USAID ISSUE BRIEF
THE FUTURE OF CUSTOMARY TENURE

OPTIONS FOR POLICYMAKERS
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SUMMARY

For years, policy makers have debated how to deal with customary tenure —sometimes known as "informal," "indigenous," or "traditional law." This concern arises because dual (or multiple) legal systems co-exist in many countries: statutory law alongside informal, customary practices, religious law, etc. Educated urban elites tend to use the statutory system while rural citizens, the less educated, and the poor typically rely on the customary system. The presence of multiple systems can contribute to insecurity and conflict; finding ways to effectively integrate the two is an important policy challenge in many countries.

In the past, most countries thought that with time and "modernization" they could simply erase customary tenure systems, replacing them with statutory systems based on titled private property. Experience now shows that this is not realistic (at least in the short term) and neither may it be desirable since customary tenure systems have attributes and strengths that respond to real needs in many countries. Furthermore, as customary systems are undermined, they leave a void that statutory administrative systems are ill equipped to fill, given the limited administrative capacity in many countries. For these reasons, policymakers now seek some sort of accommodation with customary tenure and are looking for guidance and experience with how these issues have been dealt with in other countries.

As many as two billion people are currently estimated to live under customary tenure regimes. When these systems are undermined, people lose rights that are critical to their livelihoods, spawning resistance and increasing poverty among already marginal populations. This process is accelerating as international companies seek land in remote communities, forest resources are commoditized (with REDD and Payments for Eco-system Services), and peri-urban development creates new land markets. This brief proposes that valorizing customary tenure systems can mitigate the pressures that undermine local tenure security. This can be done by formally recognizing and providing a legal "space" for customary tenure rights, by registering rights established under customary tenure regimes as statutory rights, or by implementing a hybrid model that combines elements of customary and statutory systems. In all cases, the goal is to provide cost-effective tenure security.

The first section of this issue brief reviews the concept and characteristics of customary tenure systems. It next summarizes the factors contributing to the evolution of customary tenure in response to a wide range of institutional and economic pressures. This is followed by a brief assessment of how statutory and customary rights systems interact, the circumstances that propel one or the other to dominate, and examples of where and why the two are likely to come into conflict. The brief concludes with a short summary of the types of interventions that USAID projects have implemented in this domain.

WHAT IS CUSTOMARY TENURE?

Customary tenure is a set of rules and norms that govern community allocation, use, access, and transfer of land and other natural resources. The term "customary tenure" invokes the idea of "traditional" rights to land and other natural resources—"the tenure usually associated with indigenous communities and administered in accordance with their customs, as opposed to statutory tenure usually introduced during the colonial period" (FAO 2002). While we tend to associate customary tenure with age-old practices, we are reminded that "how far these are rooted in the practices of past generations (i.e., traditions) is hardly relevant; they stem from and are sustained by the living

community of today...The singular shared attribute of indigenous tenure regimes around the world today (and adhered to by no less than two billion people) is that they are community-based property systems" (Wiley 2008).

CHARACTERISTICS OF CUSTOMARY TENURE

Precisely because they are community based, customary tenure systems are inherently unique to the locality in which they operate; thus they are difficult to characterize by generalities. The following characteristics are found in many, but certainly not all, customary tenure systems. Insofar as customary systems respond to the needs of particular localities and user groups, they frequently entail complexities not found in statutory systems that address more general principles and concerns. They may, as noted below, address such issues as seasonal variation in resource supply and demand, may respond to specific needs of particular socieconomic groups in the community, and may craft quite complicated arrangements to deal with competing resource user groups (e.g., gatherers, cultivators, and herders).

Customary tenure systems gain their legitimacy from the trust a community places in the people and institutions that govern the system.

Arrangements may be written or unwritten but most often consist of a corpus of unwritten prescriptions concerning rights of use and access to both land and other natural resources. Descendents of the first arrivals in the community, often respected male elders, are usually the repository of tenure norms and rules.

Customary tenure systems may be enforced by the formal judicial system (even if largely unwritten), or they may be neither recognized nor enforced by the law. In any case, their legitimacy in the community is usually independent of their recognition by the formal legal system.

Outsiders may not share this local respect for customary tenure arrangements, especially when they have not been formally codified. This becomes a significant issue when external pressures, whether from more powerful domestic or international interests, increase.

> **Customary tenure reflects the particular needs of the local community, often leading to significant complexity.**
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> In the Rumbek area of Sudan, Agar and Gok Dinka communities manage three agro-ecologies: the uplands, the floodplain, and the river. These groups rely on all three land types for their livelihood, which combines cattle herding with food crops. The boundaries of their territories run perpendicular to the river to ensure access to all three ecologies. Homesteads are spread around the uplands, where people grow crops during the rainy season. Cattle mainly use the flood plain and the riverbanks for grazing in different seasons. Once food crops are harvested, cattle move to the uplands and graze on stubble. Even the river is divided into sections, and specific fishing rights are accorded to each community. Outsiders are allowed to use resources, but only after gaining permission from the, traditional authorities (De Wit 2001).

Customary tenure mirrors the cultural and social values of the community.

These values may be reflected in rules that govern a particular resource (e.g., trees considered sacred); rules that favor or disadvantage certain user groups (e.g., by ethnicity, gender, insider/outsider populations); or rules that promote other community values (e.g., sustainable use of resources, provision of a safety net for vulnerable community members). In general, traditional communities have a special relationship with the land. In many parts of Africa, for example, "land is regarded not simply as an economic or environmental asset, but as a social, cultural, and ontological resource… [that is] embodied in the very spirituality of society" (African Union 2009). Such deep cultural attachments to the land and other natural resources shape the array of rules, obligations, and sanctions in customary tenure systems.

Customary tenure often favors the rights of first occupants and those who initially invest labor to clear the land. But they may also have mechanisms for latecomers to enter the system.

In many customary tenure systems, rights to exploit the land are granted to those who first clear it for agricultural use or who first delimit the boundaries of the territory. These first occupants (or groups of occupants, or lineages) acquire the right to exclude or otherwise manage the access of outsiders. Typically, newcomers gain progressively stronger rights through intermarriage with the founding families or by being a responsible neighbor and investing in the local community.

Customary tenure may differentiate rights between community members and those considered to be outsiders.

As noted above, outsiders and newcomers are rarely afforded rights identical to those of the original settler families (and their descendents). People who are not of the settling lineage may have limited rights to plant trees or to make other permanent investments on borrowed or rented lands (because this act may imply ownership or primary right status), yet these same people may be granted secondary or subsidiary rights, for example, to gather fallen branches for firewood, graze animals in the off-season, and forage tree crop products.

Customary tenure frequently disaggregates rights to resources found in a particular space, allowing multiple uses and users of resources found in the territory.

Complex secondary rights, rooted in the history of particular localities, may specify rules of access to resources used for gathering, hunting, fishing, and other non-permanent land uses. Additional complexity may arise when seasonal rights are granted to certain user groups. A given space may have dozens of rules that apply according to resource, user, use, or season.

The complex, differentiated tenure rules found in customary systems often protect the interests of disadvantaged, vulnerable, and minority populations.

While it is important not to idealize customary tenure systems, historically many of their provisions provided rights of at least limited access to populations who might have been excluded under more rigid, undifferentiated systems. The landless poor (often women) were sometimes granted gathering rights on land owned by others; pastoralists may have been able to use harvested fields for seasonal grazing. However, as noted below, while the flexibility of customary tenure systems allows them to respond to particular needs in the community, it also renders beneficiaries vulnerable to pressures to rescind such rights. As such, customary rights of the underprivileged can be fragile in the face of pressure from more powerful actors.

Customary tenure often makes provision for collective (as opposed to individual) ownership or management of space.

Sometimes the entire territory is considered to be the collective property of the community, which then allocates specific rights to designated resources within the territory. As such, many customary tenure systems place constraints on an individual's right to permanently alienate resources that fall under community purview: an individual might be prohibited from selling his/her holdings to an outsider without consent from community authorities. However, within this constraint, a variety of land transactions might be permissible including sharecropping, leasing and loans, gifts, and exchanges of property.

Customary tenure is a "living institution."

Customary tenure systems are not static: they evolve over time in response to changes in the institutional, economic, and physical environment. The next section addresses the ways customary tenure systems may evolve in response to various pressures and influences

THE EVOLUTION OF CUSTOMARY TENURE SYSTEMS AND CURRENT PRESSURES

There is a mistaken tendency to view customary tenure systems as quaint relics of a by-gone time. In fact, there is now ample evidence that customary tenure systems are not only powerful forces in resource management, but they can be highly responsive to changes in the world around them. Adaptations take place in response to population growth, market forces (supply and demand), political changes, conflicts, and even climate change. In general, rules are relatively lax (and may even lapse) when resources are abundant and demand is low. As resources become more coveted, the rules of access, exchange, and inheritance become more intricate and/or

> **Customary tenure systems often had provisions to ensure the tenure rights of women and poor people. As the statistics below demonstrate, these rights have been progressively eroded in many communities.**
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> In Kenya, 24 out of 40 orphans interviewed in Kakamega, Katundu, and Limuru districts reported their property had been taken by their close relatives.
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> In Namibia, 41% of widows and orphans lost farm equipment, 44% lost cattle, and 28% lost small livestock.
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> In Uganda, in one district office, 90% of the cases of intra-family conflict involved women's land rights and 70% of these involved threats of eviction.
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> In Zambia, 30% of widows lost more than 50% of their land after their husbands died. Seventy-nine percent of orphans in Kakolo community in Kitwe district reported their property had been taken by grandparents, uncles, and aunts.
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> In Zimbabwe, 53% of boy orphans and 47% of girl orphans in Manicaland and Chilmanimani districts were displaced after their parents had died (FAO, IFAD, World Bank 2009).

restrictive. Rules may suddenly emerge—or be rescinded—as rights to land, forests, fallows, and water resources are renegotiated to address new economic and environmental realities.

- As Shea trees in the Sahel became coveted economic assets (due to the demand for Shea butter by the cosmetics industry), stricter tenure rules replaced the largely open access tenure regimes of earlier years.

- Investments that increase the value of a resource may revive long dormant tenure claims; when degraded lands are restored with soil and water conservation practices, original settler families may reactivate their historical claims to the land, thereby excluding migrants or even those who carried out the restoration work.

- The population of many communities doubled in the period of a single generation at the same time that the productivity of the resource base diminished due to deforestation, excessive harvesting of resources, or unsustainable farming practices that rendered previously fertile lands sterile. In such cases, original lineages have reinforced rules against tree planting and other long-term investments by outsiders and newcomers in order to protect their traditional land ownership rights and limit future claims.

In general, when previously abundant resources move into the scarce or coveted category, there is a pattern of rules evolving away from more flexible, negotiable, and inclusive arrangements toward more rigid and narrowly defined rules that favor the interests of the elite or privileged. This can happen within customary tenure systems (e.g., when traditional rights granted to women or poorer resource users are "forgotten"); it can occur when customary tenure systems begin to mimic the restrictions imposed by statutory rules (e.g., exclusion of pastoralists); or it can take place through a weakening of customary tenure arrangements relative to formal statutory rules, as will be discussed below.

While demographers have long warned that internal population growth will lead to greater land scarcity in developing countries, it is now clear that external demands for resources are having a major impact on even remote rural communities. International and multinational companies seek land to produce food for export and biofuels, or to extract minerals and other resources. It is now estimated that six million hectares of land will be converted (from forests, pastures, wetlands, etc.) into agricultural production each year through 2030, a trend fueled by demographic growth, rising incomes, and urbanization (World Bank 2010). Two-thirds of this expansion will be in Sub-Saharan Africa and Latin America where land is perceived to be most available. In at least some of these cases, outsiders are exploiting the apparent vulnerability of customary tenure systems (or confusion between customary and statutory systems) to gain easy access to resources (Grain 2008, Zoomers 2010). The result has been increasing land dispossession (sometimes called "land grabs") in local communities.

Carbon markets (valued at $126 billion in 2008) also increase the pressure on resources previously governed by customary tenure systems. As concern for global climate change translates into carbon offset programs, forested lands (as well as "wastelands" viewed as appropriate for environmental rehabilitation) are sought for their carbon absorption value (Capoor and Ambrosi 2009). In many cases, the supposed wastelands are in fact territories managed under customary tenure systems with multiple user groups and tenure claims associated with them.

These massive pressures on land, unseen in many communities since colonial times, have exerted game-changing pressures on customary tenure systems, intensifying and accelerating the tightening of rules as people try to secure their claims. Demands for land for agro-industrial production, extractive industries, and carbon offset programs put an international price on a previously local commodity. Even a whiff of outside interest drives speculation and competing claims to land, reviving latent customary rights that may have been dormant when land values were lower. The sudden appearance of tree seedlings, fences, or hastily constructed buildings on previously ignored parcels is a good first indicator that land tenure rights are being activated.

Soon land markets emerge. Where customary systems may have been highly functional in mediating relations between local actors in the pre-land market era, they are now confronted by outside land seekers who, whether innocently or willfully, ignore customary strictures and authorities. People not recognized as land owners in the customary system may sell lands to which others lay customary claim. The state may sell land that communities count as theirs. Community members with customary rights may also be eager to capture the rising value of land by selling their parcels in contravention of rules that try to protect a community's territorial integrity. These pressures undermine internal respect for the rules as well as the customary leaders' authority to resolve disputes. The result is conflict between community members, between community members and outsiders, and between community members or leaders and the state. In such cases, private, short-term, and elite interests are likely to prevail over the collective, more inclusive, and long-term resource management considerations that customary tenure systems struggle, in many cases, to protect.

THE RELATIONSHIP BETWEEN CUSTOMARY TENURE AND STATUTORY TENURE SYSTEMS

In most countries of Africa, Asia, and Latin America, several legal systems—statutory, customary, and international— coexist over the same physical space, resulting in overlapping rights, contradictory rules, and competing authorities. An International Institute for Environment and Development report noted, "Far from being clearly delimited and mutually exclusive, the customary and statutory are usually intertwined in complex mosaics of resource tenure systems" (Cotula, Toulmin, and Quan 2007).

There are cases where statutory and customary systems co-exist in harmony and provide a reasonable degree of tenure stability. However, more often they are the source of confusion and tension. The worrisome consequences of this confusion will be addressed in the next section, but first we turn to the dynamic relationship that characterizes the interaction between these two systems.

The tenure landscape in both industrialized and developing countries consists of a patchwork of government/state, communal/private, and individual/private property rights arrangements (Bruce 1986). National parks, state forests, First Nations territories, apartment cooperatives, leasehold properties, and individually owned freehold parcels all coexist in the United States and Canada. In developing countries, while the form may differ by region or country, one can safely assume that there are overlapping systems managing the resources of most territories.

The customary system may allocate rights among numerous users, but the state also allocates rights and responsibilities to resources in the same space. Not infrequently, these contravene the customary arrangements. In many countries, the state claims ownership over all land that has not been farmed or developed, while communities believe that they have customary claims to forests and ancient fallows. Differing perceptions of who holds the legitimate authority over use and management of the land, forests, water, and sub-soil resources are at the origins of many of the conflicts between local peoples and the state, or local people and outsiders (who usually appeal to state rules when seeking access).

Whether customary and statutory tenure systems coexist more or less harmoniously depends on several factors. There is significant overlap in the list below, but together these factors influence which set of rules dominates under given circumstances and whether there are tensions between the two systems.

Degree of interaction between customary and statutory systems

When there is little interaction between the two systems, there is probably little conflict; one is likely to be clearly dominant. In a remote rural area where there are few state agents and resources are relatively plentiful, chances are high that the customary system is alive and well. The state may be aware of this but unconcerned (or grateful that there is at least some system for managing resources and resolving conflicts). Conversely, in a resource-competitive urban environment, statutory rules are likely to dominate. There may be founding lineages or others who harbor claims to now-urban ancestral lands, but they may feel too powerless to activate those claims. It is worth noting that while such arrangements may appear stable, they can be turned on their heads by sudden turns of events (as when the Haiti earthquake revealed competing urban land claims of varying legitimacy and origins or when a national park is designated in a remote area, suddenly overturning long standing customary tenure arrangements).

Conflicts between the systems are likely where the two systems collide,

> **The strength and resilience of customary tenure systems was demonstrated in Mozambique after 25 years of war.**
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> The October 1992 General Peace Agreement ended 25 years of armed struggle and civil war. Access to land became a key issue as millions of refugees and Internally Displaced Peoples (IDPs) returned. Although the government attempted to manage this process, it simply did not have the resources to carry out a structured resettlement plan. Surprisingly, as it turned out, the process largely took care of itself. Donors committed considerable resources to transporting, registering, and managing the actual return from exile, but returnees were free to resettle where they chose.
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> Millions of people returned to their homes where, even a generation later, they still had customary rights to land and resources. Most conflicts that arose were settled by the same customary authorities who had managed land and natural resource use before the war. It quickly became clear that customary land systems had survived not only post-Independence policies and the disruption of war but also the decades of colonial administration that preceded them (Tanner 2002).
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> A recent FAO/UN-Habitat report calls these customary chiefs a "living cadastre" and customary systems "the most enduring and flexible mechanisms for the majority of people [in Mozambique] to secure access to land and resolve conflicts" (FAO and UN-Habitat 2010).
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> Customary authorities played similarly important roles in helping to reestablish security and social stability in Liberia and Sierra Leone.

often in fast-growing peri-urban areas. Local authorities may try to maintain long-standing rules, while state authorities arrive to impose formal requirements.

Degree of social homogeneity
Customary tenure systems achieve legitimacy largely from the trust and respect of those governed by the system. To the extent that people share a common background and social history, it is more likely that they will respect customary arrangements and defer to traditional authorities. This is one reason that customary tenure systems are more prevalent in traditional homogeneous communities than in more urban, heterogeneous communities, or even rural areas where there has been significant in-migration and the founding lineage may no longer predominate.

Degree of economic and social stability
When situations evolve slowly, giving customary systems the time to adapt and adjust, there is more likely to be peaceful coexistence with statutory systems. To the extent that customary systems are functional and succeed in keeping conflicts out of the formal judicial or state enforcement domain, the state in less likely to interfere. Or, there may be tacit recognition that some aspects of resource management will operate under statutory rules, while others will bow to customary arrangements (e.g., a hotel near a national park may have title to the land but recognize traditional pastoralist rights to traverse the territory and allow women to pursue their traditional right to collect crayfish from the stream). In another variation, customary tenure systems may remain dominant but evolve to look more like statutory systems (e.g., becoming less flexible and inclusive). The end result may not look very different to the marginalized resource user, but such incremental erosions of rights are less likely to engender tenure conflict than sudden dispossession when customary systems are suddenly superseded by statutory regulations.

Conversely, rapid change (such as that brought about by outsider attempts to purchase large tracts of land, sudden changes in commodity prices, or the arrival of large numbers of immigrants/refugees) puts severe pressure on customary systems and authorities. Some members of the community may seek rapid profits and choose to ignore the customary rules. Those who find advantage in appealing to statutory law may do so. In such cases, there may be significant tensions between the two systems, resulting in violence and acts of sabotage as the losers manifest frustration at the erosion of their rights.

Degree to which resource users are outsiders or insiders
Outsiders are, for many reasons, more likely to favor the statutory system. Their experience may not make them sensitive to the existence of customary law, and logistically (language, lack of written documentation) it is difficult for them to understand customary rules. In addition, in most cases outsiders seek both the formality provided by statutory law (e.g., a legal title) and want to benefit from the full bundle of rights usually associated with statutory ownership (e.g., the authority to exclude others from all uses of the resource). Outsider land purchases cause conflict between statutory and customary law when customary ownership rights are not acknowledged during the sale (e.g., the state sells a piece of land to an international investor without reference to the community that considers the land to be theirs).

Having said this, there are many cases where outsiders have been known to exploit customary tenure rules to gain access to resources precisely because they think they can more easily intimidate or bamboozle customary authorities. To the extent that such arrangements are not well understood and transparent to the community, they too may create conflict and undermine the community's faith in the legitimacy of customary systems.

Relative degree of trust in national and local institutions
Resource access and tenure security are vitally important to people and communities. As such, they put considerable care into assessing the institutions with which they are willing to entrust these relationships. Trust in customary tenure institutions may decrease for many reasons, including perceptions of corruption and partiality. Corrupt traditional authorities may abuse their role and sell or give away community lands in return for special privileges. Traditional authorities may not have the knowledge or confidence to deal with pressures from powerful outside interests. In such circumstances, people may turn to state institutions in hopes of securing their rights (e.g., seeking formal land titles), even as they fear the loss of autonomy and flexibility this entails.

Formal institutions may also lose people's confidence. When countries are racked by political instability, when the lack of accountability allows governments to behave arbitrarily, or when administrators represent private rather than public interests, local communities may decide to place their hopes in customary institutions that can be more easily monitored and held accountable. This explains, in part, the remarkable resilience of customary tenure institutions that survive decades of conflict or egregious state governance.

The balance between customary and statutory tenure systems depends on myriad factors and shifting relationships. However, in general, despite decades of efforts by the colonial and post-independence governments

to replace customary tenure with western property rights systems, customary systems have remained surprisingly resilient.

WHY PAY ATTENTION TO CUSTOMARY TENURE SYSTEMS?

We ignore at our peril customary tenure systems that govern resource access for approximately two billion people around the world. The risks include perpetuating and aggravating conflicts and violence, further marginalizing vulnerable populations, and increasing the risk of biodiversity loss. On the positive side, thoughtful integration of customary tenures systems into today's resource management strategies can generate significant benefits. These include reducing costs of resource management and administration and increasing tenure security across the board. Let us briefly examine some of the reasons it is worth the effort to understand and valorize customary tenure systems before turning to some of the practical considerations of how that can actually be done.

Customary tenure systems protect the interests of people who in many cases depend on natural resources for their basic livelihoods. When these rights are reduced or customary systems give way to statutory systems that effectively exclude marginal populations from accessing resources, the consequences are dire. Vulnerable groups like divorced women, widows, tenants, and people living with HIV/AIDS may lose land to land-grabbing relatives, to distress sales to neighbors, or to powerful villagers or outsiders.

Statutory systems as they are currently managed deal best with people who have the knowledge, skills, and financial resources/power to navigate formal systems. Those who cannot read or effectively defend their own interests are marginalized. Customary systems have been generally less demanding of formal education to document and defend rights. In many cases formal administrative systems are not even present in remote areas given the state's lack of capacity. Hence, when customary systems break down the poor majority of citizens become unprotected occupants, essentially treated as squatters on their own land.

- In Kenya, where women head 70% of all squatter households, 25% of urban women slum dwellers report that they were displaced from their rural homes as a result of involuntary land dispossession (UN-Habitat 2004).

- The livelihoods of entire populations, like migratory pastoralists, are at increasing risk. As more land falls under statutory tenure systems that fail to acknowledge their special needs (or even their existence), they find it impossible to negotiate access rights that are key to their survival (Quan and Dyer 2008). Yet, increasingly erratic rainfall in semi-arid environments suggests that nomadic livelihood strategies may be the best suited for marginal rainfall areas. Failure to adequately address these issues, and the consequent sense of dispossession among increasingly desperate pastoralists, contributes to the lawlessness that is taking over parts of the Sahel.

- The undermining of customary tenure systems in Madagascar (in conjunction with the absence of statutory rule enforcement) has created a resource management void in some areas of the country. This has provoked a run on the remaining forest resources, putting the country's famed biodiversity at increased risk.

The governments of some industrialized western countries and many developing countries are taking measures to recognize and integrate customary tenure into national policies. There are numerous reasons for doing this.

First, customary tenure systems can provide useful models for how to deal with the complexities of (especially) rural societies that statutory systems have proved ill equipped to address. These include, for example, separating bundles of rights to ensure that stakeholders maintain access to those most critical to their livelihoods, rather than indiscriminately according all rights to a given space to a single user. In effect, this makes more efficient use of resources since people are not allocated exclusionary rights to resources they are unlikely to need or use.

Second, governments recognize the limits of formal state institutions to deal with a multiplicity of issues in often remote and inaccessible areas. By respecting the authority of customary tenure institutions to devise and enforce rules governing the use of land and other natural resources, administrative costs can be substantially reduced and resource management oversight vacuums avoided. Customary mediation systems are also effective at dealing with disputes before they end up in court.

Third, there are increasing cases of indigenous populations effectively advocating for their customary resource rights (and creating significant political turmoil when these demands are not met). Canada has taken significant steps to cede land to First Nations Peoples while several Latin American governments have devolved territorial

rights to indigenous populations. Since these sorts of demands are likely to intensify, it makes sense to address them proactively rather than later trying to remedy (at considerable added expense) past injustices.

Fourth, as natural resources are being increasingly "commoditized" by payments for eco-system services (e.g. maintenance of intact forests), it becomes increasingly important for communities to clarify existing property rights, even to areas that have not been farmed and are more easily identified as "owned." Recognizing territorial claims, as well as the fact that in many cases forests still exist because customary tenure arrangements helped protect them, can enable local communities to capture some of the benefits of these payments.

Fifth, recognizing customary land rights provides a degree of legal protection for property owners who risk losing their rights in the transition to statutory systems. Otherwise these people may be treated as squatters and be deprived of their property with little or no compensation. Severe social unrest can follow such dispossession.

APPROACHES TO RECOGNIZING, FORMALIZING, AND TRANSFORMING CUSTOMARY TENURE SYSTEMS

The previous approach to customary tenure, which either effaced it by neglect or actively sought to erase it by the imposition of statutory systems, has now given way to more positive approaches. At a minimum, there is a growing movement to at least recognize the existence of such systems, offering them a certain legitimacy and protection. However, many countries have now gone significantly beyond the benign neglect implied by recognition and are actively seeking to valorize customary tenure systems through formalization (identifying, certifying, and registering customary rights); transformation (adopting some of their attributes in the statutory system); or some combination of both.

Formalizing customary tenure systems has risks and can be expensive. The principal risk is that the positive attributes of a system that is flexible and locally responsive may be undermined when it is codified. Furthermore, there are very real costs associated with documenting and/or codifying complex local systems in often remote and inaccessible areas. These two factors recommend a minimalist approach: tenure system should be formalized and the state or external agencies should intervene only when there is a demonstrated need. This point will be further discussed below but should be stated up front as a guiding principle in deciding where and when to intervene. ***Where a local system is working reasonably well and is not subject to significant outside pressures that stress the system beyond its ability to adapt and mediate conflicts, outsiders should not interfere***.

> **Governments are rethinking their approach to customary tenure.**
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> In Kenya, the state spent a half century deliberately trying to formalize private land holdings through titling. Yet, 65% of the total land area remains under Trust Land (customary tenure) today (Wily 2010b). In its new land policy, the Kenyan government had decided to recognize customary land rights, as a new category of land tenure (alongside private and public land).

If evidence on the ground suggests that pressures exceed the capacity of local systems to respond or are creating incentives for corruption, favoritism or other negative outcomes that undermine the credibility of the system, it is best to intervene early. This can avoid a situation where key leaders lose their legitimacy, making it harder to reconstruct effective systems at some later date.

There are two major approaches to incorporating customary systems into statutory frameworks, as well as numerous variations.

WHERE RESOURCE PRESSURES REMAIN LOW: FORMALIZE A TENURE "SHELL" AROUND THE CUSTOMARY TENURE AREA, WHILE ALLOWING LOCAL AUTHORITIES TO CONTINUE MANAGING INTERNAL RESOURCES

In this model, the state explicitly recognizes customary tenure primacy within a defined territory. The state's role is limited to establishing and enforcing the external boundaries of customary lands, allowing local institutional structures and authorities (e.g., Chiefs, elders, and other designated by the community or customary practice) to resolve all resource management issues within the delimited territory. In Canada, Ecuador, Columbia, and Panama, states have used this approach to recognize the authority of indigenous communities to manage forest reserves on their lands. As a condition of delegating this authority, governments may require resource management plans and evidence that the resources are being sustainably managed.

This approach works best when land and other natural resources are not yet under high pressure, population density is relatively low, traditional institutions are strong, and the national government is credibly committed to respecting customary tenure prerogatives (and is willing/able to protect territory boundaries from incursion if necessary). In addition, the community must have confidence that traditional authorities can assure tenure security for its members and fairly resolve internal land conflicts.

While land sales to outsiders are usually prohibited in order to protect the integrity of the territory, provisions may allow communities to lease their lands for particular uses and periods of time. This flexibility (that typically allows out-grower schemes, long-term leases, concessions, and other negotiated arrangements that facilitate external investments) allows communities to directly benefit from the use of resources under their control. These arrangements can postpone often controversial decisions about whether customary tenure arrangements should be replaced by classic titling of private property.

New carbon payment protocols (e.g., REDD+ or avoided deforestation contracts) may be negotiated as long as the territorial rights of the community are clearly recognized and non-contested.

The implementation of the "tenure shell" approach requires the government to invest state resources and work with local communities to delineate territorial boundaries (Tanner, DeWitt, and Norfolk 2009). At the outset of the process, a policy and legal framework must be established to recognize community rights. There are numerous examples of how this can be done in practice.

- The South Africa Communal Property Associations Act 1996 permits customary groups to incorporate and supports local institutions to acquire, hold, and manage property in accordance with a written constitution (Fitzpatrick 2005).

- In Papua New Guinea, the Land Group Incorporation Act of 1974 lets customary groups incorporate as a formal legal entity with the right to hold, manage, and deal with land transactions with outsiders. The Act spells out the conditions of incorporation, the mechanisms for dispute settlement through village courts, and any restrictions on the sale of land to outsiders (Fitzpatrick 2005).

- In Botswana and Namibia, the government has set up Land Boards to administer community lands. Customary authorities are represented on the board (Tanner, DeWitt, and Norfolk 2009).

- In Mozambique, the Land Law and Regulations recognize pre-existing customary rights. These laws allow for the delineation of local territories and set up institutions to administer the lands. Within these territorial boundaries, customary tenure rules apply.

A recent World Bank report notes that in countries like Madagascar, Mexico, Ethiopia, and Vietnam that have encouraged transparent and accountable structures to emerge at the local level, "registration at group level can be a cost-effective way to protect rights over large areas quickly, greatly empowering right holders" (Lavigne Delville 2010). However, they caution that it can be difficult to identify clearly defined "groups" that meet the minimum criteria for registration.

This approach works best when accompanied by capacity building to reinforce local skills to negotiate contractual arrangements (e.g., leasing) with outsiders. In addition, likely increases in pressures on land and other resources should be anticipated; programs that help communities prepare for these inevitable pressures can help customary systems adapt more effectively and avoid the conflicts that may otherwise accompany such pressures.

WHERE LAND VALUES ARE HIGHER: TRANSFORMING CUSTOMARY INTO STATUTORY RIGHTS

Conflicts between customary and statutory systems tend to occur where land values are increasing and various interests compete for access to previously low-value resources. Customary authorities may lack the skills, tools, and power to deal with these competing interests and to protect the rights of community members. In situations where resource conflicts and emerging land markets suggest such trends, the formal registration of property rights may be the best strategy. Ideally, this should take place before significant dispossession occurs.

In this scenario, the objective is not necessarily to perpetuate or reinforce the customary tenure system but rather to ensure that the maximum possible rights already established under prior customary systems are transferred to the statutory system when property is registered. If care is not taken at this stage of things, illiterate, poor, absent, or marginalized people are likely to lose their property rights. It means that the formal registration system must have mechanisms to notify, identify, and verify customary rights holders and, if necessary, to defend their claims against others.

Registration accords individuals the rights usually associated with full, private ownership—namely the power to sell, lease, mortgage, and transfer rights by inheritance. The now statutory owner receives a title or other certificate of possession once his/her rights are formally confirmed. This process ensures that customary users capture at least some of the increasing value of land and resources.

The closer statutory administrative systems are to local communities, the more likely that customary tenure rights will be recognized by formal land registration procedures. Governments can encourage the formalization of customary rights by creating local registries, rather than requiring claimants to go to regional or national land offices. Madagascar's new Land Law allows local individuals to register high-value lands through community land commissions. Communes, the lowest governance unit in the country, are now encouraged to open land offices. These offices define procedures for recognizing ownership of land parcels, manage land information systems, and inform the national land office of certificates issued. The operating costs are covered by the commune budget and by revenue from the sale of the certificates (Teyssier 2010). Other approaches to formalizing customary tenure holdings are described in the literature (Mitchell 2009).

The costs of actually titling individual rights can be very high because of the level of proof required to demonstrate ownership. Therefore, "only where there is considerable tenure insecurity within a group... would the benefits of recording individual interests potentially outweigh the considerable costs and risks of the recording process" (Fitzpatrick 2005).

In cases where full titling is not yet needed, but people desire some more formal recognition of their rights, it makes sense to implement less onerous and rigorous procedures to record customary rights. This can be a step toward titling, and is most practical to implement before increasing land pressures engender significant conflicts. The system could be as simple as a property holder making a hand drawn map on a piece of notebook paper, with annotations of boundaries. As long as there are no disputes over the parcel, the customary official validates the claim and transfers it to the local government office. This practice represents a first step toward formal recognition and reproduces an increasingly common practice in which local people make note of land transactions and entrust the paper to the safekeeping of an elder in the community. "These papers are a less costly way of formalizing land transactions and assure a first level of security" (Teyssier 2010).

HYBRID "MIXED TENURE" REGIMES

In actual practice, governments and local communities are working together to establish customized "mixed tenure regimes" that combine attributes from the customary and statutory systems as needed to address the realities of a particular time and place.

Land rights formalization (e.g., titling) procedures usually register the rights of individuals and accord all use rights to a given parcel to the new owner. However, it is possible to formally register rights in the name of a family or group, and it is also possible to differentiate rights to a given territory, recording not only rights to use the land but also secondary use rights to other resources (e.g., forest products, water, fish) in the territory. Usually these practices are associated with a robust customary system where the "tenure shell" has already been defined and recognized by the state.

Identification and mapping of local customary rights, now recognized and protected by statutory law, is currently taking place in Benin, Burkina Faso, Côte d'Ivoire, Ghana, Guinea, Madagascar, and Ethiopia. Communities (usually working with a designated government agent) draw up tenure maps that record use rights to resources within their established territories (Lavigne Delville 2010, Idelman 2011, Kadine 2011). Existing titles, deeds, and customary evidence of rights to land and resources are recorded in registries recognized by the state. Inexpensive GPS units are helpful in identifying locally recognized boundaries, which are then recorded in public registries that increase their legitimacy vis-a-vis outsiders. As communities make decisions about land and resource use, these are recorded in land charters, local conventions, or other documents approved by community-level councils.

In yet another permutation, national authorities may define minimum standards to which customary systems must conform, while giving them substantial leeway in how to meet those standards. In such a case, the statutory regulations might be considered a "legal shell" within which the customary system operates. This system could, for

> **The African Union recently issued a clarion call to ensure that women's rights are adequately protected under African tenure systems.**
>
> "Better and more productive use of land requires that the land rights of women be strengthened through a variety of mechanisms including the enactment of legislation that allows women to enforce documented claims to land within and outside marriage. This should come hand in hand with equal rights for women to inherit and bequeath land, co-ownership of registered land by spouses and the promotion of women's participation in land administration structures. To ensure full enjoyment of land rights, these measures must be part of an ideology that removes issues regarding the land rights of women from the private sphere of marriage and family, and places them in the public domain of human rights" (African Union 2009).

example, be applied in implementing the AU's call for protection of women's tenure rights.

In the case of co-management of forest resources, the state has reiterated its ownership of vast tracts of forest land in Madagascar while delegating management of use rights to local communities who, under customary tenure traditions, consider the land to be theirs. In order to be granted co-management rights, the community organization must agree to meet certain standards set by the state, submit management plans, and monitor the health of the forest. Following approval of this plan, community members can harvest and sell timber and secondary tree crop products or enter into leasing agreements with eco-tourism ventures (Montagne, Razanamaharo, and Cooke 2007).

LESSONS LEARNED FROM EXPERIENCES WITH CUSTOMARY TENURE

If, even a decade ago, customary tenure was virtually invisible to most national policy makers, it has now earned a place at the table. The 65th Session of the United Nations General Assembly reported on the question in August 2010, concluding that "while security of tenure is indeed crucial, individual titling and the creation of a market for land rights may not be the most appropriate means to achieve it. Instead...the strengthening of customary land tenure systems and the reinforcement of tenancy laws could significantly improve the protection of land users" (United Nations 2010). The African Union, with the African Development Bank and the UN Economic Commission to Africa, have gone even further in developing a coherent policy that recognizes the important place of customary tenure (African Union 2009, 2010).

Given that USAID projects have significant history dealing with these complex issues, this section highlights some of the key lessons learned from working with customary tenure systems around the world.

Continue to illuminate the existence of customary tenure systems.

Failure to recognize and acknowledge customary tenure systems is sometimes purposeful and deliberate. Powerful, resource seeking people and corporations are likely to find it more convenient to deny such systems than to try to understand—and respect—them. While significant progress has been made, even good-willed people can be sadly ignorant of the existence of customary tenure systems and the imperative need to understand them. If you are anywhere in Africa, Asia, Latin America, or the South Pacific and you hear people talking about land restoration of "abandoned fields" or "vacant land" suitable for agricultural production without immediately pausing to wonder about the customary use rights to that land, you know there is a problem. Land, nearly *all* land, has customary claims and use rights associated with it (as do many other natural resources).

While customary tenure arrangements often appear mysterious and opaque from the outside, USAID projects have had excellent success in illuminating these issues with participatory and other research methods that work with local populations to document customary systems. Rapid assessment studies reveal key issues that can be explored in greater depth if more detail is needed (Bruce 1989; K. Freudenberger 1994; USAID 2008, 2007a, 2007b). Including regional and national policy makers in field research teams has helped to promote respect for customary tenure systems and a greater willingness to accommodate them even from people more familiar with top down or formal approaches.

Promote transparency, accountability, and effective checks and balances.

Customary tenure systems are not immune from the governance issues that plague many of the countries where they operate. Customary authorities can be as corrupt, unfair, and partial as anyone else. Rural communities sometimes do, but often do not, protect the rights of minorities, women, and the underprivileged. Powerful local vested interests may dominate decision-making processes. Transparency tends to be higher because of the proximity of decision makers to the affected population, but this is little comfort to the powerless victims of arbitrary or unjust practices.

The challenge is to recognize and secure local land rights while not subjecting people to abuse from inequitable power relations and unaccountable local institutions. Too much unfettered control over land at any one level, national or local, will invite abuse. Centralizing control over land administration leads to fraudulent practices by bureaucratic and national elites. Similarly, vesting total control of land in chiefs, customary authorities, local councils or government boards can open the door to corruption and abuse.

Effective resource management demands checks and balances both within tenure systems (e.g., ensuring that a full range of stakeholders are represented on community decision-making boards) and between them (e.g., requiring customary authorities to sign off on statutory land titles and government authorities to approve local sustainable management plans). The single most important improvement in many countries would be to ensure that all important land transactions must be widely publicized (in writing and orally, especially in the geographic area concerned), with sufficient time for the public to express any concerns or competing (including customary) ownership claims.

There are fundamental contradictions implied in demands for more democratic and equitable customary institutions: on one hand we call for respect of traditional decision making systems and values, while on the other hand we ask those systems to reflect notions of justice and inclusion (e.g., respect for women's rights, safety nets for the poor, democratic decision making) that may or may not represent traditional values in those communities. This paper notes this contradiction while reporting that most customary tenure advocates insist that its future depends on transparent and participatory decision making systems. Their goal is to arrive at democratic and locally accountable institutions that distribute rights equitably within local communities and respect the rights of women and other vulnerable peoples. The FAO has drafted a set of recommended best practices in its Voluntary Guidelines for Tenure Governance (FAO 2009) and various governments are struggling with how to encourage more democratic customary leadership systems (the elimination of chiefs in the land boards of Botswana, democratic election of Chiefs in South Africa, or greater controls on Chieftain powers in Ghana).

Prioritize interventions according to the intensity of pressures on customary tenure systems and the risks to customary resource rights.

Governments should focus interventions where they are most needed, usually where there are significant or growing pressures on resources. The minimal benchmark of tenure security is that "rights to land and natural resources are not contested without reason and that people can invest efforts and reap the benefits of [their] efforts" (Lavigne Delville 2004). USAID and other development organizations have developed analytical tenure assessment tools to help identify areas where tenure security is fragile and intervention is warranted (USAID 2008, 2007a, 2007b, 2011). If the assessment shows that vast areas of a country are relatively stable from a tenure security perspective, there may not be much need to intervene. We should not assume that all land or resources need to be titled.

Conversely, the assessment may identify areas where tenure security is insufficient, usually around high-value (often peri-urban) and resource-rich lands. Emerging land markets and more frequent conflicts over resources are good clues that intervention may be needed and that some sort of system to register land may be required.

While governments may seek a simplified system based solely on classic land registration procedures, this is rarely realistic in the short term. Even in the long term, it may not be the most appropriate way to deal with the concerns of multiple stakeholders. One study on tenure and decentralization in West Africa concluded that "establishing an effective register of land and property rights will take many decades in much of Africa, given current low levels of documentation. Setting up a single, unified system may make sense as a long-term goal, but meanwhile it may be better to establish locally tailored procedures that can be upgraded over time" (Toulmin 2005). Land covenants, group titling, land charters, and other mechanisms for recognizing customary rights offer promising alternatives to individual titles.

Titling should not be imposed where it is not needed, but governments can and should anticipate events that are likely to lead to tenure insecurity, intervening before disruptive conflicts take place or poor people are deprived of their livelihoods. This might include documenting customary resource rights before a new national park is created, or in an area where international interests are beginning to prospect for land or minerals.

Allow communities to define the most appropriate strategies for formalizing customary tenure arrangements.

Communities themselves are the best placed to determine whether recognition of territorial, household, or individual holdings will best protect their interests and reflect local realities. These decisions should involve consideration of the advantages of maintaining internal flexibility in the system versus the need to recognize particular rights. They will also have to decide what types of use rights should be protected (seasonal access to land, access to secondary forest products, etc.).

Make values and principles explicit when redefining and clarifying tenure regimes.

Customary tenure systems reflect the values and priorities of the community. While this attribute can be deformed by leaders who abuse their authority, it remains one of the fundamental s of customary tenure systems. Statutory tenure systems, on the other hand, tend to reflect larger impersonal values (e.g., the primacy of private ownership, the encouragement of capital investments, etc.). When merging tenure systems, or mediating between the customary and statutory systems, countries must decide which values they wish to protect and promote, and under which circumstances. It is critically important that these values are explicit, transparent, and openly negotiated.

Are there areas where encouraging investment and growth is high priority? Are there people whose way of life (e.g., pastoralists) or social rights (e.g., women, indigenous people) warrant protection under the law? To what extent does the system want to perpetuate or reform practices that have long characterized a given community (e.g., the traditional favorable treatment of first occupants vs. equal treatment of all residents)? These are strategic

decisions that should be deliberated, preferably democratically and transparently, by countries and communities that are seeking to clarify their tenure systems.

Many countries with customary tenure are signatories to international conventions that require respect for the land rights of indigenous communities. These international accords are used by communities, such as the Inuit of the Arctic, to protect their rights to land and other natural resources (IBA Toolkit 2010). People concerned with these issues may want to encourage more countries to sign these conventions, which strengthen the voice of indigenous peoples and their advocates.

International institutions, such as the FAO and the World Bank, are working with governments, businesses, and civil society to develop codes of conduct requiring investors to respect the customary land and resources rights of local people. These will provide guidelines for international businesses who wish to behave responsibly while strengthening the hand of civil society entities who demand minimum standards of accountability.

Involve the Public.
The previous paragraphs underline the importance of public debate over tenure policy. Top-down policy reforms on land are usually either ignored or actively resisted by the public. Local communities often distrust government imposition of titling and registration, fearing that it will deprive them of customary rights. USAID has supported public dialogue on tenure issues in many African countries, facilitating the active participation of rural communities. History suggests that when the discussions are transparent, local authorities are included in the process, and people are assured that their customary rights will not be neglected or trampled; it is possible diffuse political opposition to land registration. This is critical to avoiding sabotage of whatever arrangements are eventually decided upon.

Retain maximum flexibility: avoid undoable actions when dealing with customary systems unless necessary and justified.
The types of policy decisions suggested here will take place in a context of rapid global and local change. Systems are under pressure; conflicts abound. It is difficult to anticipate how the context will change in response to global economic pressures, climate change, and other forces that we little understand. Yet, as we have seen in this paper, we do not have the luxury of inaction; there are too many people being impoverished by the current confusion and rapid erosion of customary rights. Under these circumstances, it makes sense to maintain maximum flexibility and "undoability" when dealing with customary systems. Once land is sold from a community, there is little chance to reclaim it; it may be better to maintain rules against alienating community land, while allowing long- or short-term leasing arrangements.

This is a learning process: build in opportunities for self-reflection, assessment, and correction.
Tenure issues are complex, our experience is as yet limited, and today's practitioners are on the cutting edge of figuring out what works and what does not. As such, it is critical that experiences are shared and reflected upon, community members are given opportunities to visit other sites where they can broaden their vision and compare different approaches, and international funders accept the need to progressively fine-tune their projects, learning from rather than denying failures.

Since even the best designed interventions in land tenure reform may lead to unexpected consequences, all efforts should be accompanied by applied research that monitors the effects of new laws and policies.

Develop a plan to deal with conflicts.
No project should enter the tenure field without a mechanism to mediate competing interests and deal with conflicts. As noted above, if there are few conflicts, the system may be working reasonably well, and there may be no need to intervene. If there are conflicts and there is no active conflict mediation process, the default winner is almost always the party who is wealthier, more powerful, or has greater access to statutory systems. The goal then, of any conflict mediation process should be to level the playing field. The key issue here is to ensure that mediation and judicial systems have mechanisms to recognize customary rights and ensure that they get a fair hearing. This may require training of judges and advocates and clarification of procedures when dealing with customary claims. It is especially critical that appeals processes are structured to acknowledge customary rights; otherwise there is a danger that as legal cases move up the system (and into courts that are geographically far removed from the conflict site) customary rules will be ignored or swept aside.

National laws must also be clear on how conflicts between customary and statutory claims will be addressed. This is necessary to minimize "legal shopping," where more influential and informed litigants take advantage of confusion caused by multiple and sometimes contradictory tenure systems to secure "easy" rights.

PROMISING INTERVENTIONS

There are numerous ways that USAID projects can contribute to securing tenure rights and help countries to define appropriate customary tenure policies. We make the standard disclaimer that since each country and situation is different, there is no standard prescription for dealing with either tenure issues in general or customary tenure in particular. These examples are indicative of the types of interventions that have been proven to be appropriate and useful in several different countries; USAID's Land Tenure Portal is a rich source of case studies, additional information, and contacts (www.usaidlandtenure.net). In most cases these interventions have involved some combination of funding (as needed for research and documentation, training, consultative processes) and technical assistance aimed at strengthening local and/or national institutions.

Encourage and facilitate national tenure assessments.
These will broadly assess tenure security and identify problem areas where intervention is recommended. It will identify areas where customary tenure is working well and where it is under pressure and no longer able to defend local property rights.

Carry-out participatory research on customary tenure systems in a representative or purposefully selected (because of particularly interesting attributes or problems) set of communities.
These will illuminate the complexity of customary tenure arrangements, the way they have dealt with environmental and social challenges, and the degree to which they are under pressure or evolving over time.

Work with governments and communities to engage a multi-level consultative process.
This process will review information from the various studies, gather stakeholder perspectives on priority concerns, work on defining principles and values that groups want to see reflected in their country's tenure system, and identify appropriate institutions to implement reforms.

Work with national institutions to develop a policy framework that responds to identified concerns and issues.
This will probably involve providing legal drafting assistance as needed to promulgate new laws and legislation that recognize customary tenure rights.

Establish (or reinforce), train, and finance the community-level resource management institutions (e.g., Community Land Boards) that implement customary tenure systems.
These are the institutions that will defend customary tenure systems and enforce their provisions. These interventions may include working on democracy and transparency issues with customary tenure institutions.

Provide training in practical skills as needed by people and institutions dealing with the nuts and bolts of local tenure security.
This may include training in conflict resolution, negotiation and contracting skills (e.g., how to negotiate a lease with outside interests, how to fairly value land and other resources, etc.). This step is crucial to leveling the playing field so that local communities can defend their rights relative to more powerful and external actors.

Ensure that mechanisms are established to monitor the impact of any new land or other tenure legislation.
This might involve, for example, establishing "tenure observatories" that collect information (e.g., transactions/dispossession, prices, in- and out-migration, court cases and other disputes) from representative areas around the country, analyze trends, and provide early alert systems when worrisome indicators are detected.

CONCLUSION

In many countries, the current tenure security situation is admittedly grim. When customary resource management systems are undermined and weakened, by default authority passes to statutory systems that are either ill-suited to manage the complex issues in local communities, or lack the capacity to deal effectively with the needs of remote dispersed populations. Populations, many million strong, whose access to land and resources was protected by customary tenure systems have been increasingly marginalized. USAID can strengthen partner governments in their efforts to protect, salvage, or resurrect, critical elements of customary systems as needed to increase tenure security for all. Happily, there are rich experiences from countries that are already struggling with these issues and promising models of interventions that are already bearing fruit.

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