly occurrence in every community.

However, although the level of legal support provided was a critical factor in a community's ability to complete the community land titling procedures, this proved to be less salient a factor in a community's progress than: the perceived degree of external threat to community land rights; community leaders' management abilities; pre-project community cohesion and cooperation (or how 'healthy' or dysfunctional a community is); the degree to which a significant percentage of the community population is transient or lacks a strong sense of 'belonging' or allegiance to the community; and ongoing local land conflicts. It is therefore important to recognize that community land titling may not be suitable for all communities. The data suggest that peri-urban communities, communities with weak leadership, communities with little or no internal cohesion or a highly-transient population, communities with too much internal strife, and communities with no sense of clear threat to their lands may not be a 'good fit' for this kind of initiative.

In addition, the data collected illustrate that to best facilitate the protection of the land rights of women and vulnerable groups in community land titling processes, debating and adopting community by-laws and constitutions is critical. Such processes opened up a space for women to challenge traditional rules that discriminated against them in an open, public forum. In the majority of communities, this led to a change or modification of such rules. In almost every community, both men and women supported the position that women were allowed to own land. There also seemed to be greater acceptance of women in the decision-making process on land use and management, and of their inheriting land on the same terms as men. In their focus groups, almost every community stated that there had been no opposition to these changes, and where there was opposition, women's collective action seemed to resolve it.

However, women's involvement must be actively and strategically encouraged. Women may need to be convened in separate groups — at least initially — to allow them to feel confident enough to voice their opinions and explain their interests. Future community land titling efforts might consider convening workshops for vulnerable groups in which they would highlight how the land documentation process may impact their rights and interests, and allow opportunity for them to discuss relevant concerns and interests among themselves. These groups may then be better

positioned to voice these interests in the larger community meetings and ensure that their concerns are addressed throughout the process.

Finally, and most critically, in rural areas where access to the formal justice system is difficult, community titling may lead to greater individual tenure security for women and members of other vulnerable groups than individual land titling. As described in section 3, individual titling tends to exacerbate power asymmetries, privilege local elites and those with greater access to legal knowledge and government offices, and may lead to a weakening of women's land claims. In contrast, during community land titling efforts, the community must work together to discuss, draft and adopt rules and land and natural resources management plans, and in so doing must confront issues of inclusion, exclusion, and how they will safeguard the land rights of women, and other vulnerable groups. When such topics are discussed publicly, allowing an authentic space for open debate and dialogue, there is a good likelihood that communities will strengthen the land rights of vulnerable groups, or at the very least strengthen intra-community mechanisms to safeguard existing rights.

For example, in Liberia, focus groups explained how "Women are now part of making decisions about land. They are allowed to own land just like men. They can inherit land just like men;"⁷⁴ one woman explained that in her community, the men "look at things differently than before. First women were not allowed to talk in land business, now we are invited to all the meetings."⁷⁵ One women's group not only mentioned the new laws that protected their rights, but also explained that their community agreed to an expansion of 'outsiders' rights; they described how, under their new by-laws, "Women can now own land, and we agreed that if a stranger stays with us for a long time and does not have bad character, they can own land too."⁷⁶

Similarly, in Uganda, during a focus group of male leaders and elders, it was stated that:

Yes, we changed our rules on women's rights: widows are allowed to stay on the family land until their death ... girls born in a family have the right to inherit this land, girls who have been divorced have the right to be given part of the family land, and elders are supposed to manage land on behalf of the orphans until they are old enough to manage the land on their own.⁷⁷

Importantly, community leaders were not only part of these discussions, but also leading them. In so doing, these leaders were both implicitly and explicitly agreeing to not only abide by these rules, but also to enforce them. In contexts where customary and community leaders are the central arbiters of justice, their support for women's rights is not inconsequential. In contrast, attempting individual titling in rural areas without first establishing strong local mechanisms to ensure local leaders' protection of women's rights may lead to greater inequity.

6. Conclusion: recommendations for realizing community land titling

African nations that have introduced community land titling laws have an opportunity to advance an innovative model of integrated rural investment. However, if the potential benefits of community land titling are to be realized, efforts must be made to address the obstacles that prevent the full implementation of these laws and restrict communities' ability to successfully claim and defend their land rights. Whether the potential of this model will be realized depends on levels of political will (at both central and local levels), community empowerment, and the degree of support provided to communities as they seek to successfully complete the administrative procedures set out in relevant legislation.

6.1 Recommendations for supporting agencies and organizations

Legal service organizations may play an important role in facilitating community land titling and helping communities to claim and protect their land rights. Such groups might: teach communities about the content of relevant land and natural resources laws and how to successfully complete the

procedures set out in accompanying regulations; train and assist communities to successfully complete land titling processes (for example, filing titling or community land association applications, defining the boundaries of community lands, or mediating intra-community conflicts); support communities to develop structures and processes to regulate the management and administration of land (for example, drafting community constitutions or by-laws to govern community land management and administration, developing natural resource management plans, or establishing community dispute resolution mechanisms); assist communities to develop by-laws through participatory processes that contain provisions addressing intra-community discrimination and conflict resolution; help communities to negotiate effectively with investors; and enforce community land claims through legal processes in the event of bad faith usurpation.

The intervention detailed in this chapter provides many interesting insights regarding how best to provide such support. Specific good practices include the following:

First, choosing the right community leaders to work with is critical, for various reasons. Distrust and suspicion of 'outsiders' is often high, especially when the issues involve productive resources or conflict-ridden processes such as land mapping. Such distrust might be mollified if such outsiders provide support at the invitation, and with the approval, of a leader that the community considers legitimate. Relatedly, the level of community commitment and the general success of the project will largely depend on the zeal of the local leaders to mobilize and lead their communities to work together. A further reason for carefully selecting the leaders to work with is that some leaders may be corrupt or distort the reality of land claims. They may be the ones claiming large areas as their own, or be involved in local land disputes. Alternatively, it may be local elites and influential community members that create obstacles to their community's success in the titling process; in such situations, working in partnership with committed and strong local and regional leaders can be imperative to an intervention's success. Involving *customary* leaders is also critical. The importance of consulting elders and receiving their approval should not be underestimated, particularly during boundary harmonization efforts. Communities particularly need their traditional leaders involved in mapping and boundary harmonization exercises; in many instances, they are the only ones with knowledge of where boundaries are located. In many locales, their inclusion strengthened communities' commitment to remain involved in the process.

Second, women's involvement must be actively and strategically encouraged. Women should be convened in separate groups — at least initially — to allow them to feel confident enough to voice their opinions, explain their interests, and make contributions to the project activities. For example, in Uganda, women did not actively participate in meetings until the field team convened separate women's groups in which they were able to articulate their various uses of the grazing lands and describe the rules that applied to each natural resource found within the grazing lands. Once they began to feel that their input to the process — particularly of writing the constitutions and planting boundary trees — was valued and important, they began to attend the wider community meetings in much larger numbers and to speak out in the larger group to ensure that their rights and interests were protected by and included in the constitutions.

Third, conflict between local elites and external elites may be unavoidable; it should be anticipated and response plans developed. For example, oversight mechanisms should be established to guard against conflict between local, community elites and elites in the capital who have family ties to a community or vested personal interests in that community's land.

Fourth, by-laws and constitution drafting processes should proceed carefully and be derived from existing community rules. It is important to underline that the process of writing down previously unwritten rules and practices inherently changes them. Any rules that are not included in a constitution, set of by-laws or land and natural resources management plan may be, by omission, negated, lost or inadvertently prohibited. Supporting organizations should assist community members to identify all natural resources found in common areas, and to define rules about their

management. Drawing a 'resource map' listing all natural resources located in the community may facilitate such dialogue, and help to create an outline of what the constitution and management plan should address. Similarly, to address questions of local governance and leadership, communities might be supported to draw diagrams of their community's existing leadership structure, and from these diagrams begin to list their leaders' responsibilities and roles.

Fifth, supporting agencies should carefully evaluate whether a community is a suitable candidate to undertake the amount of work involved in community land titling procedures. As discussed above, if a community is not able to cooperate, has weak or corrupt leaders, or has intractable land conflicts, it will likely be unable to complete the process successfully. Moreover, ongoing land conflicts may become more deeply entrenched or possibly turn violent, while new conflicts may also emerge. It is therefore advisable to work only with communities that proactively seek out legal support for documenting their communal land claims, and, before accepting to work with them, carry out an extensive analysis of power dynamics, ongoing conflicts and threats to land, and levels of community cohesion.

Finally, the need for enhanced state support for community land titling and administration cannot be underestimated. Where community land titling initiatives decentralize land administration and management to the community level, new roles and responsibilities should be created for local and regional officials. For example, local land officials may be trained to: provide technical advice and capacity-building to community-level land administration structures to support their efforts to sustainably and equitably manage land and natural resources, resolve boundary disputes, and administer their lands; help communities to negotiate and enforce contracts with investors; support communities to monitor the use of their natural resources, including enforcing penalties for abuse of agreed limits on logging or hunting; and develop the capacity of community leaders to sustainably and equitably manage community resources and resolve land disputes according to principles of fairness and equal rights.

State administrators could also be encouraged to better support community land interests. The research found that local and regional government officials may need training on relevant land legislation and related procedures. They may also need awareness-raising of the needs of rural communities and to be encouraged to see their role as 'solution-providers' and defenders of community rights. Generating such changes in institutional culture is complex and may require oversight and the provision of incentives.

6.2 Recommendations for policy and legislative reform

To ensure an effective and enabling environment for community land titling at the legal and regulatory level, legislative and procedural reform may be required to ensure that procedures can be easily completed by rural communities with minimal external supports. To this end, land laws and their implementing regulations should establish straightforward and unambiguous procedures and clearly set out the rights and responsibilities of all key actors.

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

There is also a need to better safeguard the interests of rural communities. Communities may require support in their dealings with investors and government officials to reduce information and power asymmetries. Within communities, individual members with more vulnerable land claims

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

- Establishing oversight and accountability mechanisms such as: laws or regulations to hold investors accountable for delivering agreed upon compensation for the use or leasing of community lands; and expedited complaint procedures and appeals processes, should investors fail to deliver the agreed benefits or rental payments;
- Establishing provisions in national legislation that safeguard women's land rights; in Uganda, the *Land Act 1998* requires that the written consent of the husband, wife and all adult children living on the land be obtained before land can be sold or mortgaged.⁷⁸ Other provisions might require that the name of both spouses be put on any formal registration of property used as the family home; legislation that requires communities seeking title to their lands to create a set of by-laws or a constitution concerning how they will administer and manage their lands in a manner consistent with national human rights provisions; and community land titling legislation that requires the democratic election of women and their representation on community land management bodies; and
- Establishing mechanisms to bridge customary and statutory legal systems, for example by requiring that decisions reached by customary courts be registered at district courts, which then review them for compliance with national human rights provisions, or by creating a direct line of appeal for disputes adjudicated at the community level to district level courts and then upwards through the court system.

In conclusion, community land titling presents an exceptional and rare opportunity to help enhance land tenure security and protect communities from encroachment and land-grabbing by outside elites. Community land titling may also have the potential to create positive change that extends beyond the documentation of customary and communal land claims to include improving civic participation; promoting the downward accountability of community leaders; facilitating the enhanced protection of women and other vulnerable groups' land rights; enhancing natural resource conservation; and strengthening internal governance and promoting the rule of law. As one community member in Liberia explained:

I don't care what anyone says, this project is the best thing to happen in our history. Imagine: now we know our borders; we know our resources; we know our rules, and they are written down for everyone to see and know; people are attending clan meetings; and our clan feels stronger together. This has never happened before! Now it is easy for us to organize and ask the government or [foreign investors] for things we want or refuse things we don't want in our community.⁷⁹

While there are many challenges to be overcome, efforts to implement community land titling laws, as tested through this intervention, bring practitioners to a closer understanding of both how to best support communities to document and protect their lands, and how other governments might best approach the development of sound legal and regulatory community land protection frameworks. Such research efforts need to be replicated and compared, and the lessons shared among the development community, policymakers, donors as well as national governments.

footnotes

- 1 In this chapter, the term 'the poor' is used to include all individuals, peoples, communities and groups that lack the power and capacity to fully and freely access and use formal legal systems to claim and defend their land rights.
- 2 See generally, E. Scheye, *Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks*, Netherlands Institute of International Relations (2009); E. Alemika and I. Chukwuma, *A Report on Poor Peoples' Perceptions and Priorities on Safety, Security and Informal Policing in A2J Focal States in Nigeria*, Center for Law Enforcement Education (2004); B. Baker and E. Scheye, 'Multi-Layered Justice and Security Service Delivery in Post-Conflict and Fragile States' (2007) 7(4) *Conflict, Security & Development* 503; L. Chirayath, C. Sage and M. Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006 (2005); J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003); Penal Reform International, *Access to Justice in Sub-Sahara Africa: The Role of Traditional and Informal Justice Systems* (2000); and W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003).
- 3 S. Falk Moore, *Social Facts and Fabrications. 'Customary' Law on Kilimanjaro 1880-1980* (1986) 319; and A. Whitehead and D. Tsikata, 'Policy Discourses On Women's Land Rights In Sub-Saharan Africa: The Implications Of The Re-Turn To The Customary' (2003) 3(1-2) *Journal of Agrarian Change*, 94.
- 4 See generally, B. Cousins, 'More Than Socially Embedded: The Distinctive Character of 'Communal Tenure'' (2007) 7(3) *Journal of Agrarian Change*; L. Cotula, *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 11; C. Tanner, *Law Making in an African Context: the 1997 Mozambican Land Law*, FAO Legal Papers Online No. 26 (2002).
- 5 Ibid.
- 6 Cousins, above n 4, 293.
- 7 J. Quan, 'Changes In Intra-Family Land Relations' in L. Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 53.
- 8 C. Tanner, above n 4 (adapted from C. Tanner, P. De Wit and S. Madureira, 'Proposals for a Programme of Community Land Delimitation' (paper prepared for the *National Seminar on Community Land Delimitation and Management*, Beira, Mozambique, 12-14 August 1998).
- 9 Cotula, above n 4, 11.
- 10 L. Alden Wily, 'The Commons and Customary Law in Modern Times: Rethinking the Orthodoxies (Draft)', (paper presented at the UNDP Conference, *Land Rights for African Development: From Knowledge to Action: A Collaborative Program Development Process*, Nairobi, Kenya, 31 October – 3 November 2005). Ibid 6.
- 11 Ibid 6.
- 12 In reality, due to the complex, overlapping nature of customary and statutory legal constructs, neither the chiefs adjudicating customary disputes, nor the judges hearing cases in formal courts apply a 'pure' version of customary or statutory law. As explained above, centuries of colonial rule impacted the tenor and nature of customary law, infusing it with various statutory constructs. Meanwhile, statutory systems for land management in Africa by nature must incorporate some of the customary constructs underlying land relations in rural areas, particularly in the areas of negotiation, mediation and conciliation. As such, "[t]he neat distinction between 'customary' and 'statutory' land tenure systems is considerably blurred, and ... between the ideal-type 'customary' and the ideal-type 'statutory', a great deal of hybrids and 'in betweens' exist.... Local reality usually resembles more a continuum of different combinations of both." (L. Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects In Africa*, International Institute for Environment and Development (2007) 11).
- 13 P. Lavigne Delville, 'Changes in "Customary" Land Management Institutions: Evidence from West Africa' in L. Cotula (ed), *Changes in 'Customary' Land Tenure Systems in Africa*, International Institute for Environment and Development (2007) 39.
- 14 L. Cotula, S. Vermeulen, R. Leonard, and J. Keeley, *Land Grab or Development Opportunity? Agricultural Investment and International Land Deals In Africa*, International Institute for Environment and Development (IIED), Food and Agriculture Organization of the United Nations (FAO) and the International Fund for Agricultural Development (IFAD) (2009).
- 15 A key issue is that rural communities often hold land communally. Where such land is not under cultivation or use by a specific family, it can be mistakenly (or disingenuously) classified as vacant and hence be particularly vulnerable to acquisition by elites, investors and state development schemes.
- 16 See, for example, J. Blocher, 'Building on Custom: Land Tenure Policy and Economic Development in Ghana' (2006) 9 *Yale Human Rights & Development Law Journal* 166; and D. Ayine, *Developing Legal Tools For Citizen Empowerment: Social Responsibility Agreements in Ghana's Forestry Sector*, IIED (2008).
- 17 For the purposes of this chapter, 'outsiders' may be defined as those individuals or families who have moved into and become part of rural communities but are not directly related (by blood or tribal affiliation) to that community's founding families. With less land available, 'belonging' and social ties are redefined; outsiders may be pushed out, lose their land or face restrictions on their access to communal resources.
- 18 P. Mathieu, P. Lavigne Delville, H. Ouédraogo, M. Zongo, and L. Paré, *Making Land Transactions More Secure in the West of Burkina Faso*, IIED Issue Paper No. 117 (2003) 1.
- 19 Villarreal, (on file with the author) 5, 7.
- 20 The increasing commercialization and commoditization of land have influenced the operation of customary systems of land administration and management. Chimhowu and Woodhouse observe that even during standard customary land transactions, there is a shift towards making reference to market values, evident in the "increasing weight placed upon cash, relative to symbolic elements of exchange, and an increasing precision in the 'seller's' expectation of what they should receive" (A. Chimhowu and P. Woodhouse, 'Customary vs Private Property Rights? Dynamics and Trajectories of Vernacular Land Markets in Sub-Saharan Africa' (2006) 6(3) *Journal of Agrarian Change* 346, 359). For example, in jurisdictions where gifts are provided to chiefs in exchange for allocating community land, today, these gifts are more closely related to the land's market value (L. Cotula, 'Case Study: Changes in 'Customary' Resource Tenure Systems in the Inner Niger Delta, Mali' in L. Cotula (ed), *Changes in "Customary" Land Tenure Systems in Africa*, IIED (2007) 81, 89).
- 21 Mathieu et al, above n 18, 3.
- 22 See generally: R. Giovarelli, 'Customary Law, Household Distribution of Wealth, and Women's Rights to Land and Property' (2006) 4 *Seattle Journal for Social Justice*; A and L. Adoko, J. and S. Levine, *Fighting the Wrong Battles: Towards a New Paradigm in the Struggle for Women's Land Rights in Uganda*, The Land and Equity Movement in Uganda (2009), The Land and Equity Movement in Uganda <<http://www.land-in-uganda.org/assets/Fighting the Wrong Battles.pdf>> at 20 April 2011; and Whitehead and Tsikata, above n 3.

- 23 Another position is that the strength of women's land rights vary widely depending on each woman's particular family situation. Whitehead and Tsikata cite Karanja as arguing that in spite of having no inheritance rights, "women held positions of structural significance, serving as the medium through which individual rights passed to their sons. They enjoyed security of tenure rooted in their structural role as lineage wives..." (Whitehead and Tsikata, above n 3, 96-97). Whitehead and Tsikata also cite a number of authors as concluding that the very strength of women's land claims is in their 'embeddedness' which provides a strong safety net. Other scholars argue a third position, that women's land rights under customary law are actually much stronger than originally imagined. Quan cites Yngstrom's finding that women can be considered to hold primary and often strong land use rights because of the recognition of the centrality of their roles in production and social reproduction; their land use rights are secured by their husbands' social obligations to ensure that they are able to feed themselves and their children (Quan, above n 7, 55; I Yngstrom, 'Women, Wives and Land Rights in Africa: Situating Gender Beyond the Household in the Debate Over Land Policy and Changing Tenure Systems' (2002) 30(1) *Oxford Development Studies*. See also L. Cotula, C. Toulmin and J. Quan, *Better Land Access for the Rural Poor, Lessons From Experience And Challenges Ahead*, IIED and FAO (2006); and Adoko and Levine 2009, above n 22.
- 24 Whitehead and Tsikata, above n 3, 91; P. Peters, 'Inequality and Social Conflict Over Land in Africa' (2004) 4(3) *Journal of Agrarian Change* 269; Yngstrom, above n 23.
- 25 P. Woodhouse, 'African Enclosures: A Default Mode of Development' (2003) 31(10) *World Development*, 1715.
- 26 See further, J.-P. Chauveau & J.-P. Colin, 'Changes in Land Transfer Mechanisms: Evidence from West Africa' in L. Cotula (ed), *Changes in "Customary" Land Tenure Systems in Africa*, IIED (2007) 76.
- 27 Interestingly, to improve the safety and validity of these transactions, the parallel development of improvised, de facto written documentation of these transactions is accompanying the emergence of a market for land rental and sale. Such written certificates of sales are essentially contract documents and receipts, creating 'proof' of the exchange for posterity should the transaction be challenged or questioned. The use of signed documents to legitimize land transactions is a kind of 'informal formalization' and aims to reduce the ambiguity and uncertainty of extra-legal and non-customary land transactions (Mathieu et al. above n 18).
- 28 See generally, H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000).
- 29 See generally, T. Hanstad, 'Designing Land Registration Systems for Developing Countries' (1998) 13 *American University International Law Review* 647; Whitehead and Tsikata, above n 3; D.A. Atwood, 'Land Registration in Africa: The Impact on Agricultural Production' (1990) 18(5) *World Development*; R. Barrows and M. Roth, *Land Tenure and Investment in African Agriculture: Theory and Evidence*, Land Tenure Center Paper 136 (1989); J. Bruce, *Land Tenure Issues in Project Design and Strategies for Agricultural Development in Sub-Saharan Africa*, Land Tenure Center Paper 128 (1986); and A. Haugerud, 'The Consequences of Land Tenure Reform among Small Holders in the Kenya Highlands' (1983) *Rural Africana*. Experience in implementing individual titling schemes has also shown that: i) the high costs of recording the ownership and multiple use claims of every plot of land within a nation can lead to poorly executed or unfinished mapping exercises, which can serve to further undermine the tenure security of those parcels of land not yet mapped and registered; ii) the costs of officially registering one's land may be prohibitively expensive for the poor, which can lead to a situation in which only elites gain formal title to their lands; iii) individual land titling and registration can facilitate and lead to distress sales in time of hunger, sickness and extreme poverty; and iv) land registries can be difficult for already vulnerable groups to access and use, and unless particular care is taken by government administrators, under-represented groups such as ethnic minorities and women may be excluded.
- 30 E. Daley and M. Hoblely, *Land: Changing Contexts, Changing Relationships, Changing Rights*, United Kingdom Department for International Development (DFID) (2005).
- 31 K. Deininger, *Land Policies for Growth and Poverty Reduction*, World Bank (2003).
- 32 FAO, IFAD, UNCTAD and the World Bank Group, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources*, Extended Version (2010) 1.
- 33 FAO, IFAD, UNCTAD and the World Bank, *Principles for Responsible Agricultural Investment that Respects Rights, Livelihoods and Resources* (2010).
- 34 Ibid 2.
- 35 L Alden Wily, *Governance and Land Relations: A Review of Decentralisation of Land Administration and Management in Africa*, IIED (2003).
- 36 In some jurisdictions, individual or household/family titling within the context of community land administration and management is also possible. In Uganda and the United Republic of Tanzania, for example, individual or household land can be titled through a publically adjudicated hearing at the village level, with the participation of customary authorities and taking into account overlapping and secondary use rights (*Uganda Land Act 1998*, chapter 227, art 6; and The United Republic of Tanzania's *Village Land Act 1999* (Act No. 5 of 1999), art 52).
- 37 In such processes, lawmakers have had to overcome several difficulties. For example, in many states, constitutional provisions do not allow for private land ownership — all land is owned by the state in trust for the people. A further difficulty is that the vast majority of land transactions are governed by customary land administration and management systems that facilitate various overlapping community and individual use rights.
- 38 Alternatively, formalizing common property management regimes under Community-Based Natural Resource Management (CBNRM) initiatives may help to play a critical role in protecting communal lands, as in the case of Namibia. Taylor suggests that for "states unwilling to accord full recognition to customary rights ... [or] in the absence of legal systems that acknowledge direct community ownership of land, the granting of management rights may be sufficient recognition of the legitimacy of community control to protect such lands from allocation to outside interests" (M Taylor, *Rangeland tenure and pastoral development in Botswana: Is there a future for community-based management?*, CASS/PLAAS Occasional Paper Series No. 16, Centre for Applied Social Sciences and Programme for Land and Agrarian Studies (2007).
- 39 J. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).
- 40 See further, L. Cotula, *Legal Empowerment for Local Resource Control: Securing Local Resource Rights Within Foreign Investment Projects in Africa*, IIED (2007).
- 41 Mathieu et al. above n 18; Peters, above n 24; Woodhouse, above n 25; and Yngstrom, above n 23.
- 42 See further, R Knight, *The Relevant Legal Frameworks of Mozambique, Uganda and Liberia*, IDLO Community land Titling Initiative Legal Framework Memorandum (2009).
- 43 L. Alden Wily, *So Who Owns the Forests?: An Investigation into Forest Ownership and customary Land Rights in Liberia*, Sustainable Development Institute (SDI) and FERN (2007) 128.
- 44 A review of 260 community consultations undertaken by the Centre for Legal and

- Judicial Training (CFJJ) and the FAO Livelihoods Programme found that communities were not provided with a genuine opportunity to negotiate and bargain with investors for mutual benefits, payments or the provision of amenities in exchange for their land. The research concluded that both investors and government officials tended to view consultations not as a mechanism to promote community development and partnership, but simply as one of various administrative hurdles necessary to complete before securing a right of land use and benefit. The CFJJ/FAO data also indicate that most agreements are poorly recorded; most written records are inadequate, with insufficient detail or no uniformity of presentation, and huge variations in the type and quality of information recorded. The meetings' minutes are generally vague and do not include sufficient detail concerning: the content of the negotiations, the benefits promised, the time frame in which these benefits will be delivered, or the economic gains to be realized by the communities in exchange for their land (A.J. Calengo, J.O. Monteiro and C. Tanner, *Mozambique Land and Natural Resources Policy Assessment*, Final Report, Centre for Juridical and Judicial Training, Ministry of Justice (2007) 13-14; C. Tanner and S. Baleira, *Mozambique's legal framework for access to natural resources: The impact of new legal rights and community consultations on local livelihoods*, FAO Livelihoods Support Programme, Working Paper No. 28 (2006) 5-6).
- 45 S. Norfolk and C. Tanner, *Improving Tenure Security for the Rural Poor Mozambique Country Case Study*, FAO Legal Empowerment of the Poor Working Paper No. 5 (2007), Food and Agriculture Organization of the United Nations <<ftp://ftp.fao.org/sd/SDA/SDAR/sard/Mozambiquecase.pdf>> at 20 April 2011; and T. Durang and C. Tanner, *Access to land and other natural resources for local communities in Mozambique: Current Examples from Manica Province* (2004).
- 46 Calengo, Monteiro and Tanner, above n 44, 13-14.
- 47 *Ibid* 18-19.
- 48 *Ibid* 14.
- 49 Durang and Tanner, above n 45.
- 50 H. Ouedraogo, *Legal Conditions for the Recognition of Local Land Rights and Local Land Tenure Practices* (2002).
- 51 P. McAuslan, 'A Narrative on Land Law Reform in Uganda' (paper presented at the Lincoln Institute of Land Policy Conference on *Comparative Policy Perspectives on Urban Land Market Reform in Eastern Europe, Southern Africa and Latin America*, Cambridge, Massachusetts, 7-9 July 2003, 27).
- 52 *Uganda Land Act 1998*, section 60(1).
- 53 McAuslan, above n 51, 17.
- 54 J. Negrao, 'Land In Africa — An Indispensable Element Towards Increasing The Wealth of the Poor' (2002) 179 *Oficina dos Centro de Estudos Sociais*, 19.
- 55 The Land and Equity Movement in Uganda (LEMU) (<http://www.land-in-uganda.org>) works to improve the land tenure security of the poor and ensure that policies, laws and structures are put in place to allow all Ugandans to have fair and profitable access to land. The Sustainable Development Institute (<http://www.sdiliberia.org>) works to transform decision-making on natural resources and to promote equity in the sharing of benefits derived from natural resource management in Liberia. *Centro Terra Viva* (<http://www.centroterraviva.org.mz>) works to contribute to improved environment and land rights policies and legislation, and to increase the capacity of civil society to participate in environmental management.
- 56 The project worked with local NGOs and community leaders to select 20 communities in each country that actively expressed an interest in seeking documentation for their community land rights and were not currently engaged in a protracted land conflict. It is important to note that in all three countries, defining 'community' was a difficult and often political exercise. In Liberia, the team reviewed with local leaders what level of community would be the most advantageous to work with: the chiefdom, clan or town. The advantages and disadvantages of each option were discussed, and the clan level was decided as the preferred option. In Mozambique, the field team decided to work at the level of the *povoado*, rather than the *regulado* (there are generally three *povoados* within a *regulado*) to ensure that the whole community was able to be involved, and to ensure that the team could convene meetings of representatives of a significant proportion of the community (in the region, there are generally over 2,000 individuals in a *povoado*). These difficulties paled in comparison with those encountered in Uganda, where the project was not documenting the perimeter of a defined community, but the perimeter of a large communal grazing land, often shared by two or more separate villages, which were not identified as a community, but all of which shared ownership rights to the same common grazing lands (see also, R. Knight, *Best Practices in Community Land Titling*, Concept Note, IDLO (2010)).
- 57 Measures included: scheduling meetings in places and at times that women could more easily attend; sending community leaders and the community mobilizer door-to-door throughout the village, specifically requesting that women attend and husbands bring their wives with them to meetings, and, as necessary, holding meetings only for women in order to focus on addressing their concerns and interests and support them to later bring these issues to the wider community.
- 58 The election methodology was decided on by the communities themselves, although the field teams mandated three general constraints: that each community elect one male and one female paralegal; that the paralegals be literate and capable of filling out government forms; and that the paralegals had a high degree of integrity and were trusted by their communities.
- 59 To enhance the accuracy of the research findings, it was important that relevant district and regional land administration officers had adequate knowledge in community land titling laws and procedures. All relevant officials (approximately 30 per nation) were thus provided with two days of training bi-annually by the project legal team. These trainings covered: all relevant land laws and legal procedures (with special emphasis on the procedural rights of marginalized groups); the obstacles faced by rural communities attempting to title their lands; and how officials might assist applicant communities to overcome these obstacles.
- 60 To track the progress of the control communities, the project researcher visited these communities monthly and met with community leaders, who updated the researcher on their community's progress.
- 61 Individuals taking part in the baseline and post-service survey were selected by random sampling to ensure a representative sampling of community demographics. The survey included both structured questions with predetermined answer categories, as well as some semi-structured or open-ended questions, in order to capture both qualitative and quantitative data.
- 62 The three focus group discussions held in each community taking part in the initiative involved: i) seven randomly selected women (including roughly 50 percent widows); ii) seven community leaders; and iii) a random grouping of seven community members (for a total of 60 focus group discussions per country).
- 63 Other steps included: forms to complete, signatures to be sought, visits to the community by relevant government officials, a formal technical survey, and other processes that will not be described herein.
- 64 In Mozambique, as a result of working at the level of the *povoado* rather than the *regulado*, there were fewer boundary

conflicts. Since the *povoados* had clearly agreed boundaries with the other *povoados* within their *regulado*, only those boundaries with other *regulados* remained open to potential conflict.

- 65 The field teams noted that, at times, boundary conflicts hinged on the splitting or splintering of families or clan/ethnic allegiances, caused by old, intra-community disagreements. In such cases, these land conflicts were not about land, but about power, control, authority, autonomy and pride.
- 66 When ancestors were consulted and their approval granted or disapproval taken into consideration, this tended to lead to the agreed boundary being regarded as more legitimate.
- 67 In Liberia, the field team observed that while the elders' opinions were more respected, they tended to be more rigid in their negotiations, defining land *ascriptively*, as "what our forefathers left us" or "where our forefathers are buried", and attaching strong emotional and historical sentiment to a particular area. In

contrast, the 'youth' (aged 20 to 40) tended to be more flexible during boundary harmonization negotiations, and used *descriptive* words to define land (for example, "something a house is built on") as a commodity; land was viewed as something that was tradable, and therefore negotiable.

- 68 This occurred across all treatment groups, as the project deemed it dangerous to deny communities mediation support in the event of an un-resolvable conflict.
- 69 It is important to note that in Mozambique, writing down community 'rules' is not a mandated part of the community land documentation process; it was included among the project activities for two reasons: to ensure comparability with Liberia and Uganda; and to attempt to understand what communities' customary rules were and to verify if they did or did not contradict the *Constitution of Mozambique 1990*. (Mozambique's *Land Law 1997 (Lei de Terras)* makes no provision for community governance or land administration once it has been

delimited, but rather it states that communities may continue to govern themselves "in accordance with customary norms and practices which do not contravene the Constitution" (*Lei de Terras*, art 12(a)).

- 70 Focus group, Siahn Clan (January 2011).
- 71 Focus Group, Zialue Clan (January 2011).
- 72 A Claasens, *It is not easy to challenge a chief: Lessons from Rakgwadi*, Programme for Land and Agarian Studies, School of Government, University of the Western Cape (2001) vii.
- 73 Across all of the study communities, the field teams observed that more people actively participated in the by-laws/constitution drafting process than any other project-related process.
- 74 Focus Group, Jowein Clan (January 2011).
- 75 Focus Group, Female Town Chief, Central Morweh Clan (January 2011).
- 76 Focus Group, Duah Clan (January 2011).
- 77 Focus Group, Akwic Village (January 2011).
- 78 *Uganda Land Act 1998*, section 39.
- 79 School Teacher, Jowein Clan (Community MOU-signing ceremony, 2010).