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## Private Lands Conservation in Papua New Guinea

Sonja Klopf

University of Colorado Boulder. Natural Resources Law Center



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# PRIVATE LANDS CONSERVATION IN PAPUA NEW GUINEA

A Country Report by the Natural Resources Law Center,  
University of Colorado School of Law

September 2004

*Sponsored by The Nature Conservancy*

Primary Author: Sonja Klopf, NRLC Research Assistant  
nrlc@colorado.edu

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University of Colorado School of Law

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Primary Author: Sonja Klopf, NRLC Research Assistant  
E-mail: [nrlc@colorado.edu](mailto:nrlc@colorado.edu)



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## **BRIEF QUESTIONS**

### **1. What legal tools are in place for the purpose of achieving private lands conservation?**

There is no Conservation Easement Act in Papua New Guinea (PNG). In fact, most laws regarding land in PNG are in place to assure the development of the land. Currently, however, none of the laws encouraging registration and development of land have been very successful. Ninety-seven percent of land in PNG remains in customary ownership. The constitutional protections of customary land make large-scale development very difficult. In addition, the State has the power to enforce environmental regulations and create conservation areas.<sup>1</sup> However, because the State has very limited resources, the efficacy of this legislation is unknown.

### **2. What legal tools are recognized by the legal system and capable of being used for private lands conservation?**

On customary land it is possible to use a Lease-Lease-Back scheme to have either control or use of land for a number of years. However, this possibility is very difficult because the approval of the State is necessary and the State has a severe lack of resources. On alienated land, which is only three percent of the country, the courts recognize easements and restrictive covenants. However, dominant and servient appurtenant parcels of land are required for easements or restrictive covenants to be valid.

### **3. What novel legal tools could be introduced to achieve the goal of private lands conservation?**

It would be most helpful if legislation were passed authorizing conservation easements on customary land and reducing some of the hurdles necessary in achieving land contracts with customary landowners. However, it might be difficult to pass this legislation because the

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<sup>1</sup> ESCAP, *Integrating Environmental Considerations into the Economic Decision-Making Process*, available at <http://www.unescap.org/drrpad/publication/integra/volume3/png/3pg01a.htm>.

customary landowners' rights are stringently protected in PNG. Another possible way of achieving private lands conservation in PNG is to not obtain a land right through the State, but rather to work directly with the groups to encourage them to adopt conservation friendly development programs.<sup>2</sup>

#### **4. What are some of the impediments to private lands conservation in PNG?**

The largest impediment to private lands conservation in Papua New Guinea is the current weakness and instability of the State. Papua New Guinea became an independent nation in 1975, less than thirty years ago. The country faces substantial problems with poverty, violence, and land tenure, and has very limited resources. Not only is the law relatively new and not very well-developed, but the land registration employees and enforcement mechanisms such as the courts and police are struggling to accomplish basic tasks with their limited resources. Any kind of conservation program will likely take longer than it would in a more developed country.

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<sup>2</sup> Please see section VI(B) for more information.

## INTRODUCTION

Papua New Guinea (PNG) is a former colony that received its independence from Australia in 1975. Slightly larger than California and lying about 100 miles northeast of Australia, Papua New Guinea has managed to largely avoid the exploitation and development that many other colonies faced “and remains largely an undisturbed rain forest populated by forest farmer[s].”<sup>3</sup> Papua New Guinea is richly endowed with natural resources such as gold, copper, silver, natural gas, timber, and oil, yet development of these resources has been slow because of the rugged terrain, limited infrastructure,<sup>4</sup> and customary land tenure in Papua New Guinea.<sup>5</sup> Because of PNG’s relatively low level of development and high number of plant and animal species, it is an ideal place for conservation programs.<sup>6</sup>

This report seeks to provide a basic description of the legal instruments, processes and institutions relevant to private lands conservation currently in place within Papua New Guinea. The report also assesses the feasibility of introducing a number of legal tools into the Papua New Guinean legal system for the purpose of achieving private lands conservation, including the potential use of conservation easements. Section I of this report provides relevant background information including the legal authority and the structure of government in Papua New Guinea. Section II provides an overview of land in Papua New Guinea. Section III discusses customary land tenure; and Section IV provides information regarding land that has been alienated and is

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<sup>3</sup> Jon H. Goldstein, *The Prospects for Using Market Incentives to Conserve Biological Diversity* 21 ENV’T L. 985, 1008 (1991).

<sup>4</sup> There are very few roads in the interior, and most paved roads do not extend much farther than beyond the towns. Most travel is done in boats or in small planes. Robert D. Cooter, *Inventing Market Property: The Land Courts of Papua New Guinea* 25 LAW & SOC’Y REV. 759, 764-765 (1991).

<sup>5</sup> CENTRAL INTELLIGENCE AGENCY, *The World Factbook: Papua New Guinea* (May 11, 2004), <http://www.cia.gov/cia/publications/factbook/geos/pp.html> (hereinafter *The World Factbook*).

<sup>6</sup> PNG has been classified as a “Megadiversity Country” and consists of 214 different species of animals, with 57 of those endemic to PNG. In addition, in 1994, only 13 percent of the land was classified as having a high degree of human disturbance, while 64 percent of the land was classified as having a low degree of human disturbance. ANIMAL INFO – PAPUA NEW GUINEA, available at [http://www.animalinfo.org/country/papua\\_ne.htm](http://www.animalinfo.org/country/papua_ne.htm) (hereinafter ANIMAL INFO).

either privately owned, or owned by the State. Section V discusses Land Registration in Papua New Guinea, including the details of land registration as well as the problems the State has had with land registration. Finally, Section VI includes recommendations for the best approach to private lands conservation in Papua New Guinea.

## **I. RELEVANT BACKGROUND**

### **A. Political History**

The earliest known inhabitants of Papua New Guinea migrated from Asia approximately 50,000 years ago<sup>7</sup>, where they lived relatively isolated from western influence until the end of the 19th century.<sup>8</sup>

In 1884, Germany annexed the northeastern section of the island of New Guinea.<sup>9</sup> In reaction to Germany's acquisition, Britain declared that the southeastern portion of New Guinea would be a protectorate of England.<sup>10</sup> Britain's portion of New Guinea was annexed as a full colony in 1888 and English law was declared to be the basic law of the colony.<sup>11</sup> In 1905, the British section of New Guinea was transferred to Australian administration and renamed Papua. The Papua Act of 1905 stated that the laws currently in force would continue to be in force, so British law remained in effect after the transfer.<sup>12</sup> During World War I, between the years 1914 and 1921, the German section of New Guinea was occupied by the Australian military, but German law continued to apply.<sup>13</sup>

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<sup>7</sup> 3 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1265 (Herbert M. Kritzer, ed., ABC-CLIO 2002) (hereinafter LEGAL SYSTEMS OF THE WORLD).

<sup>8</sup> 2 MODERN LEGAL SYSTEMS CYCLOPEDIA Ch. 10, 6 (Kenneth R. Redden, ed., William S. Hein & Co. 1991) (hereinafter MODERN LEGAL SYSTEMS CYCLOPEDIA).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

After World War I, in 1921, both the northeastern German territory and the southeastern Australian colony became Territories of the League of Nations under Australian administration.<sup>14</sup> The German law previously in force in the northeastern section of New Guinea was replaced by English common and statutory law.<sup>15</sup> Papua (Australian) and New Guinea (previously German) were at first administered separately, with the territories having relative autonomy.<sup>16</sup> Australia did not even expand its administration into the more inaccessible and remote Highlands of New Guinea until the 1930's.<sup>17</sup> In addition, legislative councils in each territory had the power to enact their own laws besides the established law from Australia and England.<sup>18</sup>

After World War II, the United Nations allowed Australia to have joint administration of the two territories, which was codified in the Papua and New Guinea Act of 1949.<sup>19</sup> Following the consolidation of the territories, Australia replaced the previous system of native administration and legislative councils with “the modern system of centralized justice.”<sup>20</sup> The colonial powers imposed peace by harshly punishing any violations of law. Consequently, tribal fighting nearly ended under the Australian administration.<sup>21</sup>

In 1973, bowing to both domestic and international pressure, Australia granted Papua New Guinea internal self-government, and full independence was finally achieved.<sup>22</sup> Papua New Guinea's Constitution was adopted on September 16, 1975, and includes four directive principles that underlie the Constitution. These principles are: integral human development, equality and participation, national sovereignty and self-reliance, and natural resources and the environment.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> George Westermarck, *Clan Claims: Land, Law and Violence in the Papua New Guinea Eastern Highlands* 67 OCEANIA 218, 220 (1997).

<sup>18</sup> LEGAL SYSTEMS OF THE WORLD at 1266.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Cooter at 762.

<sup>22</sup> LEGAL SYSTEMS OF THE WORLD at 1266.

The natural resources and environment directive calls for conservation of natural resources and the environment, the use of natural resources for the collective benefit of citizens, and the replenishment of natural resources for the benefit of future generations.<sup>23</sup>

Since independence, Papua New Guinea has been torn between a need for development of its resources and a higher standard of living, while at the same time clinging to traditional land tenure and having a healthy distrust of profit-oriented development companies. Foreign companies and institutions have been reluctant to invest where there is little stability, and these groups have not had a substantial impact on the environment or development of Papua New Guinea.<sup>24</sup> There has also been serious social conflict after independence including increased tribal fighting, gang activity, and a secessionist movement on the island of Bougainville.<sup>25</sup>

## **B. Current Situation in Papua New Guinea**

Papua New Guinea is a developing country that has a relatively low standard of living. The population experiences the adverse effects of an unstable macroeconomic environment, declining per capita GDP, high inflation and interest rates, increasing external debt, and a depreciating currency.<sup>26</sup> The per capita GDP in 2002 was \$2,100, and 37 percent of the population was living below the poverty line.<sup>27</sup>

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<sup>23</sup> Constitution of the Independent State of Papua New Guinea, Preamble (Sep. 16, 1975).

<sup>24</sup> LAND MOBILISATION IN PAPUA NEW GUINEA I (L.T. Jones & P.A. McGavin, eds., Asia Pacific Press 2001) (hereinafter LAND MOBILISATION IN PAPUA NEW GUINEA).

<sup>25</sup> LEGAL SYSTEMS OF THE WORLD at 1267.

<sup>26</sup> Tim Curtin et al., *Land Registration in Papua New Guinea: Competing Perspectives* STATE SOCIETY AND GOVERNANCE IN MELANASIA 19 (The Australian National University 2003).

<sup>27</sup> *The World Factbook*.

## ***1. Industry and Production in Papua New Guinea***

The major industries in PNG include copra crushing, palm oil processing, plywood and wood chip production, crude oil production, and mining of minerals.<sup>28</sup> Mineral deposits such as oil, copper, and gold make up 72 percent of export earnings.<sup>29</sup> Logging is another industry that has grown quickly in Papua New Guinea, and like mining is another extraction of natural resource industry. These natural resources industries represent an important source of revenue and employment for the country.<sup>30</sup> However, quite often these industries generate a large portion of the nation's income, while employing a small portion of the nation's citizens.<sup>31</sup>

Agricultural products in PNG include coffee, coca, coconuts, palm kernels, tea, rubber, and sweet potatoes.<sup>32</sup> Coffee is now the major agricultural cash crop, whose production is centered in the Highlands of PNG,<sup>33</sup> and accounts for 36 percent of the total agricultural export earnings. However, the increasing output of PNG's cash crops have continued to be below the population growth rate, which is worrisome when considering the future standard of living for the majority of the people.<sup>34</sup>

## ***2. Violence and Corruption in Papua New Guinea***

One of the major areas of concern in Papua New Guinea is the weakness of the State in controlling violence at all levels of society. One facet of this lawlessness are the rascal gangs that began in the capital city of Port Moresby, but have spread over the rest of the country.<sup>35</sup> The

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Goldstein at 1005.

<sup>31</sup> Cooter at 765.

<sup>32</sup> *The World Factbook.*

<sup>33</sup> CUSTOMARY LAND TENURE: REGISTRATION AND DECENTRALIZATION IN PAPUA NEW GUINEA 73 (Peter Larmour, ed., The National Research Institute 1991) (hereinafter CUSTOMARY LAND TENURE).

<sup>34</sup> The population growth rate in Papua New Guinea is around 2.7 percent. Curtin at 11.

<sup>35</sup> Sinclair Dinnen, *Law, Order and State in Papua New Guinea*, STATE SOCIETY AND GOVERNANCE IN MELANASIA 4 (The Australian National University 1997).

continuing subordination of women throughout the country in spite of the equity provisions in the constitution and enacted statutes is disturbing as well.<sup>36</sup>

After independence, there was also an escalation of tribal fighting in the Highlands, which continues to result in deaths, damage to property, and considerable disruption to government services and commercial activities.<sup>37</sup> Quite often, those involved in tribal fighting view the violence as a legitimate strategy for dispute resolution.<sup>38</sup> Because the government of Papua New Guinea is limited in resources compared to the former Australian colonists, the State does not have complete control of the Highlands. Consequently, in resolving disputes, tribal groups often balance physical threats with strong legal arguments.<sup>39</sup>

There has also been lawlessness and violence at a larger level in PNG. In 1996 and 2001 thousands of protestors in Port Moresby and in towns across the country went to the streets to object to the World Bank's plan for land registration.<sup>40</sup> These riots were often student-led and even international agencies were involved in the resistance to land registration.<sup>41</sup> The rioters apparently believed that land registration would lead to landlessness for the people.<sup>42</sup> In addition to these large-scale protests, there was also a secessionist movement on the island of Bougainville. The nine-year revolt began with protests and the closing of the Panguna Copper Mine on the island.<sup>43</sup> A peace agreement for Bougainville was finally signed in 2001—after

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<sup>36</sup> Dinnen at 10.

<sup>37</sup> Most tribal fighting today occurs in the Enga, Western Highlands, and Simbu Provinces. Dinnen at 6.

<sup>38</sup> *Id.*

<sup>39</sup> Westermark at 222.

<sup>40</sup> *Id.* at 224.

<sup>41</sup> *Id.* at 218.

<sup>42</sup> Curtin at 6.

<sup>43</sup> Westermark at 224.

more than 20,000 lives were lost<sup>44</sup>—which might allow for Bougainville’s secession in ten to fifteen years.<sup>45</sup>

One of the most concerning aspect of this continued violence is the State’s lack of ability to deal with it. As the lawlessness continues to increase, there is a corresponding reduction in the capacity of the Papua New Guinea State to provide effective deterrence or control.<sup>46</sup> An important sign of this lack of control is the marked increase in private policing and private security organizations that operate throughout the country.<sup>47</sup>

After the riots in 1996, the police imposed a nationwide curfew.<sup>48</sup> Human rights organizations have complained that the State is normalizing severe crisis policing measures such as the Curfew Act and increasing the use of military personnel and riot squads in ordinary crime situations.<sup>49</sup> Police will raid villages in search of suspects or stolen goods; these raids are often followed by complaints against the police of fatalities, rapes, assaults, destruction of property, and theft.<sup>50</sup>

Besides the lack of resources, political corruption is one of the major sources of the State’s inability to control violence within its borders. The Governor-General, Sir Wiwa Korowi, remarked in 1995 “that corruption had become deeply rooted in Papua New Guinea” and the former Governor of the Bank of Papua New Guinea has described State corruption as “systemic and systematic.”<sup>51</sup> Politicians have privileged access to discretionary State funds, and the limited controls have led to widespread corruption in every level of government.<sup>52</sup> Perhaps most telling

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<sup>44</sup> *The World Factbook*.

<sup>45</sup> James R. Hooper & Paul R. Williams, *Earned Sovereignty: The Political Dimension* 31 DENV J. INT’L L. & POL’Y 355, 360 (2004).

<sup>46</sup> Dinnen at 2.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.* at 1.

<sup>49</sup> *Id.* at 3.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 7.

<sup>52</sup> *Id.* at 7.

is that in 1991, the Ombudsmen Commission was investigating allegations made against 90 of the 109 members of the national parliament.<sup>53</sup>

### **C. Legal Authority and Government in Papua New Guinea**

The basic framework of the Papua New Guinea government is a constitutional monarchy with a parliamentary democracy.<sup>54</sup> However, in practice the government and its agencies are relatively weak when compared with the political power of the clans and villages.<sup>55</sup>

#### ***1. Legal Authority***

The legal system is based on English Common law, however, “in practice the formal legal system exists alongside a vibrant informal system built around customary beliefs and institutions as adapted to recent change.”<sup>56</sup> The formal legal authority of Papua New Guinea is based primarily on the following: (1) the Constitution of September 16, 1975; (2) Organic Laws; (3) Acts of the Parliament; (4) Emergency Regulations and Provincial laws; and (5) the underlying law.<sup>57</sup> The Constitution and the Organic Laws are the Supreme Law of Papua New Guinea, and all Acts that are inconsistent with them are considered invalid.<sup>58</sup> Organic Laws are laws made by the Parliament. They have the same authority as the Constitution, but they must be consistent with the Constitution and expressed to be an Organic Law.<sup>59</sup> The Organic Laws are more difficult to enact than National Legislation and may only be altered by another Organic law or by an alteration to the Constitution.<sup>60</sup>

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<sup>53</sup> *Id.* at 8.

<sup>54</sup> *The World Factbook.*

<sup>55</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 15.

<sup>56</sup> LEGAL SYSTEMS OF THE WORLD at 1265.

<sup>57</sup> PNG Const. § 9.

<sup>58</sup> *Id.* at § 11.

<sup>59</sup> *Id.* at § 12(1)(b) & (c).

<sup>60</sup> *Id.* at § 12(2).

Provincial law is relatively strong in PNG.<sup>61</sup> The 1995 Organic Law on Provincial and Local Level Government shaped provincial assemblies, and these local governments have begun to assume some of the national government's responsibilities.<sup>62</sup> If a provincial law makes an "exhaustive" provision about a subject, then the Parliament cannot legislate on the subject.<sup>63</sup> If a provincial law is not exhaustive, a national law is valid as long as it is not inconsistent with any provincial law.<sup>64</sup> However, provinces may not pass any legislation that has effect outside of the province.<sup>65</sup>

Underlying law is the unwritten law that should be applied to any matter where there is no legislation. The underlying law consists of custom as well as the adopted common law and equity of England before 1975, the date of PNG independence. Underlying law must be consistent with the Constitution and the statutory law, and if there is no rule of law on a subject, the Supreme and National Court have the authority to create an appropriate rule.<sup>66</sup>

## **2. Government in Papua New Guinea**

The government in Papua New Guinea is a constitutional monarchy and consists of an executive, legislative and judicial branch as well as twenty separate provincial governments.

### **a. Executive Branch**

Because PNG is a monarchy, the head of State is Queen Elizabeth II, who has held this position since 1952. The queen is represented in PNG by the current Governor-General, who is appointed by the National Executive Council. The executive branch also consists of the Prime

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<sup>61</sup> Twenty provinces make up Papua New Guinea including: Bougainville, Central, Chimbu, Eastern Highlands, East New Britain, East Sepik, Enga, Gulf, Madang, Manus, Milne Bay, Morobe, National Capital, New Ireland, Northern, Sandaun, Southern Highlands, Western, Western Highlands, and West New Britain. *The World Factbook*.

<sup>62</sup> LEGAL SYSTEMS OF THE WORLD at 1267.

<sup>63</sup> YASH GHAI & A.J. REGAN, THE LAW POLITICS AND ADMINISTRATION OF DECENTRALIZATION IN PAPUA NEW GUINEA 166 (National Research Institute 1992).

<sup>64</sup> "A law is exhaustive if it is clear that the legislature intended it to be 'set out completely, exhaustively or exclusively' the statutory provisions or the policy on the matter." *Id.*

<sup>65</sup> *Id.* at 151.

<sup>66</sup> LEGAL SYSTEMS OF THE WORLD at 1267-1268.

Minister, Deputy Prime Minister, and Cabinet.<sup>67</sup> The prime minister is appointed after legislative elections and is usually the leader of the majority party or leader of the majority coalition.<sup>68</sup> The National Executive Council (NEC) is responsible for the executive government of the country and consists of the prime minister and cabinet members.<sup>69</sup>

## **b. Legislative Branch**

The legislative branch is made up of a unicameral National Parliament, also called the House of Assembly.<sup>70</sup> The National Parliament is subject to constitutional laws, but otherwise has unlimited powers of lawmaking.<sup>71</sup> There are 89 parliament members elected from open electorates and 20 members elected from provincial electorates to equal a total of 109 parliament members, who hold office for five years.<sup>72</sup>

One of the major weaknesses of the National Parliament is that if there is a no confidence vote against the prime minister, the Parliament must be dissolved and a general election must take place.<sup>73</sup> Parliament may also be dissolved at any time by an absolute majority vote. The National Parliament has been dissolved because of a successful no confidence vote in the past, and its effect is to destabilize the government.<sup>74</sup> Another difficulty with the National Parliament is that PNG displays bewildering cultural diversity with over 800 different ethnolinguistic groups.

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<sup>67</sup> The current Governor General is Sir Albert Kipalan; the current Prime Minister is Sir Michael Somare (since August 2002); and the current Deputy Prime Minister is Andrew Baing (since November 15, 2003). *The World Factbook*.

<sup>68</sup> *The World Factbook*. There are a number of political parties in PNG, but they are not well developed. The government is most often formed by a loose coalition of parties, and not a single, dominating party. LEGAL SYSTEMS OF THE WORLD at 1269.

<sup>69</sup> *Id.*

<sup>70</sup> *The World Factbook*.

<sup>71</sup> LEGAL SYSTEMS OF THE WORLD at 1268.

<sup>72</sup> *The World Factbook*; LEGAL SYSTEMS OF THE WORLD at 1268.

<sup>73</sup> It was not possible to find out how often a successful vote of no confidence occurs in PNG. However, after a successful vote of no confidence in the Wingti Government, a new government began in 1989 with Rabbie Namaliu as Prime Minister. Lawrence Kalinoe & M.J. Kuwimb, *Customary Land Owners' Right to Sue for Compensation in Papua New Guinea and the Ok Tedi Dispute* 25 MELANESIAN L. J. 65, 67 (1997).

<sup>74</sup> Because of problems with this law, it is now necessary to wait eighteen months after an election before raising a vote of no confidence. The previous law called for a wait of only six months. LEGAL SYSTEMS OF THE WORLD at 1268-1269.

It is impossible for members of parliament to even be familiar with all of their constituents' customs, let alone represent them effectively.<sup>75</sup>

### **c. Judicial Branch**

The judicial system was established through sections 160 and 163 of the Constitution, and consists of the Supreme Court, the national court, local land courts, and the village courts.<sup>76</sup>

The Supreme Court is the highest court of the nation, and exercises jurisdiction over constitutional issues. In addition, the Supreme Court has advisory jurisdiction as well as appellate jurisdiction from the National Court, and it is the final court of appeal in PNG.<sup>77</sup> The Supreme Court normally consists of three judges. The court is based in Port Moresby, but occasionally the judges will travel and hear cases in different parts of the nation.<sup>78</sup> The chief justice is appointed by the Governor General after recommendations by the National Executive Council.<sup>79</sup>

The National Court system in Papua New Guinea is an appellate court system, but it also has original jurisdiction. The National Court has unlimited original jurisdiction in both civil and criminal cases. The court also has the authority to review lower courts' decisions as well as enforce constitutional laws.<sup>80</sup> Jurisdiction of the National Court also extends over appeals from the local and district courts, while the Supreme Court takes appeals from the National Court. The National system consists of courts set up throughout the country with one judge presiding in

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<sup>75</sup> Cooter at 792; LAND MOBILISATION IN PAPUA NEW GUINEA at 28.

<sup>76</sup> There are also other specialty courts including the coroner's court, children's court, tax court, and the military court. LEGAL SYSTEMS OF THE WORLD at 1269.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> The other Supreme Court judges are appointed by the Judicial and Legal Services Commission. *The World Factbook.*

<sup>80</sup> LEGAL SYSTEMS OF THE WORLD at 1269.

each area and over each court. Currently there are resident national court judges in most provincial capitals.<sup>81</sup>

District courts are inferior to the National Court and consequently their jurisdiction is more limited. The District court has criminal jurisdiction over summary offenses, committal hearings, and some indictable offenses. Civil jurisdiction of the district system includes personal claims so long as they do not surpass 10,000 (PNG Kina)<sup>82</sup> as well as such issues as custody, maintenance, village court appeals, land dispute settlements, and adultery.<sup>83</sup>

Land Courts in Papua New Guinea are governed by the Land Disputes Settlement Act and often deal with legal disputes concerning boundaries, ownership, and use of customary land.<sup>84</sup> Land courts are presided over by a magistrate of the district court, and appeals from the Land Courts are taken to provincial land courts.<sup>85</sup> Resolution of these disputes in Land Courts regularly produce the first written record of actual boundaries, titles, and explicit customary law in areas of PNG.<sup>86</sup> Parties to disputes also have the normal right of appeal to the National Court of the Supreme Court if it becomes necessary.<sup>87</sup>

Village Courts are not part of the national judicial system, but they are the only courts “that apply and enforce customary laws and practices to disputes.”<sup>88</sup> The magistrates of Village Courts are usually village leaders who have already earned the respect of their peers.<sup>89</sup> Presently there are over 1,000 village courts that have jurisdiction over about 84 percent of the country.<sup>90</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> One United States dollar is roughly equal to about three Papua New Guinea Kina, the PNG system of currency.

<sup>83</sup> LEGAL SYSTEMS OF THE WORLD at 1269.

<sup>84</sup> Cooter at 785. Please see section III(B)(1) for more information on the Land Disputes Settlement Act.

<sup>85</sup> “The provincial land court is presided over by a principal magistrate, who is normally resident in the provincial center.”

LEGAL SYSTEMS OF THE WORLD at 1269-1270.

<sup>86</sup> Cooter at 785.

<sup>87</sup> Lawrence Kalinoe, *Determining Ownership of Customary Land in Papua New Guinea: Re Hides Gas Project Land Case 21 MELANESIAN L. J.* 1 (1993).

<sup>88</sup> LEGAL SYSTEMS OF THE WORLD at 1270.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

The Village Courts focus on mediation, compromise, and compensation rather than adversarial litigation.<sup>91</sup> Appeals from the Village Courts can be heard by the District Courts.<sup>92</sup>

Finally, it is important to note that the courts in Papua New Guinea face demanding resource challenges that strain their entire system. Magistrates are now required to have a law degree, but there is a shortage of qualified candidates. In addition, the expanding caseload means that there are sometimes long delays when dealing with the courts. Currently there is only one magistrate per 36,500 people.<sup>93</sup> The buildings are also in poor condition and cannot accommodate staff adequately.

## **II. OVERVIEW OF LAND IN PAPUA NEW GUINEA**

### **A. Introduction to Land in Papua New Guinea**

Papua New Guinea consists of about 460,000 acres of land, much of which has a large potential for tree crop production, intensive livestock production and farming, as well as other forms of natural resource exploitation such as mining.<sup>94</sup> In 1994, 64 percent of land in Papua New Guinea was classified as having a low degree of human disturbance; and in 1992 only 0.07 percent of land in PNG was either totally or partially protected.<sup>95</sup> Yet almost none of that land is available for purchase for agricultural, commercial, or even residential purposes, and as a result, comparatively little development has occurred in spite of the economic opportunities.<sup>96</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> Curtin at 7.

<sup>95</sup> Papua New Guinea's land consists of 57 percent Major Forests, 17 percent Other Coastal Aquatic, 12 percent Major Wetland, 11 percent Interrupted Woods, 2 percent Grass and Shrub, and 1 percent Desert and Semi-desert. ANIMAL INFO.

<sup>96</sup> Curtin at 7.

There is also a shortage of modern housing throughout the country as well as a lack of development of tourism.<sup>97</sup> There has been pressure from the rural areas as more people move into towns, and urban sprawl and squatting on customary land have resulted.<sup>98</sup> The reason for this lack of development is that 97 percent of the land in PNG is customarily owned, so the uncertainty surrounding customary land tenure, as well as the fact that tribal rights are stringently protected, make it very difficult for changes in the uses of land to occur.<sup>99</sup>

## **B. Restrictions on Land Ownership and Use**

One of the most important restrictions on land ownership is that only citizens may acquire freehold land.<sup>100</sup> This constitutional restriction on land ownership was put in place to protect the indigenous inhabitants of Papua New Guinea from exploitation. A non-citizen may retain any freehold land that was acquired before Independence Day, but may not acquire any new freehold land.<sup>101</sup> Non-citizens who had acquired land before PNG Independence were not required to give up their freehold estates. However, the non-citizen owners are somewhat limited as to what they can do with that land. First, the Land (Ownership of Freeholds) Act allows for a non-citizen owner of land to apply to the State to change the freehold land into a 99 year State lease, with the State becoming the owner of the original parcel of land. The owners are not required to do this and there is no provision in the Land (Ownership of Freeholds) Act that provides for any compensation to the owner.<sup>102</sup>

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<sup>97</sup> PNG receives a total of only approximately 40,000 visitors each year. *Id.*

<sup>98</sup> LAND ISSUES IN THE PACIFIC 79 (Ron Crocombe & Malama Meleisea, eds., Macmillan Brown Centre for Pacific Studies 1994) (hereinafter LAND ISSUES IN THE PACIFIC).

<sup>99</sup> John Charles Kunich, *Fiddling Around While the Hotspots Burn Out* 14 GEO. INT'L ENVTL. L. REV. 179, 246 (2001).

<sup>100</sup> PNG Const. § 56. An automatic citizen is a "person born in the country before Independence Day who has two grandparents born in the country or an adjacent area," or a person born outside of PNG prior to Independence Day who has renounced any other citizenship and has been registered as a citizen of PNG. A "non-automatic citizen" is a person who has become a citizen of PNG by descent or by naturalization. PNG Const. §§ 65-67.

<sup>101</sup> George M.S. Muroa, *The Extent of Constitutional Protection of Land Rights in Papua New Guinea* 26 MELANESIAN L. J. 85, 101 (1999).

<sup>102</sup> Muroa at 102.

Land ownership is also restricted in that the State owns all gold and minerals in or on any land in the country. State ownership of minerals stems historically from the Mining Ordinance of 1922, which stated, “All gold, silver, copper, tin, antimony and metals of every description . . . in or under all lands . . . are and shall be deemed always to have been the property of the Administration.”<sup>103</sup>

The Constitution also guarantees that citizens’ property cannot be compulsorily acquired by the government unless the land is acquired for a specific public purpose or a reasonably justifiable reason.<sup>104</sup> In addition, any law that regulates or restricts property rights of citizens must conform to a number of requirements.<sup>105</sup> First, the law must expressly state that it restricts or regulates guaranteed rights. Secondly, it must specify which guaranteed right is being restricted or regulated. Thirdly, the law must be made by the National Parliament and certified by the Speaker of Parliament.<sup>106</sup>

The PNG government also has the power to acquire property through its emergency powers where compensation is usually not required.<sup>107</sup> However, the property is generally required to be returned to the owner as soon as the emergency situation ends.<sup>108</sup> The taking or acquisition of land is also allowed in consequence of an offense against the law as well as any land that is ownerless and abandoned, as long as it is not customary land.

Finally, reasonable restrictions on the rights of an owner to use his property may be imposed where necessary for the preservation of the environment or of the national cultural

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<sup>103</sup> R.S. O’Regan QC, *The Ownership of Minerals and Petroleum in Papua New Guinea: A Comment* 7-8 QUEENSLAND U. TECH. L. J. 141, 143 (1992).

<sup>104</sup> PNG Const. § 53(1); Muroa at 88.

<sup>105</sup> PNG Const. §38(2); Muroa at 95.

<sup>106</sup> *Id.*

<sup>107</sup> Muroa at 95.

<sup>108</sup> *Id.* at 96.

inheritance.<sup>109</sup> For example, the government could restrict the sale of rare artifacts to tourists, or restrict the shooting of birds of paradise to preserve their numbers.<sup>110</sup>

### **C. Conveyance of Land in Papua New Guinea**

There are no laws that deal with disposition of non-citizen, freehold land. However, because citizens are allowed to acquire and hold freehold land, non-citizens can presumably sell their freehold interests in property to citizens. In addition, non-citizens can sell their land to the government under the Plantation Lands Acquisition Scheme instead of obtaining a State lease through the Land (Ownership of Freeholds) Act. Finally, it might be possible for non-citizens to make testamentary dispositions of their land to their descendants. However, any disposition of land made *inter vivos* is likely invalid under section 56 of the PNG Constitution.<sup>111</sup>

The disposition of customary land, on the other hand, is allowed between customary groups as long as the transfer occurs according to custom. Non-citizens cannot acquire customary land and any non-citizen dealings with customary land must be approved by the State.<sup>112</sup>

### **III. CUSTOMARY LAND IN PAPUA NEW GUINEA**

The customarily owned clan land is sacred, and the clans view their relationship with the land as one of a trustee to the land with rights of beneficial use. In addition, clan members generally do not see themselves as having the right to alienate the land from the ownership of the family.<sup>113</sup> Land is also seen by the tribes or clans as insurance and social security, which is not

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<sup>109</sup> PNG Const. § 53(5)(f); Muroa at 97.

<sup>110</sup> Muroa at 97.

<sup>111</sup> Muroa at 102.

<sup>112</sup> Please see Section III(A) for more information.

<sup>113</sup> Cooter at 772; LAND ISSUES IN THE PACIFIC at 80. An African saying that accurately reflects PNG custom is, “land belongs to the few who are living, many who are dead, and the countless yet unborn.” LAND MOBILISATION IN PAPUA NEW GUINEA at 30.

available from the State of PNG because of their current lack of resources.<sup>114</sup> Every plot of land in Papua New Guinea, even the land that seems vacant—such as jungles and swamps—has a name, owners, and an oral history.<sup>115</sup> There are “no-man’s lands” as well that are very dangerous because clans are actively contesting them.<sup>116</sup> Finally, there are also lands that clans use in common for hunting or gathering firewood.<sup>117</sup>

### **A. Customary Land Law in Papua New Guinea**

Customary land is defined as land that has not been alienated by the original native owners, and remains in their possession and control.<sup>118</sup> Boundaries for customary land have not been surveyed, the title has not been registered, and it is generally governed by native law and custom.<sup>119</sup> Landowner groups, usually defined as clans or sub-clans, are defined by lineage, and these groups are the ones with the power to make decisions about their land.<sup>120</sup> Clans usually have a governance structure consisting of a headman or council of elders, who participate in the decisions about allocating resources.<sup>121</sup> Knowledge of the lineage boundaries is passed from generation to generation through the use of oral storytelling and other informal processes where elders show children the land boundaries.<sup>122</sup> The challenge with using custom to determine land tenure for the majority of land in the country is that not only are there about 800 different ethno-linguistic groups in PNG, but customary law is unwritten and always evolving.<sup>123</sup>

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<sup>114</sup> LAND ISSUES IN THE PACIFIC at 80.

<sup>115</sup> Cooter at 766.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> JOHN T. MUGAMBWA & HARRISON A. AMANKWAH, LAND LAW AND POLICY IN PAPUA NEW GUINEA 117 (Cavendish Publishing 2002).

<sup>119</sup> Cooter at 759-760.

<sup>120</sup> Although clans are normally headed by an individual or smaller group, important and significant decisions regarding land matters usually require a consensus of all clan members. LAND MOBILISATION IN PAPUA NEW GUINEA at 29.

<sup>121</sup> Cooter at 777.

<sup>122</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 30.

<sup>123</sup> *Id.* at 28. Papua New Guinea does not yet have systematic data regarding the size and form of customary groups throughout the country. Cooter at 763. One of the examples of the constant change of customary land tenure is that there has been an

Although there is enormous cultural variation, it is still possible to generally describe customary land law. Land is usually communally owned, however usage rights are often given to individual families or different clans, sometimes in perpetuity.<sup>124</sup> Alienation of customary land is generally discouraged, but long-term leases seem to have been accepted.<sup>125</sup> Because a freehold system of land is not even contemplated in customary law, it is not clear who in the clan would have the power to alienate the clan's land.<sup>126</sup> Inheritance usually follows some kind of patrilineal or matrilineal system; thus, by virtue of being born into a lineage, access to property is granted depending on the recognized rights of the clan.<sup>127</sup> Multiple rights in land are also recognized, such as firewood gathering, fishing, hunting, and rights of thoroughfare.<sup>128</sup>

According to one commentator, customary land rights are “principally a function of effective possession and control, with the capacity to clear land and establish visible dominance over its surface, being of prime importance.”<sup>129</sup> The boundaries of the land are often designated with natural physical features or planted trees or bushes. If the boundaries are unclear or if there is a dispute, there is usually adjudication or tribal warfare to settle the dispute.<sup>130</sup> Groups often defend their right to land by focusing their evidence on first occupation of the land and the use of the land by their ancestors.<sup>131</sup>

Among most customary groups, the clan as a whole defends its land, inheritance follows rules that can be distinguished broadly into patrilineal or matrilineal, land can be given as compensation by one group to another, one group can invite another to live on its land, and a family's claim to a piece of land is strengthened

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increasing movement away from lineage ownership and towards a nuclear family ownership and a succession form of inheritance. LAND MOBILISATION IN PAPUA NEW GUINEA at 33.

<sup>124</sup> MUGAMBWA at 117.

<sup>125</sup> *Id.*

<sup>126</sup> Cooter at 780.

<sup>127</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 29.

<sup>128</sup> MUGAMBWA at 128.

<sup>129</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 31.

<sup>130</sup> *Id.*

<sup>131</sup> Westermark at 223.

by spilling blood on it, burying dead in it, planting permanent crops, or building a permanent house on it.<sup>132</sup>

## **B. The State and Customary Land**

Intervention by the State into customary land tenure is quite limited. Essentially, the Land Act “draws a kind of ring around it, but takes little notice of what goes on inside.”<sup>133</sup> Although the State first regarded customary law as foreign law and required it to be proved by evidence, the Constitution now sees customary law as a part of the underlying law of PNG.<sup>134</sup> The importance of customary land to the State is visible through the Constitution, which recognizes the sacredness of land, and therefore makes it very hard to separate from its customary owners. Land under customary law cannot be sold or leased to anyone besides other customary groups unless the State is involved.<sup>135</sup> Also under the Constitution, it is impossible to change a land use in customary land without the unanimous consent of the clan members.<sup>136</sup> Even customary land that has been converted to freehold and registered cannot be transferred or leased for more than twenty-five years without first getting approval from the Land Board.<sup>137</sup>

### ***1. Land Disputes Settlement Act***

The determination of ownership disputes of customary land in Papua New Guinea are dealt with under the Land Disputes Settlement Act. The purpose of the Act is to provide “a just, efficient and effective machinery for the settlement of disputes in relation to interests in customary land” through traditional dispute settlement processes.<sup>138</sup> This Act divides the

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<sup>132</sup> Cooter at 767-768.

<sup>133</sup> CUSTOMARY LAND TENURE at 2.

<sup>134</sup> MUGAMBWA at 117.

<sup>135</sup> Land Act, No. 185, § 15 (1996); MUGAMBWA at 80.

<sup>136</sup> Goldstein at 1005.

<sup>137</sup> Land Tenure Conversion Act, No. 15 § 12 (1964) (Amended 1987); MUGAMBWA at 79.

<sup>138</sup> Land Disputes Settlement Act, No. 45 § 1 (1975).

country into land mediation areas and creates both Local Land Courts and Provincial Land Courts.<sup>139</sup>

Land mediators are appointed to initially hear any land disputes.<sup>140</sup> The primary function of a land mediator is to “assist in the attainment of peace and harmony . . . and endeavoring to obtain the just and amicable settlement of disputes.”<sup>141</sup> If an agreement is reached, then the Land Mediator records that agreement.<sup>142</sup> The parties to an agreement may apply to a Local Land Court in order to have the agreement approved, which has the same effect as an order of the Local Land Court.<sup>143</sup>

There are a number of interesting aspects of the Land Dispute Settlement Act including the fact that the Local Land Courts are not bound by any law or rule of law other than the Act.<sup>144</sup> Also, lawyers are normally not allowed to represent parties under the Act in order to make the court system more accessible to the general population.<sup>145</sup> In addition, there is a provision in the Act concerning the equitable distribution of property. If one of the parties is short of land and the other has an abundant supply; if the party short of land has held an interest in the disputed land within the last 100 years; if the court’s determination will lead to a peaceful and effective settlement of the dispute; and if the party deprived of land will still have an abundant supply even if some is taken away, then the court may order that some of the interests in land be returned to the party short of land.<sup>146</sup> This kind of determination is very different from the Western system of land tenure, which generally does not take into account the amount of land owned by each party.

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<sup>139</sup> Please see section C(2)(c) of this report for more information on the local land courts.

<sup>140</sup> Land Disputes Settlement Act, No. 45, § 11.

<sup>141</sup> *Id.* at § 15.

<sup>142</sup> *Id.* at § 18.

<sup>143</sup> *Id.* at §§ 19(1) & 19(6).

<sup>144</sup> *Id.* at § 35(1)(a).

<sup>145</sup> *Id.* at § 72.

<sup>146</sup> *Id.* at § 40.

## 2. *Land Groups Incorporation Act*

The purpose of the Land Groups Incorporation Act is to recognize the corporate nature of customary groups and allow them to hold, manage and deal with land in their customary names.<sup>147</sup> This act allows for customary groups to apply to the State for recognition as an incorporated land group.<sup>148</sup> The Registrar must be “satisfied that the group possesses common interests and coherence independently of the proposed recognition, and share or are prepared to share common customs.”<sup>149</sup> If a corporate group is approved, then the group is a corporation, has perpetual succession, may sue and be sued, and “do and suffer all things that a corporation may do or suffer.”<sup>150</sup>

The powers of an incorporated land group, however, relate only to land and its use and management. A land group may acquire, hold and dispose of customary land and rights in any manner allowed by custom. A group may also acquire, hold and dispose of other land and rights, use and manage the land, or enter into agreements for the use or management of the land, borrow money or accept property on credit, or distribute any product of the land or any profits arising out of the use or management of it.<sup>151</sup> The Land Groups Incorporation Act also outlines how Land Groups can “wind up,” either when they are finished doing their intended business or when they are no longer able to continue to function as an incorporated group.<sup>152</sup>

### C. **Development and Use of Customary Land**

The Constitutional restrictions on the sale of land to non-nationals as well as the traditional restrictions on the permanent transfer of land outside of clans makes any control of

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<sup>147</sup> Land Groups Incorporation Act, No. 147 (1974).

<sup>148</sup> *Id.* at § 5.

<sup>149</sup> *Id.* at § 5(3)(c).

<sup>150</sup> *Id.* at § 11(1)(a-d).

<sup>151</sup> *Id.* at § 13.

<sup>152</sup> *Id.* at § 15.

the land by outsiders very difficult.<sup>153</sup> The absence of registration mechanisms for customary land, coupled with the attendant uncertainty of dealing with unregistered customary land, “have led to the introduction of a range of procedures for mobilizing its use and development.”<sup>154</sup> The most often used of these methods are tenure conversion, clan land usage agreements, and Lease-Lease-Back Agreements.<sup>155</sup>

### ***1. Tenure Conversion***

Tenure Conversion was first used in 1963 in order to provide for the transfer of customary land to individual freehold title. Land Tenure Conversion takes place under the Land [Tenure Conversion] Act, and was enacted for the purpose of encouraging development of the land.<sup>156</sup> However, even under the Land Tenure Conversion Act, it was later found that the customary interests to the land had often not been extinguished, and the registered titles were not regarded as a marketable commodity.

### ***2. Lease-Lease-Back Agreements***

Lease-Lease-Back Agreements are usually made for commercial agreements because direct dealings regarding land usage is illegal.<sup>157</sup> First, the customary owners of the land lease the land to the State. Then, the Minister for Lands and Physical Planning must be “satisfied, after reasonable inquiry, that the land is not required or likely to be required by the owners or by persons.”<sup>158</sup> Finally, the land is leased to the company seeking to use or develop the land. As useful as this idea seems for PNG, there has been no widespread leasing because of the backlog

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<sup>153</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 94.

<sup>154</sup> CUSTOMARY LAND TENURE at 73.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 74.

<sup>157</sup> Cooter at 776.

<sup>158</sup> *Id.*

of applications in the Department of Lands. It is virtually very difficult or impossible to actually get a Lease-Lease-Back application completed.<sup>159</sup>

### ***3. Problems with Contracting for Customary Land***

There are a number of problems that occur when a foreign entity or company tries to gain some control over customary land. First, the organization must work with the State and the formal procedures required to mobilize land resources. Working with the State can be quite difficult because of the extensive requirements as well as the lack of State resources.<sup>160</sup> Also, the State has weak enforcement mechanisms when it comes to enforcing the contract.<sup>161</sup> Especially in the Highlands, the capacity for law enforcement is very low, and customary promises dominate without much interference from the State.<sup>162</sup>

There is also a problem because of the cultural divergence between the landowners and developers and each group's concept of a contract.<sup>163</sup> The concept of a binding contract is often culturally foreign to many native Papua New Guineans. Traditional "contracts" are often neither permanent nor obligatory, but are merely a consensus at a particular time. These "contracts" are expected to adjust to changing circumstances. Also, many PNG cultures see time as cyclical, with seasonal and tidal influences rather than western time measured by the clock.<sup>164</sup> Quite often there is a complete reassessment of the compensation terms whenever a new generation gains more power within the clan.<sup>165</sup>

Finally, landowners often have a negative perception of development and resource mobilization. There have been some scandals regarding development companies trying to

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<sup>159</sup> *Id.*

<sup>160</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 56.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 76.

<sup>163</sup> *Id.* at 56.

<sup>164</sup> *Id.* at 60.

<sup>165</sup> *Id.* at 76.

develop land they were not entitled to or development companies doing significant environmental damage to areas.<sup>166</sup> Many customary landowners do not trust developers to provide them their “fair share” from the activity being conducted on their land.<sup>167</sup> Also, when landowners travel to the cities and come into contact with higher living standards and media images, it can result in large changes in preference and increase the problems with enforcing the contract without more compensation.<sup>168</sup> In fact, contracts are often flagrantly broken in PNG by landowning parties hoping to “seize strategic opportunities.”<sup>169</sup>

#### IV. ALIENATED LAND IN PAPUA NEW GUINEA

The alienated land in Papua New Guinea has been brought out from customary law through title conversion and is either owned by the government or held in private through freeholds.<sup>170</sup> The State is much more involved in alienated land. In fact, the State owns most of the alienated land, and has the power to regulate its use in detail through the terms and conditions of leases it issues. However, even with alienated land, the State is limited by its resources, and its formal powers still depend on the State’s capacity to use them.<sup>171</sup> State owned land is somewhat less than two percent of the land in Papua New Guinea, and about one percent of the land is in individual, private, freehold ownership.<sup>172</sup>

Alienated land is divided between private freehold, the national government, and leasehold title from the government.<sup>173</sup> State owned land is most often dealt with through State

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<sup>166</sup> The Ok Tedi mine is an example of the severe environmental effects that sometimes occur with development projects. With approval of the government, the mine dumped about 80,000 tons of mine tailings every day into the nearby river system. The fish stock fell by 50-80 percent after only a few years of operation and pollution from suspended sediments and heavy metals has been 10,000 times greater than U.S. EPA standards. Kalinoe & Kuwimb at 69.

<sup>167</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 75.

<sup>168</sup> *Id.* at 65.

<sup>169</sup> *Id.* at 63.

<sup>170</sup> Cooter at 766.

<sup>171</sup> CUSTOMARY LAND TENURE at 2.

<sup>172</sup> Cooter at 766.

<sup>173</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 28.

leases that include terms and conditions for the people or companies leasing the property. It is possible for the State to conserve this land by using the terms and conditions of the lease. There are also a number of ways of restricting development on privately owned, alienated land through some common law legal tools.

## **A. Easements**

An easement is traditionally defined as “a right which attaches to a particular piece of land and which allows the owner of that land either to use the land of another person in a particular manner or restrict its use by that other person to a certain extent. A right of way over another’s land is a common example of an easement.”<sup>174</sup> The easement is not legal unless it satisfies four legal requirements: (1) there must be a dominant and servient tenement; (2) the right must accommodate the dominant tenement; (3) the dominant and servient tenements cannot be owned and occupied by the same person; and (4) the right must be capable of forming the subject matter of a grant.<sup>175</sup>

There are a number of ways that an easement can be created. First, an easement can be created by statute; these statutory easements are usually created for government bodies. Second, an easement may be created by express grant if the owner of the servient land expressly grants an easement to the dominant land. Third, an easement may be granted by an express reservation if the owner of the dominant land sells a part of his land and expressly reserves an easement over the land he is selling. Fourth, an easement may be created through an implied reservation, although courts are generally reluctant to recognize implied reservations unless they are created out of necessity and it was an intended easement.<sup>176</sup>

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<sup>174</sup> MUGAMBWA at 399.

<sup>175</sup> *Id.*; *In Re Ellenborough Park* (1955) 3 All ER 667.

<sup>176</sup> MUGAMBWA at 406.

Easements are recognized under the Land Registration Act, which details the registration of any easement created over land that has been registered under the act.<sup>177</sup> Where there is an easement over annexing land, then the Registrar shall record this in the Register Book and register the easement.<sup>178</sup>

There are also a number of ways that easements can be extinguished under the Land Registration Act. An easement may be extinguished expressly, through a merger, or through abandonment.<sup>179</sup> If the parties agree to extinguish an easement, then that is an express extinguishment. An easement will also be extinguished through a merger, where the dominant and servient land comes into a common ownership. In that case all of the easements affecting the land are merged and extinguished. Finally, easements are extinguished through abandonment. If the beneficiary of an easement abandons that easement, the easement will be extinguished forever. However, courts generally avoid inferring abandonment of an easement.<sup>180</sup>

## **B. Restrictive Covenants**

A covenant is a promise contained in a deed or a contract. The burden of the covenant does not run with the land unless there is privity of estate. However, in equity certain covenants may be enforced against the assignee of the servient land as long as they are restrictive covenants.<sup>181</sup> The requirements of a restrictive covenant are: (1) the covenant must be negative in nature and substance, must restrict the servient landowner from doing something, and must not impose a positive duty to do something. (2) The covenant must also be made for the benefit of the land retained by the covenantee, which means that there must be a dominant and servient land parcel. If there is not a dominant and servient parcel, then the covenant is a personal

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<sup>177</sup> *Id.* at 410; Land Registration Act, No. 191 § 95.

<sup>178</sup> MUGAMBWA at 410.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 413.

covenant and only binds the immediate parties.<sup>182</sup> (3) The original contractors must also intend the burden and benefit to run with both the servient and dominant parcels of land. (4) Finally, restrictive covenants only have effect in equity.<sup>183</sup>

There are three possible ways to discharge a restrictive covenant. First, restrictive covenants can be discharged by operation of law when both the dominant and servient lands enter into the same hands. Second, restrictive covenants can be discharged when a court of equity holds that the covenant is unenforceable after a suit by the covenantee. Finally, restrictive covenants can be discharged through an agreement by the parties.<sup>184</sup>

Land registered under the Land Registration Act is somewhat different when it comes to restrictive covenants. The Land Registration Act itself does not discuss the registration of restrictive covenants. The legality of restrictive covenants on registered land is questionable, and it is usually agreed that restrictive covenants are not enforceable against subsequent registered proprietors.<sup>185</sup>

## **V. LAND REGISTRATION IN PAPUA NEW GUINEA**

Both the colonial and post-Independence governments have not pursued any clear and consistent policy on customary land registration in Papua New Guinea. Although there is legislation regarding land registration, it has not been very successful. In addition, it is very likely that any move to successfully register land will continue to face steep opposition from the people.<sup>186</sup> The Land Registration Act shapes a system of conveyance and registration of title to

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<sup>182</sup> *Id.* at 415.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 418.

<sup>185</sup> *Id.* at 418-419.

<sup>186</sup> G. Manda, *The Choice of a Customary Land Registration System in Papua New Guinea* 23 MELANESIAN L. J. 155, 179 (1995).

land known as the Torrens system, which originated in Australia.<sup>187</sup> All dealings in alienated land, even State leases upon registration, must follow the details of the act. Customary land that has been converted into freeholds under the Land Tenure Conversion Act may also be registered under the Land Registration Act.<sup>188</sup>

The two main characteristics of the Torrens system are the title by registration and the indefeasibility of title.<sup>189</sup> Registration under the Land Registration Act gives the registered person title, and evidence of the title is created through registration.<sup>190</sup> The second feature of the Torrens system is the indefeasibility of title once a person is registered as the proprietor. Once someone has registered his land under the Land Registration Act, his title cannot be divested or attacked by rival claims to the land or rival interest in the land, unless there was some kind of fraud involved.<sup>191</sup> The fact that the Land Registration Act makes a registered certificate inviolable against native land rights was used a number of times in the courts to not allow traditional landowners to reclaim the alienated land, which they felt was unfairly acquired for them.<sup>192</sup>

The Land Registration Act also protects unregistered interests and states that no estate or interest “can be created or transferred under the Act until the instrument purporting to create or transfer the same is registered under the Act.”<sup>193</sup> Finally, the Land Registration Act allows a person wrongfully deprived of his land to bring an action of ejectment or damages against the wrongdoer.<sup>194</sup>

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<sup>187</sup> MUGAMBWA at 421.

<sup>188</sup> *Id.* In addition to National Legislation, the East Sepik Province has enacted its own registration system, which has not made any progress so far. Manda at 161. Please see the Appendix for copies of the East Sepik Province Registration Laws.

<sup>189</sup> MUGAMBWA at 421.

<sup>190</sup> *Id.* at 422.

<sup>191</sup> *Id.* at 423.

<sup>192</sup> *Id.* at 426. *Blasius Tirupia and Others v. The Administration of the Territory of PNG* (1973) PNGLR 34, at 40 (the court stated that “a registered title could not be disputed by reference to unregistered native land rights.”)

<sup>193</sup> Land Registration Act § 17(1); MUGAMBWA at 487.

<sup>194</sup> MUGAMBWA at 501.

## **VI. RECOMMENDATIONS**

### **A. Work With the State to Create Conservation Areas**

One possible way to achieve lands conservation in PNG is to work with the State to create conservation areas. Papua New Guinea has the power to acquire land for conservation purposes. In addition, one of the directives of the PNG Constitution is the conservation of resources. It might be possible to identify those areas that most need to be conserved and work with the State in obtaining protection for those areas. PNG is, at least in writing, dedicated to protecting the environment, but it is also short of resources and faces a large portion of the population living in poverty. It is possible that if an NGO does some of the preliminary work, and finds ways to conserve land that either encourages development (through ecotourism, etc.) or at the very least does not displace the population, then PNG might be willing to use the State's power to conserve the land. However, it is important to note that one of the major problems in PNG is the high level of corruption in the government. There is a possibility that a conservation plan could be conceived and the details worked out, but not passed, because of the deep pockets of a development company.

### **B. Work with Customary Groups to Achieve Conservation<sup>195</sup>**

Ninety-seven percent of the land in Papua New Guinea is customarily owned. Therefore, when conserving land in Papua New Guinea, it will be necessary to work with the customary landowners. There are two different possible ways of working with these groups.

The first possibility is to try and get a recognized interest in customary land and reserve that interest in land for conservation purposes. In order to obtain a freehold ownership of land,

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<sup>195</sup> Please see: Anastasia Telesetsky, *Graun Bilong Mipela Na Mipela No Tromweim: The Viability of International Conservation Easements to Protect Papua New Guinea's Declining Biodiversity* 13 GEO. INT'L ENVTL. L. REV. 735 located in the appendix for more information on working with customary groups to create easements on land.

though, it is necessary to be a citizen. Otherwise, another option such as leasing land is required. However, leasing land from customary groups still requires the approval of the State, which can be extremely difficult because of PNG's lack of bureaucratic resources. In addition, the State generally does not have enough law enforcement power to enforce a contract that the customary landowners might decide not to honor. Therefore, it is necessary to invest time and effort into coming to a mutual understanding and agreement that both customary landowners as well as the conservation organization can comply with. Any land usage agreement regarding customary land is not legal without the State's approval, and it is not possible without the customary landowners understanding and approval.

A second possibility for conservation in Papua New Guinea is to work with the customary groups in order to help them secure sustainable development and a higher standard of living. In working directly with the groups, it would not be necessary to actually attain an interest in land. Therefore it would not be necessary to have to work through the bureaucracy of the State. Instead, a conservation organization could provide education and some materials for projects that encourage conservation. The Maisin people of Papua New Guinea have had positive and close contact with Greenpeace and the Macarthur Foundations who could be used as mediators or points of entry.<sup>196</sup> This tactic does not have any guarantee of permanence. However, considering the lack of resources of the State and the continuing problems regarding successful registration of land, it is unlikely that any tactic undertaken now could unequivocally guarantee land conservation in the future.

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<sup>196</sup> LAND MOBILISATION IN PAPUA NEW GUINEA at 85.

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