



# Contemporary processes of large-scale land acquisition by investors

Case studies from sub-Saharan Africa

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# Abbreviations

BTAG	Biofuels Technology Advisory Group
CFJJ	Centro de Formação Jurídica e Judiciária
CLS	Customary Land Secretariats
DC	District council
DUAT	Direito de Uso e Aproveitamento da Terra (land use and benefit right)
DNTF	Direcção Nacional de Terras e Florestas
EIA	Environmental Impact Assessment
ECZ	Environmental Council of Zambia
EMP	Environmental Management Plan
EPA	Environmental Protection Agency
EPB	Environmental Project Brief
FDI	Foreign direct investment
FNDP	Fifth National Development Plan
FPIC	Free, prior and informed consent
GIPC	Ghana Investment Promotion Center
Ha	Hectares
Km	Kilometres
MACO	Ministry of Agriculture and Cooperatives
MICOA	Ministry for the Coordination of Environmental Affairs
NEMC	National Environmental Management Council
NGO	Nongovernmental organisation
OASL	Office of the Administrator of Stool Lands
PAP	Project-affected persons
PSDRP	Private Sector Development Reform Program
R and R	Resettlement and rehabilitation
TIC	Tanzania Investment Centre
UNCTAD	United Nations Conference on Trade and Development
WRM	World Rainforest Movement
ZDA	Zambia Development Agency

# Abstract

Rapid growth of emerging economies, growing interest in biofuels as an alternative to fossil fuels and recent volatility in commodity prices have led to a marked increase in the pace and scale of foreign and national investment in land-based enterprises in the global South. Emerging evidence of the negative social and environmental effects of these large-scale land transfers and growing concern from civil society have placed 'global land grabs' firmly on the map of global land-use change and public discourse.

Yet what are the processes involved in these large-scale land transfers? Based on a review of policy documents, interviews with government officials from diverse sectors and discussions with customary leaders and affected communities, this paper provides a comparative analysis of legal and institutional frameworks and actual practices associated with large-scale land acquisitions in Ghana, Mozambique, Tanzania and Zambia.

Results suggest that in many cases it is not a global 'land grab' driven only by the private sector but also a supply-driven process in which governments and local (customary) entities alike are playing an active role – often bolstered by an unwavering faith in the role of foreign private sector investment to drive national and local economic development and by new opportunities for extracting rents from the land alienation process. Results also suggest that customary rights are seldom adequately protected in the context of land negotiations despite widespread legal recognition of these rights. Furthermore, results are strikingly similar within the four countries despite a wide variety of legal and institutional frameworks for protecting customary rights and regulating large-scale land acquisition. This raises an analytical challenge that we discuss in the final section as a means of distilling implications for governance.



# 1

## Introduction

Global trends such as rising food prices and policy commitments to alternative energy, have over the preceding decade led to a rapid expansion in the scope and scale of transboundary investments in land for the cultivation of food and biofuel crops (Cotula *et al.* 2009, de Schutter 2011, World Bank 2011). A recent study by the World Bank (2011) found 56.6 million ha of large-scale farmland deals to have been announced between 2008 and 2009 – with more than 66% of the area targeted by these investments located in Africa. This demand is estimated to be equivalent to more than 20 years of agricultural land expansion in Africa (Deininger 2011). While Africa has historically been largely sidelined by foreign investors, it is becoming an increasingly attractive destination for farmland investments due to its relative abundance of cheap and agro-ecologically suitable land (FAO 2008, Fischer *et al.* 2009) and its increasingly liberalised trade and investment regime (UNCTAD 2009).

While these large-scale agricultural investments could in theory make important contributions to Africa's macroeconomic and poverty indices (Poulton *et al.* 2008, Cotula *et al.* 2009, von Braun and Meinzen-Dick 2009, World Bank 2011), this rapid pace of land acquisitions is increasingly being characterised in the academic literature and the press as a 'neo-colonial land grab' by foreign companies and governments (Hall 2011). While the evidence to date does confirm private investors, foreign capitals and exports to be at the forefront of these developments, evidence also points to

significant involvement of state-owned companies, citizens, the diaspora and national political elites (GRAIN 2008, Cotula *et al.* 2009, Friends of the Earth 2010, Schoneveld *et al.* 2010, O'Brien 2011, World Bank 2011).

The active role of governments in consumer and host countries alike has also been instrumental in facilitating large-scale land acquisitions by providing financial, technical and administrative support to investors; providing regulatory frameworks conducive to investment; and, in the case of host-country governments, assisting in land acquisition (Cotula *et al.* 2009, Ilhéu 2010, Luo *et al.* 2010, World Bank 2011). According to UNCTAD (2009), 87% of investment promotion agencies in Africa are actively promoting foreign agricultural investments, more than in any other region of the world, reflecting an institutional climate highly receptive to these global capital flows. Transfer from customary to state land is also widespread as a precondition or means for transferring land to investors (World Bank, 2011). Very similar institutional structures (e.g. investment promotion agencies and 'one-stop' centres) and processes (e.g. public 'land banks', land tenure reforms, changes in the 'investment climate' and favourable investment incentives) can be observed among African countries with widely varying historical, cultural and institutional contexts. This points to the prominent role of international actors, including international financial institutions, in shaping this 'investment climate' (see, for example, Daniel and Mittal 2010).

These growing commercial pressures on land from such a diversity of actors pose very real challenges to safeguarding the rights and livelihoods of groups until now at the periphery. In practice, in much of rural Africa, systems of collective ownership under customary, rather than statutory, law continue to govern claims to land and resources.<sup>1</sup> While a majority of African governments have implemented land reform programmes to extend legal recognition to customary rights, customary claims are rarely afforded the same legal protection as formal property rights and remain susceptible to expropriation (Wily 2011). With investment flows in Africa having become increasingly contingent on ease of access to land (and arguably water), strengthening customary rights and ‘investment promotion’ are threatening to become conflicting policy objectives. This tension raises very real challenges to land governance on the continent.

This paper seeks to deepen our understanding of the processes through which customary rights are both safeguarded and marginalised in the process of negotiating large-scale land transfers to investors. It does this through a comparative analysis of the

legislation protecting customary land rights and governing large-scale land acquisitions in different case-study countries, and by contrasting legislation with actual land acquisition processes in each country.

The analysis is focused on four countries that are among the primary targets for large-scale land-based investments in Africa, namely Ghana, Mozambique, Tanzania and Zambia. By contrasting legislation and practice across countries and exploring why contradictions between legislation and practice occur, this paper identifies gaps in the mechanisms currently employed to safeguard the interests of customary land users.

Following a brief overview of customary tenure and land reforms in sub-Saharan Africa, the methodological approach employed in this study is presented. The next two sections profile findings from the analysis of the statutory underpinnings of customary rights protections and large-scale land acquisitions, and land acquisition processes in practice. The paper concludes with a reflection on findings and implications for governance.

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1 Recent scholarship has questioned use of the concept of ‘customary’ to tenure relations characterised by a dynamic interplay between diverse sources of authority (e.g. traditional leaders, decentralized local authorities) and to contemporary situations that often confer greater authority to customary leaders than was true in pre-colonial times (Platteau 1992, Toulmin and Quan 2000, Fitzpatrick 2005). Mamdani goes so far as to argue that all contemporary African customary authorities are not the legacy of pre-colonial systems but rather of the colonial experience of indirect rule (1997), which granted chiefs a high degree of control over land use and allocation and treated customary land tenure and judicial processes as fixed in precedent and practice (Brown 2005). While recognising these concerns, we choose to employ the term to represent both traditional and modern forms of ‘community’ norms and practices related to land tenure given the term’s widespread usage in legislation.

# 2

## Land reform and customary tenure in sub-Saharan Africa: A brief review

Land reform has often been central in efforts to promote rural development (Brown 2005). Indeed, land reforms were a major concern for development thinkers seeking to enhance equity and efficiency in the first few decades following the Second World War. This wave of reforms did not shape land relations on the African continent, where such aims were considered redundant due to the perceived abundance of land and flexibility of communal land tenure institutions (Platteau 1992).

By the end of the 1980s, this trend seems to have reversed, with land policy reforms rapidly expanding as a condition of structural adjustment lending by the World Bank in the region (Falloux 1987, Platteau 1992). Since the early 1990s, most countries in southern Africa and, indeed, sub-Saharan Africa at large, have gone through structural adjustment programmes and policy reforms aimed at liberalising the land market (Manji 2006, Daniel and Mittal 2010, Kleinbooi 2010), including, in some cases, legal recognition of customary rights. These reforms have been controversial for several reasons: perceived lack of public participation, limited legal backing for rights of customary users, the conceptualization of development and related land reforms as market-based enterprises, and the easing of restrictions on land ownership by foreigners and potential scale of these landholdings (Brown 2005, Zambia Land Alliance 2006, Andrianirina-Ratsialonana 2011).

Land is unquestionably recognised as a crucial asset for the rural poor. Yet in a context of growing commodity prices and commercial interest in

land, the question of how to protect customary rights gains centre stage – as does how to effectively translate these rights into meaningful economic benefits for the poor. The debate may be characterised by two camps, one advocating for formalising and individualising customary tenure, the other advocating against it.

The first position argues the ambiguity, flexibility and negotiability of rights under customary tenure undermine tenure security and productivity-enhancing investment. It also argues that formal titling increases the efficiency of land distribution and boosts agrarian productivity and capital accumulation (World Bank 1989, de Soto 2000). Since Hardin's seminal publication *The Tragedy of the Commons* in 1968, it has also been argued that customary tenure regimes and the communal resource management practices which often accompany them contribute to resource degradation by failing to regulate predatory behaviour.

The second position, which cautions against formal registration of property, is rooted in decades-long research by anthropologists and political scientists on the institutional foundations of sustainable natural resource management (Ostrom 1990). This body of research has focused on the adaptive character of customary tenure arrangements within challenging ecological conditions and their greater suitability to providing safety nets for women and other marginalised groups than formalised tenure (Behnke 1994, Lastarria-Cornhiel 1997, Niamir-Fuller 1998, Gray and Kevane 1999). It

has also highlighted cases where formal titling has allowed wealthier and more powerful groups to acquire rights at the expense of the poor (Lastarria-Cornhiel 1997, Toulmin and Quan 2000). These cases go a long way to explain why de Soto's 2000 publication *The Mystery of Capital* (which argues the lack of formalised property rights has hindered development in non-Western countries due to the inability to use land as collateral) has generated so much controversy (Manji 2008).

The trends in recognition of customary tenure have been bolstered by a wider move to enhance the efficiency and effectiveness of government by devolving key areas of authority and responsibility to local levels of government ('administrative decentralisation') or civil society groups ('democratic decentralisation') (Ribot 2003). A review of experiences in 20 African countries found widespread policy and legal commitment to decentralisation in the land sector. It also found evidence to suggest that the more devolved and locally empowering forms of land management are most successful in equitably bringing the majority of land interests under formal management (Wily 2003).

Yet recent policies emphasising foreign direct investment as a pathway to local and national

economic development and increases in the number and scale of large-scale land acquisitions raise important questions: will increasing commercial pressure on land be compatible with the commitment to recognise customary land rights, and will it advance or undermine the trend towards decentralised land and resource management? As stated by Wily (2003: i):

Already there are signs that governments do not always sustain their enthusiasm for decentralised mechanisms when they confront the realities of implementation or the loss of control over the periphery... Nor do decentralised approaches always sit easily with other common objectives of current reforms and most particularly, a wish to free up the land market. (2003:i)

The political will to safeguard customary rights and decentralised land governance may be further undermined by new opportunities for extracting rents from large-scale land developments by political and economic elites who stand to benefit from tenure insecurity and ambiguity or centralized control. Thus, the view of land rights as a context for negotiation over both the land itself and the *authority over* land becomes a highly relevant area of inquiry in its own right (Lund 2008, O'Brien 2011).

# 3

## Methodology

We used the following methodology to assess the legal underpinnings of large-scale land acquisition and the actual practices involved: a content analysis of key policies and legislation, key informant interviews with government agencies involved in land administration and investment promotion, key informant interviews with local chiefs and authorities and, where possible, focus group discussions with affected households. In cases where fieldwork was limited (e.g. Mozambique), we analysed evidence from published case studies to assess land acquisition processes in practice.

Research on actual processes of land acquisition in each country consisted of a comparative assessment of findings from multiple case studies involving large-scale land acquisitions. While the majority of findings are drawn from the biofuel sector, cases also include land acquisitions for food crop production and silvicultural plantations (Table 1).

In Ghana, nine biofuel feedstock plantations were visited from six different companies. These were

spread across four districts, namely Asante Akim North, Kintampo North, Nkoranza, and Pru – all within the forest-to-savanna transition zone that dissects central Ghana. Land acquisition processes in Pru district, where five plantation sites were located, were studied in more depth.

Case studies for Mozambique draw on 13 published case studies, five of these from the recent expansion of silvicultural plantations for pulp and paper in Niassa (spread across three districts) and eight from biofuel plantations spread across four provinces (Gaza, Inhambane, Manica and Sofala). Of the latter, four are for jatropha and four for sugarcane.

Case studies in Tanzania included two foreign-owned biofuel investments, the UK-based SunBiofuels (Kisarawe District) and Dutch company BioShape (Kilwa District).

In Zambia, findings are drawn largely from four detailed case studies involving interviews with customary land owners, three in Northern Province (Isoka and Mpika Districts) and one in Copperbelt

**Table 1. Overview of cases from which findings are drawn**

Country	Sectors	Number of cases	Methods
Ghana	• Biofuels	6 companies, 9 plantations	Key informant interviews, fieldwork, secondary data
Mozambique	• Biofuels • Silvicultural plantations	8 5	Key informant interviews, secondary data
Tanzania	• Biofuels	2	Key informant interviews, fieldwork, secondary data
Zambia	• Biofuels • Food crops	3 1	Key informant interviews, fieldwork, secondary data

**Table 2. Overview of parameters applied in the policy analysis**

Parameter	Description
1. Types and duration of land rights afforded to investors	Nature of land rights that may be acquired by investors (e.g. usufruct, leasehold or freehold) and conditions (e.g. duration and renewability of these rights).
2. Provisions to protect customary rights	Legal provisions to protect customary rights – whether through formal titling or recognition of existing systems of land occupation and tenure, as well as mechanisms to ensure local rights to land and other natural resources are safeguarded during the negotiation process.
3. Government programmes and actions for promoting and/or guiding land allocation	Government initiatives for identifying suitable and/or available land for particular types of uses, and for identifying land available for large-scale investments within customary areas; sector-specific initiatives for promoting land-based investment.
4. Envisioned process of consultation with customary land users	Legislated steps and processes through which customary rights holders are informed, consulted or given decision authority over land transfer and its terms. This includes three related sub-parameters.
a. The role of intermediaries	The legislated role of government agencies or other actors in regulating, mediating or facilitating the negotiation process.
b. Mechanisms for local representation	Legislation that specifies mechanisms for representation of 'local communities' or customary rights holders in the negotiation process.
c. Compensation mechanisms	Legal provisions that specify the level, type and distribution of compensation to be paid for land alienation.
5. Impact mitigation requirements	Legislation requiring project proponents to mitigate negative socio-economic impacts of their investments.
6. Monitoring	Legislation requiring the monitoring of social impacts and, where stipulated, the social dimensions or indicators to be monitored.
7. Dispute resolution	Legally recognised mechanisms for recourse for aggrieved parties.
8. Changes in the status or classification of customary land	The legal status of land following the termination of investor land rights (e.g. whether it reverts to customary tenure or becomes state land).

Province (Mpongwe District). While the majority of these involve large-scale land acquisitions for jatropha, one case focuses on oil palm destined for the food market.

The methodology for assessing the legal underpinnings of customary land rights and the process of large-scale land acquisition involved the development of a set of parameters to explore

how the law supports different dimensions of customary rights in the negotiation process. These parameters are structured sequentially, following key stages in the 'land acquisition process' – from the underlying rules governing rights and who may hold them and land alienation procedures to project implementation and the status of land following project completion. The parameters are summarised in Table 2.

# 4

## The statutory underpinnings of large-scale land acquisition

The statutory underpinnings of customary rights and how these rights are safeguarded in the process of large-scale land acquisition are presented below in country narratives and summarised in Table 3.

### Ghana

Land ownership in Ghana can be classified into two broad categories: that under customary ownership (constituting 78% of the total land area) and that controlled by the state (20% of the total land area), with the remaining area under some form of shared ownership (Deininger 2003). The Ghanaian Constitution of 1992 forbids the sale of customary land, only allowing for temporary alienation through leasehold titling. Customary land can only be reclassified to state land through the use of the state's right to eminent domain, which enables involuntary expropriation of customary land for a 'public purpose'. Customary law freehold (or usufruct title) can be acquired by subgroups or individuals within 'traditional areas', typically by being the first to cultivate that land, through inheritance or through allocation by traditional authorities. However, only in select cases are these lands formally registered (thereby providing legal security) – typically in (peri-)urban areas or where so-called Customary Land Secretariats (CLS) have been established. A Traditional Council, comprised of the area's Paramount Chief and village elders, typically administers land under customary ownership. These Councils, referred to in Ghana as the 'allodial title' holders, hold the ultimate right to allocate and retract user rights and to reallocate

and alienate land. Thus the Traditional Council holds the sole authority to negotiate with project developers over leasehold terms. As a service to investors, the Ghana Investment Promotion Center (GIPC) maintains a land bank to connect investors to Traditional Councils willing to alienate land to investors.

Various statutory instruments, most notably the Constitution, have specified the conditions under which Traditional Councils are to administer (and therefore also alienate) their landholdings. For example, Traditional Councils have the 'obligation to discharge their functions for the benefit respectively of the people of Ghana, of the stool, skin, or family concerned and are accountable as fiduciaries in this regard' (Constitution 1992, Article 36.8).

Although principles of free prior and informed consent (FPIC) are not enshrined explicitly in the land laws, the National Lands Policy of 1999 does stipulate that 'no interest in or right over any land ... can be disposed of ... without consultation of the owner or occupier' (Article 4.3c). On the basis of these and other provisions (see Table 3), land users aggrieved by land alienation to a project developer (as a result of, for example, involuntary expropriation and inadequate compensation for the same), have avenues for seeking redress, through various sectoral ministries, customary institutions and the judiciary.

Various instruments detail, in general terms, the duties and responsibilities of Traditional Councils

Table 3. Policies and regulations governing processes of customary land allocation/acquisition by investors

Parameter	Ghana	Mozambique	Tanzania	Zambia
1. Types and duration of land rights afforded to investors	Leasehold titles ≤ 50 years (foreign investors) and 99 years (domestic investors), renewable ( <i>Land Title Registration Law 1986, Constitution 1992</i> ).	Long-term usufruct titles, or DUAT ( <i>Direito de Uso e Aproveitamento da Terra</i> ), valid for up to 50 years, renewable ( <i>Land Law 1997</i> ).	Derivative rights granted through the Tanzanian Investment Council for non-citizens; granted rights of occupancy or derivative rights for citizens ( <i>Land Act 1999</i> ). Upper limit of 99 years, with biofuels subject to 25-year and 20 000 ha limits ( <i>Land Act 1999, Biofuels Guidelines 2010</i> ).	Unless approved by the President, a 14-year Provisional Certificate is initially issued. After at least 6 years, a 99-year Certificate of Title can be applied for ( <i>Lands and Deeds Registry Act 1914</i> ).
2. Provisions to protect customary rights	Customary tenure is recognised and governed by customary law ( <i>Land Title Registration Law 1986</i> ). The Traditional Council has to approve the alienation of Customary Land and has fiduciary duties ( <i>Administration of Lands Act 196, Constitution 1992</i> ). Land can be compulsorily acquired by the state through the right to eminent domain ( <i>State Lands Act 1962</i> ).	DUATs are acquired for occupation based on customary norms and practices; when land is acquired, it should be 'free and without occupants' ( <i>Land Law 1997</i> ). DUAT title holders must give access to neighbours that lack access to public roads or water supply; public and community access routes established by customary practice shall be registered ( <i>Land Law Regulations 1998</i> ). 'Public interest' projects placing restrictions on existing DUATs require compensation ( <i>see below</i> ).	Customary tenure is recognised and governed by customary law ( <i>Village Land Act 1999</i> ). Both the Village Council and Village Assembly have to provide approval when allocating land ( <i>Village Land Act 1999</i> ). Land can be compulsorily acquired by the state through the right to eminent domain ( <i>Land Acquisition Act 1967</i> ). Former land users should be allowed to continue to use water resources ( <i>Land Act 1999</i> ).	Customary tenure is recognised and governed by customary law ( <i>Land Act 1995</i> ). The chiefs and local authorities have to approve the alienation of customary land ( <i>Land Act 1995</i> ). Customary land can be compulsorily acquired by the state through the right to eminent domain ( <i>Land Acquisition Act 1970</i> ). Customary land cannot be alienated without certification that the people's interests and rights have not been affected by the approval' ( <i>Administrative Circular, No. 1, 1985</i> ).
3. Initiatives to guide land allocation	The Ministry of Land and the GIPC have established land banks as a service to investors.	Commercial biofuel developments should be limited to land approved under the Agroecological Land Zoning Exercise (2008), which considers both land suitability and availability ( <i>National Biofuel Policy and Strategy 2009</i> ). Several agricultural growth corridors are underway, linking key mining and agricultural areas to major ports (e.g., the Japanese and Brazilian-supported 'Pro-Savana' initiative along the Nacala corridor).	The TIC has established a land bank as a service to investors; the <i>Kilimo Kwanza</i> policy encourages large-scale agricultural initiatives and has a target to increase general land to about 20% by converting village land.	In each province, land has been earmarked for Farm Block Development (FBD), where infrastructure is to be provided by the government to stimulate commercial agricultural development on agroecologically suitable and strategically located land through a core-satellite structure – as a programme under the <i>National Agricultural Policy 2004</i> . The Ministry of Lands and ZDA have established land banks as a service to investors.

Parameter	Ghana	Mozambique	Tanzania	Zambia
4. Process of consultation with customary land users	No interest in land belonging to an individual or family can be disposed of without consultation ( <i>National Land Policy 1999</i> ). A public hearing may be required if concerns are raised over the content of the EIA before an environmental permit is issued ( <i>Environmental Assessment Regulations 1999</i> ).	Community consultation in the process of ensuring land is 'free and without occupants' and delineating community lands is required ( <i>Land Law 1997, Technical Annex Land Law Regulations 2000</i> ). In the EIA process, public participation is required for all projects causing dislocation of communities or leading to restrictions in natural resource use ( <i>Environmental Impact Assessment Regulations 2004</i> ).	Anyone proposing to use village land under a right of occupancy may, by invitation, address a Village Assembly meeting to answer questions about the proposed land use ( <i>Village Land Act 1999</i> ). In the EIA process, the NEMC must solicit oral or written comments from those affected, notify the public, circulate the EIA for review, and convene a public hearing if requested ( <i>Environmental Management Act 2004</i> ).	When alienating land, both chiefs and District Councils must declare that 'members of the community' were consulted ( <i>Customary Tenure Conversions Regulations 2 1996</i> ). Project developers must seek the views of those to be affected by the project and describe 'the socio-economic impacts...', such as resettlement' when preparing an EIA ( <i>Environmental Impact Assessment Regulations 1997</i> ).
4a. Mechanisms for local representation	Besides deciding on the alienation, the Traditional Council is mandated to represent its constituents in negotiations, having fiduciary duties to administer land in a manner beneficial to its constituency ( <i>Constitution 1992</i> ).	The 'community's own mechanisms for representation and action' are fixed by law ( <i>Land Law 1997</i> ). To ensure 'representativeness of results and consensus', the delineation of areas occupied by local communities must include men and women, diverse socio-economic and age groups and neighbours, and be signed by three to nine men and women selected in public meetings ( <i>Technical Annex, Land Law Regulations 2000</i> ).	Besides deciding on the alienation with the Village Assembly, the Village Council is required to also agree on and approve the nature and extent of compensation with the Commissioner of Lands ( <i>Village Land Act 1999</i> ). The Village Council is to manage the land as a trustee in line with principles of sustainable development ( <i>Village Land Act 1999</i> ).	When approving conversion of customary to leasehold tenure, the chiefs and District Councils must confirm that the land transfer to the applicant will not infringe on the rights of others ( <i>Administrative Circular No.1 1985, Customary Tenure Conversion Regulations 1996</i> , incl. <i>Regulation 2</i> ).

Parameter	Ghana	Mozambique	Tanzania	Zambia
4b. The role of intermediaries	The GIPC should provide to an enterprise the assistance and guidance as the enterprise may require ( <i>Ghana Investment Promotion Act 1994</i> ). The Lands Commission is required to approve that the development is consistent with existing development plans before titling ( <i>Constitution 1992</i> ).	The Cadastral Services and local administrative authorities are to be involved in land identification and delineation; the District Administrator or his/her representative is to evaluate the existence of DUATs acquired through occupation, and to specify the terms of partnership in cases where such rights exist ( <i>Land Law Regulations 1998</i> ).	The TIC shall help identify and provide investment sites, estates, or land for the purpose of investments ( <i>Tanzania Investment Act 1997</i> ). Both the President and Minister of Land have to approve the transfer of village land to general land, and the Commissioner of Lands on the nature and extent of compensation ( <i>Village Land Act 1999</i> ).	The ZDA, with the Ministry of Lands, 'shall assist an investor in identifying suitable land for investment and ... applying to the responsible authorities for land' ( <i>ZDA Act 2006</i> ). The District Council must approve the request of chiefs to convert customary to leasehold tenure and certify that existing interests in land are not being infringed by alienation ( <i>Customary Tenure Conversion Regulations 1996</i> ). The Commissioner of Land and the President must approve the alienation ( <i>Administrative Circular No.1 1985</i> ).
4c. Compensation mechanisms	Only legislated for land acquisitions by the state, which should enable the replacement of land of equal value and suitability and 'cover the cost of disturbance' ( <i>State Lands Act 1962, Constitution 1992</i> ). For all types of land acquisitions, 'provisions should be made for persons displaced' ( <i>National Land Policy 1999</i> ). Land revenues should be shared between the Traditional Council, Stool, and District Assembly according to a constitutional formula ( <i>Constitution 1992</i> ).	DUAT title holders must pay an 'authorisation tax' and annual ground rent to government ( <i>Land Law 1997, Land Law Regulations 1998</i> ). Where 'public interest' projects (e.g. transport, energy or water supply lines) place restrictions on existing DUATs, the public or private entity involved must compensate the title holder an amount corresponding to the value of the harm resulting from the non-utilisation of the affected area ( <i>Land Law Regulations 1998</i> ).	Any person whose customary right of occupancy or recognised long-standing occupation or customary use of land is revoked has right to full, fair and prompt compensation ( <i>National Land Policy 1996, Land Act 1999</i> ). Compensation shall be for the value of unexhausted improvements and loss of profits and include a transportation, accommodation and disturbance allowance ( <i>Assessment of the Value of Land for Compensation Regulations 2001</i> ).	When land is acquired compulsorily by the state, compensation should be equal to the open market value of the property ( <i>Land Acquisition Act 1970, Constitution 1991</i> ). When land is not alienated for a 'public purpose', the President should always receive compensation for the alienation and ground rents ( <i>Land Act 1995</i> ). As part of the environmental mitigation measures, proponents should provide compensation to affected individuals and communities (see below).

Parameter	Ghana	Mozambique	Tanzania	Zambia
5. Impact mitigation requirements	Aside from the above compensation mechanisms, impact mitigation requirements apply only to environmental issues and should be included in the EMP ( <i>Environmental Assessment Regulations 1999</i> ).	Projects requiring full EIA must identify mitigation measures, which are unspecified but presumably require attention to the general evaluation criteria in Art. 8 – including the ‘number of people and communities affected’ and a set of general criteria related to the significance of impacts ( <i>Environmental Impact Assessment Regulations 2004</i> ).	The project developer will propose mitigation measures in the EIA and EMP, which include ‘ways and means of minimising negative aspects, which may include socio-economic and cultural losses suffered by communities and individuals, while enhancing positive aspects of the project’ ( <i>Environmental Impact Assessment and Audit Regulations 2005</i> )	Environmental permit holders should adopt mitigation measures, ‘to ameliorate or compensate for adverse environmental impacts and losses suffered by individuals and communities and for enhancing benefits’ ( <i>Environmental Impact Assessment Regulations 1997</i> ).
6. Monitoring (social dimensions of, procedures)	The EPA is charged with ensuring ‘compliance with any laid down environmental impact assessment procedures in the planning and execution of development projects’ ( <i>Environmental Protection Agency Act 1994</i> ). Project proponents must produce an EMP to guide ‘self-regulation’ and submit an annual environmental report ( <i>Environmental Assessment Regulations 1999</i> ).	EMPs, required for both the full EIA and simplified environmental assessment, require self-monitoring; MICOA is also responsible for inspection and enforcement, and may require environmental audits ( <i>Environmental Impact Assessment Regulations 2004</i> ). Provisional land authorization (max. two years for foreigners) may be revoked if development plans are not carried out by the end of the authorized period and there is no reasonable justification ( <i>Lei de Terras 1997</i> ).	Under environmental impact regulations, project proponents must submit annually an environmental audit report, based on provisions in the EMP, to the NEMC ( <i>Environmental Impact Assessment and Audit Regulations 2005</i> ). The NEMC, in consultation with relevant ministries, may monitor ‘all environmental criteria and phenomena’ and conduct audits ( <i>Environmental Management Act 2004</i> ). The TIC has an Aftercare Investment Service charged with monitoring investments.	The proponent should conduct an ‘environmental audit’ after 12 months, and thereafter whenever requested ( <i>Environmental Impact Assessment Regulations 1997</i> ). An inspector may undertake investigations relating to the implementation of the permit conditions ( <i>Environmental Impact Assessment Regulations 1997</i> ). The ZDA may also make inspection to determine whether the investment is being implemented as per investment licence conditions ( <i>ZDA Act 2006</i> ).

Parameter	Ghana	Mozambique	Tanzania	Zambia
7. Dispute resolution	<p>Aggrieved persons can issue complaints with the EPA over issuance of environmental permits (<i>Environmental Assessment Regulations 1999</i>), with the Lands Commission over issuance of leasehold title (<i>Land Title Registration Regulation 1986</i>), and with the House of Chiefs over chiefly misconduct (<i>Chieftaincy Act 2008</i>).</p>	<p>Local communities participate in conflict resolution (<i>Land Law 1997</i>). There is a policy intention to strengthen community and district tribunals to address eventual conflicts related to DUAT titles (<i>National Land Policy 1995</i>). Those whose rights have been undermined by the Environmental Law or who suffer personal damages may seek reinstatement of their rights or demand reparations through the courts of law (<i>Environmental Law 1997</i>).</p>	<p>The Village Land Councils should initially deal with land disputes. If they are unable to resolve the dispute, a case can be brought before the judiciary (<i>Village Land Act 1999</i>). Persons aggrieved with a decision, omission, imposition/ failure to impose a condition, or approval/disapproval of an EIA, may appeal to the Environmental Appeals Tribunal within 30 days of occurrence (<i>Environmental Management Act 2004</i>).</p>	<p>Any person aggrieved with a direction or decision of a person in authority may apply to the Lands Tribunal for determination at his or her own expense; persons aggrieved by decisions of the Tribunal may appeal to the Supreme Court within 30 days (<i>Lands Tribunal Rules 1996; Customary Tenure Conversions Regulations 1996</i>). Aggrieved persons can issue complaints with the ECZ over issuance of environmental permits within 45 days of issuance (<i>Environmental Protection and Pollution Control Act 1990</i>).</p>
8. Changes in the status or classification of customary land	<p>Customary land cannot be sold (<i>Constitution 1992</i>); it can only be reclassified to state land when acquired through the right to eminent domain (<i>State Lands Act 1962</i>).</p>	<p>The Land Law of 1997 only specifies the fate of 'non-removable improvements' upon termination of DUATs, which become state property. While the fate of land is unclear, the process of delineating community land could result in any remaining land with DUATs being placed under permanent state control.</p>	<p>Village land must be transferred to state land prior to its acquisition by investors (<i>Land Act 1999</i>).</p>	<p>Customary land must be transferred to state land prior to its acquisition by investors (<i>Lands and Deeds Registry Act 1914</i>).</p>

and outline mechanisms for recourse. The existing framework, however, fails to specify in sufficient depth the processes and terms under which alienation is permissible. With the exception of compulsory land acquisitions by the state, there are no comprehensive legal provisions that guarantee the right to compensation for loss of livelihood, specify resettlement and rehabilitation (R and R) procedures, or assign responsibilities to this effect. Although the Lands Commission has to approve and ultimately allocate the formal leasehold title to the investor, land laws fail to specify criteria for approval; they merely stipulate that the Lands Commission determines whether the project is 'consistent with existing development plans' (Constitution 1992, Land Commission Act 2008).

When converting more than 40 ha of land, project proponents must conduct a detailed Environmental Impact Assessment (EIA). In addition to environmental factors, the EIA incorporates social and economic dimensions. EIA-related laws, however, do not specify responsibilities of proponents towards project-affected persons (PAP). For example, proponents must adopt impact mitigation strategies as part of their Environmental Management Plans (EMP), but are not legally required to account for non-environmental impacts.

Moreover, no national-level regulations specify the type of land that can be converted to plantation agriculture, with the exception of land with an officially recognised protected status. For physical developments, permits must be obtained from local government, but not when they relate to 'farming and other activities carried on in a settlement of a population of not more than five thousand' (Local Government Act, article 51.3[a]).

## Mozambique

Mozambique has one of the most progressive land laws in Africa. In addition to protecting land-use rights acquired under customary law or through 'good faith' occupation, the 1997 Land Law is widely seen as striking an effective balance between protecting customary rights and enhancing land access for investors. As all land is ultimately vested in the state and cannot be sold or alienated, rights

to land are governed by the issuance of a *Direito de Uso e Aproveitamento da Terra*, or DUAT (land use and benefits right). DUATs may be acquired in three ways: through land occupation by individuals or local communities following customary norms and practices; through land occupation by Mozambican nationals who intend to use the land for at least 10 years; or through official authorisation of a request. While customary land users may obtain an individual or collective DUAT title, the absence of a title does not undermine rights acquired through land occupation following customary norms and practices.

Foreign companies registered in Mozambique may acquire DUATs. DUATs intended for 'economic uses' (by foreign entities or market-oriented activities carried out by Mozambican nationals) are subject to a maximum period of 50 years, renewable. Once an application for a DUAT has been submitted, a provisional authorisation of no more than five years (for Mozambican nationals) or two years (for foreigners) is issued, allowing land developments to begin. After this period, a title is issued. However, should development plans not be carried out according to the approved calendar of activities without a valid justification, or if fiscal obligations are not met, the provisional authorisation may be revoked without indemnification. If such rights are revoked due to non-compliance or non-extension of the title, such rights return to the state.

For all areas falling outside of urbanisation plans, the size of the landholding determines the authorising body: provincial authorities approve DUATs < 1000 ha; the Minister of Agriculture and Fisheries approves DUATs for 1000 to 10 000 ha; and the Council of Ministers must approve for land areas greater than 10 000 ha. A 2008 government resolution further requires the submission of terms of agreement with 'the holders of rights acquired by occupation' for DUAT applications for land areas in excess of 10 000 ha (Kleinbooi 2010).

Growing demand for biofuel production led the government to suspend the issuance of new land titles between October 2007 and May 2008 and initiate an agroecological zoning exercise; the first zoning was finalised in early 2008 at a scale

of 1:1 million (Nhantumbo and Salomão 2010). In recognition of the inaccuracies of zoning at this scale, the government is carrying out a second zoning exercise at a 1:250 000 scale. At the time of writing, the issuance of new DUATs was reportedly still on hold in Maputo and Zambézia Provinces.<sup>2</sup> Sectoral legislation restricting investments to areas authorised in the agroecological zoning, such as the Biofuels Policy and Strategy of 2009, enable the alignment of investments to areas identified as suitable.

Before local administrative authorities approve the issuance of a title, a community consultation must be carried out to ensure the area is 'free' and without occupants. The legislation requires representatives of the Cadastral Services unit, the district administrator and local communities to carry out this consultation jointly. The process of delineating customary land, whether for investors or for formalising customary land rights, is described in far greater detail in Mozambican legislation than is true for the other case-study countries. The process involves the following steps (Technical Annex of the Land Law Regulations, 2000):

1. 'Information and dissemination' on the proposed project, relevant laws, delineation objectives and methodology, advantages and implications;
2. A participatory diagnostic exercise to document the history, 'culture', social organisation, use of land and natural resources, spatial occupation, population dynamics, conflicts and mechanisms for their resolution and to conduct participatory mapping;
3. Preparation of a 'sketch' that geo-references local landmarks and community boundaries;
4. Devolution of the sketch to the local community and neighbours, to be signed by three to nine community members, all title holders, those occupying neighbouring properties and the district administrator; and
5. Registration in the National Land Cadastre.

Article 12 of the Land Law further subjects collective DUATs to the rules of co-ownership of property under the Civil Code, which gives all cotitlholders (community members) an equal say over the use and disposal of assets (Norfolk 2009). Thus, while the law seemingly gives communities veto power over land access by investors, mining licences are clear exception. Here, the right to eminent domain is invoked, involving compensation but no community consultation. The Rural Development Strategy and *Iniciativa de Terras Comunitarias* (Community Lands Initiative), a donor-funded initiative to support the registration of rights and local economic development opportunities from the same, provide further mechanisms to support the negotiation of partnerships of mutual benefit between communities and investors (de Wit and Norfolk 2010).

## Tanzania

Land in Tanzania is divided into three categories: village, reserved and general land:

- Village land is managed and administered by Village Councils, members of which are elected by Village Assemblies as per the provisions of the Village Land Act of 1999.<sup>3</sup>
- Reserved land includes land set aside for various protection purposes, including forest and wildlife conservation, marine parks and public recreation and utilities, among others (Land Act 1999). Such reserved land is under the management and administration of sectoral government agencies.
- General land, which is regulated under the provisions of the Land Act of 1999 and under the supervision of the Ministry of Lands, refers to land that is neither village land nor reserved land. 'Unoccupied' or 'unused' village land is included in this category.

These three categories are limited, however, by the legal caveat that all land is vested in the President as trustee. Hence transfers across land categories are subject to the Executive's approval. Alongside these

<sup>2</sup> Interview with Maputo-based staff of CEPAGRI, 30 November 2010.

<sup>3</sup> Village Assemblies, formed under the Local Government Act of 1982, consist of all adults in the village land area.

statutory provisions that confer administrative responsibilities to state actors and village authorities, Tanzania's land laws provide explicit protections for customary rights, which are placed on an equal footing with statutory rights, and which hold sway regardless of whether they are certified.

Customary rights of use prevail across the different categories and persist even where land is transferred across categories. As with more formal rights, they can be re-assigned through lease and inheritance but are administered by customary authorities – the Elders' Council – whose involvement is required to endorse land allocation and in dispute resolution. Land ownership in Tanzania is restricted to citizens, except in the case of investment, where derivative rights of occupancy issued via the Tanzania Investment Center (TIC) are permitted.

While accurate data on the specific breakdown among categories are lacking, experts estimate that village land accounts for more than 70% of land in Tanzania, reserved lands about 28% and general land about 2%. Most land targeted by investors is village land. The Village Land Act of 1999 allows Village Councils (with consultation and approval of Village Assemblies) to transfer up to 250 ha of land. The Minister of Lands approves transfers involving more than 250 ha (as with most land acquisitions by investors). To transfer these lands to investors, village land must first be re-categorised to general land, which is then vested in the State, via the TIC, for allocation to investors.

Although the Land Act of 1999 accommodates the transfer of general land back to village land, it is unclear whether land vested in the TIC will revert back to village land upon contract default or termination. The Minister of Lands must ensure the Commissioner of Lands, or any assigned official, explains the purpose of any proposed transfer of village to general land to the Village Assembly. Moreover, the investor must address the Village Assembly to respond to villagers' concerns. If the Village Assembly approves and recommends the transfer, the Commissioner of Lands forwards the approval to the President, who signs off on the transfer to general land. After the President's approval, the notice of transfer is gazetted, giving aggrieved parties 30 days to lodge complaints prior

to the final transfer. The land is then vested in the TIC, which issues derivative rights of occupancy to foreign-owned investors or a granted right of occupancy to a Tanzanian-owned enterprise. Such leases must not exceed 99 years, and may include periods of 33 and 66 years. The Biofuels Guidelines of 2010, however, subject land acquisition for biofuels to 25-year and 20 000 ha limits. Leases can be renewed or revoked subject to the investor's performance in upholding the terms of the lease.

Tanzanian legislation requires that compensation be paid prior to transfer (Village Land Act 1999; Land Act 1999). If the President so directs, the investor can pay the compensation (Land Act 1999). As approximately 90% of villages do not have land-use plans that document current and projected land use, they must draw up these plans prior to transfer. District planning agencies coordinate this process with oversight from the Land Use Planning Commissioner. As with the transfer process, village land-use planning requires the input of village residents and other stakeholders, including their verification and adjustment of the plan (Land Use Planning Act 2007, URT 2010).

Similar to other countries, an elaborate system of approvals and consent by actors extending from the village up to the President has been crafted to check against arbitrary and/or unsanctioned appropriation of village land. A ceiling is also placed on the amount of land that can be independently transferred by village-level authorities.

## Zambia

In Zambia, all land is vested in the President, who holds the land 'in perpetuity for and on behalf of the people of Zambia'. Land is further classified as either state land or customary land, categories which are in turn governed by leasehold and customary tenure, respectively. Widely cited statistics suggest that 94% of all land in Zambia is under customary tenure (Republic of Zambia 2006a), but these figures are reportedly derived from 1978 data.<sup>4</sup> While a comprehensive land audit has not been conducted since this time, the Committee on Agriculture and Lands (2009) asserts

4 14 May 2010 interview with Bwendo Kabanda of Oxfam.

that traditional authorities effectively control only 37% of land in Zambia; this raises the question of the scale of transfers from customary to leasehold tenure. While state or customary land can legally be allocated to investors, the large areas under customary tenure, along with the difficulty of accessing state land, mean that most large-scale investments, in practice, target customary areas.

Investors primarily access land in Zambia by acquiring a leasehold title in the form of a Provisional Certificate, which is valid for a period not exceeding 14 years. After six years, upon submission of a boundary survey in accordance with procedures stipulated in the 1971 Survey Regulations, the investor may apply for a 99-year Certificate of Title. In contrast with the Provisional Certificate, Certificates of Title are non-contestable. An investor may also obtain a Certificate of Title directly if approved by the President (Lands and Deeds Registry Act 1914).

Colonial-era legislation placed restrictions on the conversion of customary land to Crown land. However, the controversial Land Act of 1995 enables customary land to be permanently converted to leasehold tenure and for non-Zambians to acquire land, thereby opening land up to investors. In cases where investors acquire leasehold title from customary authorities, the state becomes the owner and administrator of the land; the title seemingly reverts to the state upon expiry, permanently extinguishing any rights of customary land owners/users.<sup>5</sup>

Thus, while the Land Act recognises existing rights to land in customary areas, it also enables foreign investors to convert land in customary areas to leasehold and to acquire title – provided the investor's proposed land use is deemed to be of 'community' or national interest (Brown 2005). The Land Act also gives the President far-reaching powers to alienate land to any Zambian or to any foreigner who is a permanent resident, holds an investment certificate by the Zambia Development

Agency (ZDA) or has obtained the President's consent in writing.

The primary pathways for acquiring customary land are through the consultation of customary land owners and compulsory acquisition by the state (Lands Act 1995, Land Acquisition Act 1996). In the first of these, the investor either seeks consent directly from the chief with consultation of the village headman or a lands working group of the Ministry of Lands and ZDA negotiates land transfers on behalf of investors. In the former case, the investor may move independently or move together with representatives of government agencies. If the acquisition is approved, the Chief issues an approval letter and the investor carries out a physical demarcation of the area with a sketch map in the presence of village headmen, and both are submitted to the District Council (DC). The DC issues a recommendation to the Commissioner of Lands, who either approves the request or, for requests involving more than 1000 ha, submits a letter to the President for his approval (Ministry of Lands 1996).

In recent years, the government has embarked on a number of initiatives to facilitate and support investor efforts to access land. The Fifth National Development Plan (FNDP) 2006 – 2010, for example, considers improvements in the land delivery system to increase the amount of land available to investors to be 'one of the major structural reform agenda items' under the Private Sector Development Reform Programme (PSDRP). The PSDRP, which was established under the Plan, established a lands working group, comprised of representatives from the Zambia Development Agency (ZDA) and the Ministry of Lands. As one of its key responsibilities, the group is involved in negotiating with chiefs for the relinquishment of customary lands, for inclusion in a land bank (Ministry of Lands 2009). In a related initiative, the working group has also supported the Farm Block Development Programme, established following the adoption of the National Agricultural Policy in 2004. Under this Programme, the government is actively acquiring large areas of agroecologically suitable and strategically located land for development into integrated commercial farming estates, with publicly financed infrastructure. Each

<sup>5</sup> While the law does not state this explicitly, leasehold title is by definition a lease from government to investors and lands acquired under the British South Africa Company – some of the most fertile lands located along rail lines – reverted to state land upon termination of the 99-year lease.

Farm Block is to consist of a so-called core venture, around which small- to medium-scale satellite farms would be established.

Mechanisms for protecting customary rights in the context of growing commercial pressures on land include: (i) the provision that chiefs and local authorities must approve any conversion of customary to leasehold tenure (in the case of negotiated land transfers); and (ii) in the case of compulsory acquisition, compensation in cash or in kind. Mechanisms for ensuring downward accountability to customary land-users include a written declaration from the Chief stating that 'members of the community' were consulted and were unaware of any conflicting rights; and a requirement that the Council ascertain 'any

family or communal interests or rights' relating to the land (Customary Tenure Conversion Regulations of 1996). The EIA process also requires community consultations and public hearings, and requires proponents to adopt impact mitigation measures that 'compensate for ... losses suffered by individuals and communities'. Outside of these mechanisms, there are no legal requirements to compensate land users for their loss of access to land and land resources. When disputes surrounding land alienation arise, aggrieved land users have access to the High Court and Land Tribunals established under the Land Act. Moreover, land users may contest the issuance of an environmental permit by appealing to the Minister of Environment and the High Court.



# 5

## Land acquisition in practice: Evidence from case-study countries

This section summarises findings from the four-case study countries related to the actual practice of land acquisition and the extent to which it reflects legislated norms and processes. Findings by country are organised according to the key variables specified in the methodology.

### Ghana

Since 2005, Ghana has witnessed a rapid rise in the number of commercial investors seeking to acquire land for plantation agriculture. Over a period of five years, investors have gained access to approximately 1.2 million ha – most of which is located in central Ghana's forest-savanna transition zone (Schoneveld *et al.* in press). The Government of Ghana, however, did not appear to have an active role in enabling these land acquisitions. While the government can acquire land on behalf of investors through its right to eminent domain, at the time of research it had not used this right for any recent land acquisitions. Nor was there any evidence of government leasing out state land to investors.

Of the nine plantations visited in this research, all land accessed by the investors is on customary land. Investors can obtain support from the Ghana Investment Promotion Center (GIPC), which maintains a land bank, to help identify suitable land and Traditional Councils willing to lease out their land. Although the GIPC did facilitate access to 150 000 ha of land in southern Ghana for two high-profile investments into jatropha

cultivation<sup>6</sup>, there was no evidence of government institutions actively supporting land acquisitions for the projects explored in the research. In these cases, all investors, some with support from local intermediaries or partners, initiated contact first with the Traditional Council, not the government. Traditional Councils subsequently negotiated directly with the investors on the terms and conditions for the leasehold contract. By and large, Traditional Councils were found to be exceptionally responsive and accommodating to investors; in addition to any payments of direct benefit to them, they had consistent expectations that large-scale investments in the area would contribute to job creation, market opportunities and the provision of social infrastructure (e.g. schools, hospitals).

In principle, as per the Constitution, Traditional Councils have a clear fiduciary duty. However in practice, none of the land alienation cases demonstrated evidence of any consultations with the wider community to determine whether the allocation would be 'in the benefit ... of the people' (1992 Constitution, Article 36.8). Neither was there any evidence of civil society organisations (CSOs) or government institutions actively involved in the land acquisition process. Though the GIPC did not appear to have initiated any of the observed land acquisitions, it indicated that, when it does link investors to landholders, it does not participate in any subsequent dealings.

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<sup>6</sup> Interview with the Director of the Ghana Investment Promotion Center, 6 August 2009.

This apparent absence of intermediaries (and formal regulations promoting this) in the actual alienation process exposes the process to iniquitous and exploitative conduct, from both the Traditional Council and the prospective investor. Investors can exploit the ignorance of Traditional Councils which may be unfamiliar with the true market of land, not attuned to potential long-term implications of alienation and easily swayed by 'development' prospects. For example, four Traditional Councils (for four separate plantations by two different companies covering 91 500 ha) entered into agreements with the investor to share between 25% and 33% of profits from jatropha seed sales. However, both companies established different limited-liability companies for cultivation and biodiesel refining. With such corporate structures and undifferentiated tax rates in the agricultural sector (with both agro-processing and agricultural production being zero-rated in Ghana), companies can easily concentrate future profits within the refining business to circumvent pay-outs. Moreover, the tendency of Traditional Councils to put their faith in the good will of the investors poses risks. For example, according to a Traditional Council that leased out 14 000 ha in Pru District, it made a verbal agreement with the investor to support the development of social and physical infrastructure in the traditional area's communities and adopt preferential hiring policies. The investor did not live up to this agreement. The failure of the Traditional Council to contractualise these agreements illustrates well the lack of legal literacy of some Traditional Councils.

While the Regional Lands Commission has the legal authority to decline investor applications for formal leasehold titles (e.g. on grounds of inconsistency with district development plans or objections by the public), in practice it seldom exercises this authority. According to the Regional Lands Commission in Brong Ahafo, for example, the application is always approved once the paperwork is in order. Therefore, in practice, the Lands Commission does not appraise or exert influence over the content of the contracts signed between Traditional Councils and investors.

Lack of outside scrutiny and the absence of appropriate laws to regulate land acquisitions also

enable Traditional Councils to exploit negotiations for personal enrichment, rather than representing, in their role of fiduciaries, the interests of their constituency. According to customary law, when the Chief allocates land, the recipient presents a token of allegiance or 'drink money' for the Chief's consideration. While this customarily entails a bottle of alcohol, kola nuts and food products, it can also take the form of large cash payments. In this manner, 'drink money' is increasingly a way to put a socially acceptable 'label' on what amounts to rent capture by traditional authorities.

Although by law all land revenues are to be reported to the Office of the Administrator of Stool Land (OASL) and divided along a constitutional formula, drink money falls into a grey area since it is traditionally considered part of a social custom rather than income.<sup>7</sup> The nature of these payments is therefore rarely made public and claimed by the OASL. Consequently, there is arguably a risk that Traditional Authorities may forego large annual rent payments, which are typically formalised as part of the land lease agreement, in favour of a more informal type of one-off contribution benefitting individual 'big men' or customary leaders.

With high levels of opacity surrounding the nature of negotiations and the payment of drink money, it proved impossible, despite efforts, to collect concrete evidence of these informal agreements. Even community members were frequently found to have had no knowledge of even the most basic provisions of the leasehold contracts, illustrating well the lack of transparency of the land alienation process. In one case, we observed that communities were only made aware of the land allocation when land occupation and use by investors had already commenced.

At all the plantations assessed in this research, communities were required to relinquish farmlands, without having formally acquiesced. At the time of research, no Traditional Council had proposed direct compensation, nor promised to share future revenue flows. It is difficult to gauge the motives of

<sup>7</sup> Interview with the Project Director of the Land Administration Project (LAP), Lands Commission, 7 August 2009; Interview with the Administrator of Stool Lands in Nkoranza District, 14 August 2009.

Traditional Councils accurately and to speculate how well, and to what ends, future land revenues will be used. But there is undeniably considerable risk of elite capture and self-interest with existing (legal) structures of power and control.

Scepticism as to the benevolence of Traditional Councils also appears to be endemic in the region, an attitude widely held by community members and government officials alike. One Traditional Council in Pru District exhibited a marked sense of personal entitlement to land revenues: 'Many households neglect to pay their homage to us at the end of the season. The money from the company is far, far better'. Others have made similar observations, particularly in relation to land alienations in the urban periphery (Kasanga and Kotey 2001, Wily and Hammond 2001, Ubink and Quan 2008). The failure of Traditional Councils to consult their constituents contravenes provisions in the Land Policy of 1999. Arguably, in cases where land loss leads to long-term deterioration of livelihoods, it also contravenes the Traditional Councils' fiduciary responsibility, as explicitly stated in the Constitution and alluded to in other laws.

The wholesale transfer of large contiguous areas of land for plantation monoculture in Ghana could have far-reaching implications for the livelihoods of those losing access to land and land resources. Although the government in practice exerts little influence over the terms and conditions of land alienation, project-affected persons can obtain redress through other avenues. In the EIA process, for example, companies are required to take stock of potential socio-economic implications. However, due to omissions in from environmental law, companies are not legally required to adopt impact mitigation strategies that are non-environmental. Despite this, at the time of research, all three companies that had obtained an environmental permit (covering an area of approximately 93 000 ha) had adopted strategies to mitigate social impacts as part of their provisional EMP.<sup>8</sup> On the basis of the *ex ante* identification of potential impacts, typical counteracting measures

included preferential hiring policies; designated farming areas within the leased land; and (temporary) subsidised access to agricultural inputs to enable agricultural intensification (since bush-fallow rotation will be less feasible given land constraints). Though by no means entailing comprehensive resettlement and rehabilitation measures, these examples do illustrate the potential utility of the EIA process. That said, a number of companies were found to be operating illegally, without having conducted EIAs or having obtained environmental permits. While the EPA was aware of some of these developments, it did not issue any stop orders, since it 'did not wish to obstruct development'. Rather than being fined for ignoring environmental regulations, one of the companies in Nkoranza District who had planted more than 1,000 ha was merely told to stop their clear-felling practices and conduct an EIA for the remaining area of land.

According to key EPA officials, the Agency lacks the human resources to monitor so many projects effectively; it also receives little support from other government institutions to ensure companies comply with environmental laws (for a more detailed discussion see Schoneveld and German 2010).<sup>9</sup> This lack of capacity to enforce not only undermines the effectiveness of the EIA as a tool for ensuring that companies adopt appropriate corporate social responsibility practices from the outset, but also to monitor compliance with the EMP.

Project-affected persons can, alternatively, claim their constitutional rights through the judiciary. At the time of research, despite some cases involving extensive displacement of customary land uses, no projects were formally contested (Schoneveld *et al.* in press). On the basis of community discussions, this appears to have a threefold cause: limited capacity among affected households to claim their legal rights; customary deference to chiefly authority; and unrealistic positive expectations of future developmental benefits.

<sup>8</sup> Discussion based on the Environmental Impact Statements of Biofuel Africa (23 January 2008), Scanfuel (21 August 2008) and Natural African Diesel (11 November 2008).

<sup>9</sup> Interview with the Executive Director of the EPA, 4 August 2009; Interview with the Director of the Regional EPA office in Brong Ahafo, 29 August 2009.

## Mozambique

Many consider the 1997 Land Law to be exemplary for the innovative ways it deals with customary tenure and for balancing the rights of customary land users with those of investors. Implementation, however, is weak and fraught with difficulties. The law provides a solid basis to protect customary rights, yet several sources suggest a tendency to scale-back reforms in the face of political pressure or special interests. Recent changes in the legal framework have made it more difficult for customary land delineations to go through (e.g. by centralizing DUAT registration), and require communities to show they can use the land productively (Nhantumbo and Salomão 2010). Government officials in charge of implementing the law often support investors rather than fulfill their responsibility to safeguard customary rights (Nhantumbo and Salomão 2010). In some cases, this may stem from political interference from higher levels of authority. In the case of Chikweti, district authorities reported that decisions come 'from above' as orders to be carried out (Siteo 2009). The country's commitment to the expansion of industrial-scale agriculture (e.g., along designated development corridors linked to major ports) may also be behind this, providing a powerful impetus to facilitate large-scale investments and related land transfers.

Based on published case studies, the majority of irregularities are connected to the consultation process. Despite the elaborate process envisioned in the 1998 Land Law Regulations, evidence suggests that community consultations are often a token gesture; most consultations concerning land access for biofuels were found to be conducted in a single meeting (Nhantumbo and Salomão 2010). This has undermined effective implementation of procedures established in the Technical Annex of the Land Law Regulations for the delineation of community lands (Annex I).

Land identification for large-scale forestry plantations in Niassa Province, for example, was based on maps produced at a scale that did not identify communities or community lands. At the time of implementation, companies such as New Forest and Tree Farms ran into difficulties:

they discovered that areas allocated for plantation establishment were superimposed on community farmland or entire communities (Siteo 2009).

ProCana, a 30 000 ha sugarcane development in Gaza Province, is another case in point. Approximately half of the land allocated for the project was found to overlap with areas set aside to resettle those displaced by the creation of Limpopo National Park. In several sites, affected communities also complained that the company was encroaching on their land, showing no respect for the agreed boundaries (Nhantumbo and Salomão 2010, Waterhouse *et al.* 2010). Had the delineation of community lands been carried out according to law, such difficulties should have been minimized if not avoided altogether.

In the case of Elaion Africa (Sofala Province), the minutes of community consultations were found to have a biased representation of discussions in favour of investors' interests. One statement stated that land occupation was accepted because the area 'was only used by charcoal producers' despite the centrality of charcoal in household income-generation and the presence of farmland in the area (Nhantumbo and Salomão 2010). Similarly, community leaders in Chikweti wrote a letter authorising land occupation after a community consultation had identified the same land as reserved for community use (Siteo 2009).<sup>10</sup> Land conflicts between communities and investors are rife, an indication of the poor quality of these consultations (DNTEF 2008).

Mechanisms to ensure that customary rights holders are represented in the consultation process

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10 Other irregularities observed in community consultations for afforestation projects in Niassa Province include:

- the establishment of plantations in areas where community consultations were carried out but no DUAT had been issued;
- failure to certify existing land uses by local communities;
- plantation establishment outside of areas zoned for forestry plantations, as in the case of Chikweti. Communities also complained about the failure to produce a map showing where farms would be relocated (Siteo 2009).

are also weak. In community consultations for biofuel projects, preliminary meetings were held with customary leaders in the absence of wider representation. These meetings reportedly influenced outcomes of subsequent consultations in favour of investors, while customary authorities and local party leaders were found to dominate discussions during the consultations themselves (Nhantumbo and Salomão 2010).

Non-participation of marginalised groups such as women and itinerant resource users in community consultations around sugar-based ethanol projects were also noted (Waterhouse *et al.* 2010). Among large-scale reforestation projects in Niassa, local leaders were found to bring their family members rather than local management committees (*comités de gestão*) to the table when contacted by companies for a community consultation (Siteo 2009). A study in Sanga District found that only 3.9% of respondents became familiar with a project through public consultations (Landry 2009). This has contributed to a lack of information among the majority of affected land users on the project or terms of agreement; they have often become aware of a project only once it is underway, leading to conflict between community members and reforestation companies (Siteo 2009, WRM 2009).

In other cases, the investor reportedly ignored agreed-upon boundaries, resulting in the occupation of prime cropland (Overbeek 2010). Energem was allocated 60 000 ha in Gaza Province, much of it customary farmland and grazing land, following 'community' consultations between community leaders (*régulos*) and the company (Ribeiro and Matavel 2009). Local residents in one community reportedly fear the *régulo*, who is an important member of the governing Frelimo party. Customary land users also reported being pressured to hand over their land, as in the case of Chilengue Location.

Experiences with intermediaries were mixed. Where ESIA processes were carried out, government officials were observed to help balance local enthusiasm for the project by raising awareness about potential food security risks (Andrew and Van Vlaenderen 2011). However,

their awareness about other potential social risks was limited. Furthermore, irregularities were observed at other stages in the land acquisition process. In some cases, community land consultations were held without the required involvement of local administrative authorities or provincial cadastral services (Siteo 2009). In other cases, a strong pro-biofuel stance by actors with, and without, legally mandated roles as intermediaries in the negotiation process resulted in processes biased towards the interests of investors.

In land acquisitions for biofuels studied by Nhantumbo and Salomão (2010), local government authorities and community leaders were encouraged, presumably by higher level officials, to focus on potential benefits associated with large-scale land acquisitions and to minimise concerns about negative social or environmental impacts. In the ProCana case, the district administrator reportedly introduced the company in one village by stating the company is 'looking for land where it could work and generate employment opportunities in the district' (Manuel and Salomão 2009: 18), illustrating a pro-investment bias. This official clearly overstepped his or her legally mandated role of identifying DUATs acquired through occupation and specifying the terms of partnership between DUAT holders and investors. Recommendations made by Siteo (2009) to establish mechanisms for controlling the consultation process to ensure that *régulos* and local authorities involve all community members and do not extract personal gain from the process, suggest this bias may be rooted in conflicts of interest among public officials.

One of the most interesting cases on intermediaries comes from Niassa, where a private, non-profit organisation has been extensively involved in mediating land acquisitions for large forestry plantations. More than a decade ago, the Mozambican government and Swedish bilateral cooperation singled out Niassa as a region with great potential for wood production, identifying more than 2.4 million ha for this purpose (WRM 2009). In 2005, the Council of Ministers (Resolution N° 3) created the Malonda Foundation as a private 'public utility' entity to

encourage investment in the sector.<sup>11</sup> They have since facilitated the establishment of Chikweti, New Forest, Tree Farms and Florestas do Niassa, large afforestation companies that at the time of research had collectively acquired 395 000 ha of land. While the Foundation holds an environmental permit, reportedly adheres to FSC principles and has its own corporate social responsibility mechanisms, it has also facilitated land deals with countless irregularities (Siteo 2009). Here, given the support by higher level traditional and government authorities to the projects, even local *régulos* claim to have had little power to shape negotiations (Overbeek 2010). While the 'degraded land' narrative has played a role in enabling access to prime farmland (and fallow) along major roads, government interference has reportedly played a role in countering local resistance (Overbeek 2010).

While community consultations are seen as a mechanism through which communities can negotiate benefits with project proponents, evidence points to the difficulty of negotiating beneficial terms of transfer in the first round of negotiations; most documented cases with successful outcomes occurred only following resistance and protest to early injustices.

In their study of large-scale land acquisitions for biofuels, Nhantumbo and Salomão (2010) found none of the case studies to involve 'genuine and enforceable partnership agreements between investors and communities'. The only documentation of agreements came in the form of minutes of community meetings, which do not carry any legal backing and were found to lack any sanctions should investors fail to live up to their promises. While some minutes did refer to the creation of jobs and social infrastructure, the wording was usually vague, lacking clear timeframes or verifiable indicators. In one case, the majority of a village's productive land was occupied without the consent of the population. In the ProCana case, the company reportedly

ignored a request by members of two villages to be compensated for the loss of agricultural and forested land (Manuel and Salomão 2009). Energem reportedly promised to build schools and hospitals, dig water holes, assist widows and orphans and provide scholarships for young men in exchange for the land. Yet after two years of project implementation, such benefits had not materialised and the company and local authorities hold the only copies of community consultation records (Ribeiro and Matavel 2009).

ESV Bio Africa stands out as a case in which negotiations were considered acceptable by affected communities and a number of early benefits had materialised (e.g. waged employment, full-time employees receiving considerably more than the minimum wage, water supply points, support for funeral costs). However, the economic downturn has affected the company's operations, with wages left unpaid for long periods and promises to improve the school and hospital left unfulfilled (Ribeiro and Matavel 2009). With approximately half of household landholdings converted in the process, this case represents an unacceptably high risk for communities.

A study by the Centre for Legal and Judicial Training (Baleira and Tanner 2004, cited by Norfolk 2009) found that neither the judiciary nor local conflict resolution mechanisms are playing a significant role in resolving conflicts between communities and investors. In the majority of cases, administrative structures with limited familiarity of the law and aligned more with higher level development directives than local needs have been involved.

Yet despite these findings, case-study evidence suggests that communities voicing serious grievances have managed to re-draw the boundaries of land acquired by investors or reach a compensation agreement (Siteo 2009, Nhantumbo and Salomão 2010):

- In Niassa, communities were involved in re-drawing the boundaries of the Tree Farms plantation (Siteo 2009).
- Resistance from some communities to cede their land led to more concrete commitments from

<sup>11</sup> The Foundation's Vision is 'to be an agent of change in the private sector, with a positive impact on poverty reduction in Niassa Province', and its mission is 'to facilitate, in a sustainable way, improvement in the business climate'. [http://www.malonda.co.mz/index.php?option=com\\_content&view=article&id=6&catid=54&Itemid=13&lang=en](http://www.malonda.co.mz/index.php?option=com_content&view=article&id=6&catid=54&Itemid=13&lang=en) (15 March 2011).

ProCana. This included securing and fencing sufficient land for grazing; gradually creating 8 000 jobs; providing technical assistance for communities to produce sugarcane; creating a 5 km buffer zone between community areas and the plantation; and building a polytechnic school, rural clinic, 5 000 houses, storage facilities, 3 water sources and 2 watering tanks for livestock (Nhantumbo and Salomão 2010). The project is however currently suspended.

- In response to conflict associated with land delineations in Niassa, the Malonda Foundation is reportedly renegotiating the initial forestry plantation boundaries (Sitoe 2009).

We found no documented case where local rights to veto land occupation altogether had led to project cancellation. However, the cases above illustrate how strong community organising can minimize costs to livelihoods and strengthen local benefits capture.

As for monitoring, while it is made possible through safeguards in land and investment legislation (e.g. provisional DUATs, time limits for initiating projects), these mechanisms have largely failed due to 'extremely weak' state capacity to monitor (Locke 2009).

As the only impact mitigation requirements mandated by law are found within environmental (Table 3), this section focuses on the extent to which environmental permits were received prior to initiating operations. Mozambican legislation requires that an environmental licence be obtained before any other licences or authorisations are issued. Where ESIA's have been carried out, there is evidence for their effectiveness in shifting the location or boundaries of plantations and processing facilities to minimise the displacement of households and cropland and in the formulation of social mitigation plans (Andrew and Van Vlaenderen 2011). However, the effectiveness of public consultations suffered from a number of limitations and a number of projects were initiated without an environmental licence (Sitoe 2009, Nhantumbo and Salomão 2010). In a legal and institutional analysis, Norfolk (2009) corroborated these findings, stating that, due to weak implementation, very few land applications

are subject to an EIA. In December 2010, the Provincial Assembly of Niassa Province issued a recommendation that all forestry companies be obliged to carry out EIAs to address a situation in which only one of the five large companies operating in the province had complied with environmental laws.<sup>12</sup> In the absence of environmental permits, companies are presumably under no obligation to mitigate the negative social and environmental effects of their operations or to monitor the same. Indeed, several case studies document negative socio-economic impacts for which mitigation measures were agreed upon but never implemented (Waterhouse *et al.* 2010).

## Tanzania

Through Tanzania's 'Kilimo Kwanza' (Agriculture First) policy, the government aims to increase general land to about 20% for large-scale agriculture, all of which is targeted to come from village land, most of which is not surveyed, certified or planned.<sup>13</sup> In 2009, to increase the amount of land available to investors, the Prime Minister directed all regional and district governments to survey and identify their unallocated land to be donated to the TIC land bank.<sup>14</sup> After investors meet the minimum requirements for registration (such as proving financial viability and providing a business plan), TIC typically introduces them to village and district authorities to ask for land. While some companies were found to go directly to district-level authorities, other land acquisition proposals were first vetted by regional governments before contact with district and village authorities was initiated.

As the TIC land bank is limited mainly to industrial land in urban areas and not informed by a nation-wide land use/land suitability plan, personal contacts and investors' own preferences heavily influence the guidance or assistance given to investors with regards to land acquisition.<sup>15</sup> In

12 <http://www.portaldogoverno.gov.mz/noticias/agricultura/dezembro-2010/exploracao-florestal-niassa-exige-estudos-de-impacto-ambiental/> (2 February 2011).

13 Interview with the Director of the Land Use Commission, 18 May 2010.

14 Interview with the Director of the TIC, 24 May 2010.

15 Interview with the TIC Director, 24 May 2010.

Kisarawe District, for example, a local Member of Parliament, who was also a close confidante of the President, played a central role in introducing the investor to local communities and in pressuring communities to accept the investment.

Not all investors undertook the long and tedious process of establishing contact and negotiating with Village Assemblies, as required by the Village Land Act. Some negotiated agreements directly with District Council members early in the land acquisition process. A SunBiofuels contract, for example, obliged the District Council to solicit villagers' consent within land areas targeted for acquisition over a maximum period of eight weeks, and to ensure the company was charged concessional rates for land acquisition.<sup>16</sup> The Council would also ensure the availability of a further 32 000 ha for expansion of company operations. This contract did not mention compensation but instead said the company would provide benefits such as employment and agricultural support programmes, as well as health and education. This agreement was to last the duration of the lease, starting from the date of transfer of the first lands.

In most cases, negotiations for land concluded with the drafting of formal contracts between interested parties. In Kilwa District, for example, an unusual contractual agreement established a 60%:40% compensation distribution mechanism between the District and Village Councils, respectively.<sup>17</sup> The contract was drafted by a lawyer from the Lindi Regional Office assigned to advise communities, but who appeared to have done so only until the shares between District and Village Councils were determined and committed. However, an unsigned contract (dated 2008) between the company and Village Governments in Kilwa District listing items covered under its compensation scheme is instructive. Items identified for compensation included trees, finished and unfinished improvements, individual houses, crops and loss of access to all communal lands. The contract specified the company's non-monetary obligations, which included constructing the Village Council office,

providing employment to villagers and contributing to water development and health.

Compensation proved to be highly contentious, mired by allegations of unfairness and characterised by a lack of disclosure of the valuation techniques and rationale used to generate compensation schedules. Compensation to some households was paid for tree crops (such as mangoes, coconuts and cashew nuts) but excluded annual crops. In other cases, compensation was paid for loss of access to communally used land, while in still other cases loss of access to communal land remained uncompensated and, indeed, the land itself excluded from valuation.

Trees in forests and woodlands generally remained unvalued, even though in some cases (e.g. Kilwa District) forest inventories were conducted but the findings excluded from valuation. Company management alleged that affected forests were degraded and deforested due to charcoal production, and thus excluded from compensation entitlements.<sup>18</sup> Local residents reported that companies cleared forests as they established the plantations.

Few villages were compensated for loss of access to communal land and this mostly included land that was collectively farmed during the socialist (*ujamaa*) era. In some cases, compensation payments were split between District Councils and Village Councils (e.g. BioShape), while in others compensation was made to District Councils alone (as with SunBiofuels). Compensation was generally deemed to be unfair since it did not consider annual crops and the commercial value of land (Mkindi 2008, Cleaver *et al.* 2010, Habib-Mintz 2010).<sup>19</sup>

Sulle and Nelson (2009) indicate that the opportunity cost to villagers of the land granted to SunBiofuels is higher than the total amount of

18 See Fisher *et al.* (2011) for estimates of the importance of charcoal production to rural household incomes in Tanzania.

19 Habib-Mintz (2010) indicates that the company had claimed it would compensate 2840 households at a rate of US\$233 per household. SunBiofuels claims to have paid an average of \$1644 per person, which translates to about \$350/ha (Cleaver *et al.* 2010). Overall, the land was grossly undervalued at \$77/ha, against a possible market value of \$570/ha.

16 Kisarawe District Executive Office. SunBiofuels file.

17 Kilwa District Executive Office. Bioshape file.

compensation paid to all 11 villages from which land was transferred. Field investigations also revealed that 'bare' land was not compensated. What's more, some places had not been subjected to valuation, even though villagers were provided with forms to specify their claims. Moreover, advance notice of the valuation procedure was inadequate – as short as two weeks.

Villagers accepted the transfers due both to the promises made about future benefits and the threats reportedly received from officials that land transfer was inevitable as it was a government order. High-level endorsement of large-scale investments by the President, Prime Minister, Members of Parliament and other officials also played a part in bringing about this acceptance. However, with land gone and inadequate compensation, some villages were making new claims or pressing for additional compensation.

At the time of field work, more than 500 people in villages around SunBiofuels were demanding compensation. Villagers believe they were misled by District Councils who encouraged them to give their lands to the investor. While it is further alleged that the company drew a contract with the District Council on compensation matters, no independent evidence could be found to support or refute this claim. Investors found compensation procedures confusing and relevant authorities appeared to have little understanding of them. For example, the TIC instructed SunBiofuels to pay it compensation; later, the company was instructed to pay the District Council instead.<sup>20</sup> The TIC also advised SunBiofuels against paying compensation for 'bare' land. Compensation procedures were found to differ substantially from one company to another.

Negotiation processes across the decision chain are overwhelmingly mediated by government actors (to the exclusion of civil society) and not fully disclosed. These two facts reduce the likelihood that a disinterested third party can effectively challenge or engage with the process. Moreover, incomplete information, in a situation of limited understanding of impacts, greatly reduces the capacity of villagers

to negotiate favourable contracts with powerful investors who are backed by government. That 'bare' land is not valued, or that only perennial crops are valued, or that trees in forests are not valued when calculating compensation severely undermine the intent of the law.

Contrary to legal requirements, market values of land were not used in valuation. The practice of paying compensation to District Councils is also unjustified. Villages, not district governments, are the legally appointed managers of village lands held under customary rights of occupancy (Gordon-Maclean *et al.* 2008, Mwamila *et al.* 2008, Songela and Maclean 2008, Sulle and Nelson 2009). Investors' promises to share benefits with communities (which they generally do not deliver) also demand re-evaluation. Consumers and shareholders are increasingly demanding companies to make voluntary contributions to community development. However, an emphasis on corporate social responsibility over community development runs a risk: companies may discount their compensation obligations in favour of nebulous community development arrangements that are mostly at the discretion of companies. Notions of social responsibility can be used to justify or camouflage unfair compensation, flout required procedures or even dissuade local communities from demanding more favourable compensation terms.

The Biofuels Guidelines require that land-use plans be drawn up prior to land transfer: this would enable villagers to determine objectively the size and location of land to be transferred. Most villages in Tanzania do not have land-use plans and investors could not proceed with transfer until such plans were drawn. Some investors financed land-use planning and mapping of village land they were planning to acquire. Others did not, arguing that village land-use plans are the responsibility of village authorities.

Where land-use planning took place, technical officers at the district level led the exercise. This included 10-year projections of anticipated use, the involvement of village residents and endorsement by Village Assemblies and Councils. While the logic motivating the drafting of land-use plans

<sup>20</sup> Interview with the SunBiofuels CEO, 16 March 2011.

prior to land transfer is sound, the use of 10-year projections to determine future land needs is untenable vis-a-vis a 99-year period of transfer.

Where land-use planning did not take place, there is a lack of clarity, especially among village residents, of how much land was given away. Some villages gave out more than 30% of their land to investors (Habib-Mintz 2010). Over some 3 years, across 14 villages in 2 study districts, 42 000 ha were transferred out of village control for close to 100 years.

The Environmental Impact Assessments of most companies are shrouded in mystery. By the time most companies currently in operation conducted their EIAs, the National Environmental Council (NEMC) had not finalized a roster of accredited experts. The credentials of the consultants, who were sourced and financed by investors, cast a shadow on the credibility of the EIAs.<sup>21</sup> The NEMC and investors alike were unwilling to release the EIAs, both of which were approved by NEMC and certified by the Directorate of Environment. The latter acknowledged that some companies did not abide by their mitigation plans. One company's EIA, for example, falsely referred to mature coastal forest stands as degraded forest, added an author to the EIA who was not involved in the assessment, did not acknowledge the forest as part of the 21 global biodiversity hotspots and failed to consider the impacts of migration and settlement into the area (Gordon-Maclean 2008, Mkindi 2008). Moreover, the company set up a saw mill,<sup>22</sup> cut and sold timber<sup>23</sup> and cleared an elephant corridor. In addition to approving flawed EIAs, regulatory authorities took no actions to enforce compliance. These findings are consistent with early observations of Tanzania's experience with EIAs (Mwalyosi and Hughes 1998).

Poor understanding of rights and entitlements to land among villagers, coupled with a lack of knowledge of and/or access to alternative

institutional channels for redress of grievances, militate against local-level efforts to safeguard claims or seek favourable terms of agreement in cases of land transfer. Mwamila *et al.* (2008) found that Village Executive Officers have little awareness of the Village Land Act and often do not even have a copy of it. It is unlikely that ordinary villagers would be better informed. Ultimately, it is unacceptable that the means by which land was acquired (i.e. district councils, government officials) should remain the only available pathway for villagers to seek redress given the costliness of legal confrontation in the courts.

Limited horizontal coordination and accountability among the agencies involved in land acquisition cause overlaps and ambiguities that create opportunities (and excuses) for investors to sidestep legislated procedures. The creation of a One Stop Centre in the TIC and the Biofuels Technical Advisory Group (BTAG) within the TIC – an advisory and approval mechanism across sectors for biofuel investments, reduce institutional fragmentation (as relevant rules are resident within specific sectors) and the transaction costs of such fragmentation. However, coordination failures and encroachment of mandates may reflect conflict and competition or an imperfect understanding of agency roles. It is not obvious why TIC, for example, would advise an investor on whom to pay compensation. Similarly, the TIC did not communicate its recent intention to withdraw Bioshape's Certificate of Incentives either to the Ministry of Mines and Energy (the lead organisation for biofuels) or to other members of BTAG.

Failures in cross-agency coordination can undermine monitoring of investments. Although the TIC has an Aftercare Investment Service that monitors investments, it is understaffed and relies heavily on regional governments and media reports for information.<sup>24</sup> Likewise, the National Environment Management Council relies on District Environmental Management Officers for monitoring and evaluation of projects, but most Environment Officers are trained in forestry, have

21 Interview with the Director of Environment, 19 May 2010.

22 Business Registration and Licensing Authority records.

23 Letter to Director, Forestry and Beekeeping Department. Undated. Letter to Director, FK Law Chambers from Permanent Secretary, Ministry of Natural Resources and Tourism, 15 April 2008.

24 Interview with the Investment Promotion Advisor of the TIC, 10 March 2011.

little awareness of broader environmental issues and lack budgets of their own.<sup>25</sup>

What do we learn from Tanzania's land acquisition processes? The checks and balances in the law worked contrary to their intended purpose due to several factors. Both central and district governments are faced with strong incentives not only to generate revenues, but also to create conditions for enhanced economic growth and poverty reduction. Investment in the agricultural sector, which employs the majority of rural Tanzanians, is viewed as a promising pathway towards achieving these goals. Three factors exemplify the bias towards investors: land leases in excess of legal limits for the biofuel sector; the approval of flawed environmental assessments; and, ultimately, the overstatement of benefits of investments by politicians (including the President), which bolsters support from government officials and extinguishes critical debate on costs and benefits among villagers and local representatives. Re-categorisation of village land to general land also contravenes the devolution of land administration and management championed by the Village Land Act, setting the stage for a marked and systematic re-centralisation of land administration and management.

## Zambia

Government efforts to promote large-scale investments in agriculture were found to be widespread in Zambia, but with a particularly high concentration in the Northern Province. Here, in addition to the presence of agricultural land along a major communication corridor (the TAZARA railway), the prevalence of shifting cultivation may be used to justify the targeting of 'degraded' land based on the widespread perceptions about the damaging environmental effects of fire (as opposed to a verifiable assessment of degradation status).

Two of the four companies studied in this research directly engaged with chiefs to acquire customary land in the province. Both companies, however, relied heavily on support from government intermediaries, notably from the lands working group, with representatives from the Zambia

Development Agency (ZDA) and the Ministry of Lands. The group helped the investors identify suitable land and convince chiefs to alienate land for the investment.

In the absence of national-level land-use planning to guide such initiatives, limited consideration was given to land availability. One company acquired in this manner at least 302 749 ha in Mpika District, from 5 different chiefdoms, for the cultivation of *jatropha*.<sup>26</sup> At the time of research, the other company, also for *jatropha*, was awaiting finalisation of the titling process for 79 300 ha in Nakonde and Isoka Districts.<sup>27</sup>

While chiefs and their constituents have no legal rights to compensation, agreements were in most cases found to be made between chiefs and the investor to lubricate the alienation process. In some chiefdoms (such as in Mpika District), this took the form of new 'palaces' for the chiefs. It is unclear what role these government intermediaries played in negotiating these terms and conditions of alienation, and what proportion of these agreements were committed to paper.

In both cases, the leasehold title was (in the process of being) allocated to the ZDA, which holds land in trust for the investor for the first two to five years before the long-term lease is granted. According to the ZDA, this mechanism has been put in place to prevent land speculation. The ZDA was adopting the same sub-lease construction with two other major investors that were not profiled in this research. At face value, it appears that the district government followed procedures correctly. For example, government surveyors had developed site plans for endorsement by the chiefs and the District Councils had recommended alienation to the Commissioner of Lands.

<sup>26</sup> The 10 sites specified in the company's Environmental Project Brief (2010) amounted to 511 183 ha, though geo-referenced site plans were provided for an area covering 302 749 ha.

<sup>27</sup> The company was actively seeking to acquire more land. While media reports suggest 2 million ha were requested, according to the ZDA, the company would gain access to approximately 300 000 ha (Interview with ZDA officials, November 2010).

<sup>25</sup> Interview with the Director of Environment, 19 May 2010.

At the time of research, while one of the investors was titling land from only 3 chiefdoms, all 11 chiefs in Luwingu, Nakonde, Chinsali, Isoka and Mporokoso Districts had conceded to alienating land by signing initial letters of offer. In addition to the lands working group, members from an industry-led biofuels association and the Ministry of Agriculture and Cooperatives (MACO) reportedly attended negotiations. The company declined some of the land offered due to its distance from key transportation routes, and any land not going to the company was incorporated into the government land bank for allocation to future investors. This suggests that in Zambia, in contrast to land banks held by investment promotion agencies in Ghana and Tanzania, the government was seeking to transfer portions of customary land to state land irrespective of an expression of interest in specific locations by investors. This clearly reflects the government's desire to enhance its control over land and its administration. The President and the Minister of Land, together with other key government officials, have repeatedly urged traditional authorities to release land for investment; they argue that customary land is insufficiently utilised and should thus be put to more productive use through large-scale commercial investments. The question of what constitutes a more 'productive' use, and for whom, remains unanswered.

This orientation reflects Zambia's economic and political ideology, also clearly reflected in the FNDP and National Agricultural Policy of 2004 and by the various initiatives to implement these policies. Inherent in this ideology is an assumption that large-scale (predominantly foreign) commercial investments will be an engine of economic development through sectoral upgrading and modernisation. When one of the chiefs in Mporokoso District initially refused to cede land during the visit of the lands working group to the area, the Minister of Commerce and Industry personally intervened, leading eventually to the Chief's acceptance.<sup>28</sup> That the Minister originated from the district and reportedly 'did not want his

<sup>28</sup> The visit was originally to focus exclusively on districts along the TAZARA railway, where the investor had expressed an interest, but the Minister reportedly insisted that Luwengo and Mporokoso also be included.

district to be left out' illustrates the implicit belief among public officials in the beneficial nature of such projects.

The Provincial Administration (through the Office of the Permanent Secretary) was also found to play an active role in large-scale land acquisitions in the province. In 2008, it held an investment promotion workshop where chiefs reportedly made commitments to give out 10 000 ha each.<sup>29</sup> Members of Parliament were also said to be facilitating large-scale land acquisitions in Chinsali and Mporokoso Districts.<sup>30</sup>

Given the tendency of the term 'land grabs' to imply process driven by foreign governments and corporations, the heavy-handed role of the government is interesting. The most concerted of these efforts is the Farm Block Development Programme. Since the programme's inception in 2004, the government has secured 947 000 ha of land, ranging from 45 000 to 155 000 ha in size, for investors. The ZDA should be credited for its recent efforts to assimilate some pitfalls associated with its role as a facilitator of large land transactions.<sup>31</sup> However, its mandated role in the process certainly does not put the ZDA in a position to be a neutral mediator in facilitating a process in which customary authorities retain the right to say no. When government agencies position themselves alongside investors in seeking to wrest land away from customary authorities for government land banks, the risks associated with large-scale land acquisition are amplified. Moreover, with a government agency becoming such a large landholder, further conflicts of interest could arise, especially when sub-leasing land can so easily become an opportunity for rent-seeking (see, for example, O'Brien 2011 for irregularities associated with Kenya's allocation of public land). Given that land alienation involves the conversion of customary to leasehold tenure and a permanent loss of customary land rights, it also raises serious

<sup>29</sup> Interview with Provincial Agricultural Coordinator of Northern Province, 2 June 2010.

<sup>30</sup> Interview with Kasama-based staff of an international NGO, 31 May 2010.

<sup>31</sup> As observed by changes in awareness and orientation that seem to have occurred between two periods of field research conducted in May/June 2010 and November 2010.

concerns over how the objective of recognising and protecting customary rights set out in the 1995 Land Act can be achieved.

The role of traditional and ex-district authorities has also been instrumental in shaping the nature of land transactions. For example, while chiefs are legally required to consult their constituency before alienating land, there was little evidence they had done so comprehensively. In most cases the chiefs involved village headmen; however, these were reportedly token consultations with little opportunity to shape decisions. In the Mpika case, a Village Development Committee consisting of nine members was called upon following the negotiation process to agree whether to welcome the 'development'. Members decided to endorse the project without any further consultations. Chiefs appear to be easily swayed by prospects of development and by the 'homage' typically provided by the investor; in almost every case, this involved at the very least improvements in or construction of a 'palace' for the chief.

Furthermore, conflict of representation and interest appear to be common at the district level. To illustrate, an ex-District Commissioner of Isoka (who accompanied the investors) reportedly prepared an initial letter of offer without tabling the land transfer for discussion by the Council, thus circumventing legislated procedures. The Chief declared, 'We came to agree because the DC said, "this is part of development", and we are behind in development in Isoka District.' The above case also reportedly involved a one-sided land delineation process by government surveyors, following an initial letter of intent from the chief in which the area and boundaries of land were not specified. This suggests a gap in the consultation of even the Chief himself; he later questioned the agreement when the map specifying the area implicated was presented to him, presumably by the lands working group and investors.

One of the most crucial legal mechanisms to protect customary rights requires both the chiefs and District Councils to certify that people's 'interests and rights are not being affected by the approval'. Little value can be placed on this assurance, however: in all the case-study sites, the

land allocated to investors was certified as free of encumbrance yet was otherwise actively used for shifting cultivation and various forestry-related activities. This in essence relegates these processes designed to protect customary rights to mere technicalities. In the Farm Block Development Programme, many of the areas, being located in accessible, prime cropland areas, were found to be actively used by communities (Ministry of Lands 2009). Moreover, given that this process results in an official declaration that the land is 'free', it may preclude the ability of affected land users to seek redress.

Since the conditions of land access are private arrangements determined 'on the side', and outside of the legislated land acquisition process, the conditions of land transfer are at the discretion of the investor and subject to the negotiation skills of customary rights holders. Investors are required to adopt mitigation measures (which may include compensation for loss) as a condition of their environmental permit, but it is questionable whether the EIA process adequately identifies impacts needing mitigation. The Environmental Project Brief for the Mpika project, for example, did acknowledge loss of farmland. However, it argued that 'food security will increase due to labour income, which will more than compensate for loss of land area; ... the business-like approach of this project will also help to replace the dubious policy of food-self-sufficiency'. Since the EPB considers the project to be 'highly positive' in economic and social terms, no impact mitigation measures were proposed outside of an 'HIV/AIDS management programme'. The rigour and validity of this process are thus questionable, considering how – in the absence of a baseline survey – the report assesses potential socio-economic impacts on the basis of untested and ideologically tinted assumptions.

For the land acquisition process for an oil palm project in Mpika District, the involvement of government, though also evident, was less pronounced. The current investors, one of Zambia's largest agri-businesses, acquired the project in 2008 in its inception phase. Although the original investor had already completed an EIA for the project in 2006, the President had rejected the 2007 land acquisition request on the grounds that it was

'too large for one project'. The Anti-Corruption Commission opened an investigation of the case to explore the role of the former Minister of Science and Technology in facilitating the land deal. Despite the issues encountered during the initial land acquisition process, the leasehold title for 20 101 ha of land was approved soon after the take-over, on a 99-year lease. In contrast to the two other cases, however, the leasehold title was directly allocated to the company; since it was not provisional, the title was essentially incontestable. The absence of implementation conditionalities creates greater risk that, if the investment fails, it will not be allocated to other productive uses and/or be used speculatively. Although the majority of land occupied by the plantation falls within wetland areas, 45 families were resettled for project development and 2 villages located near the nursery site reported to have lost agricultural land.<sup>32</sup> Although the company did compensate resettled households in cash and in kind, other affected households were not directly compensated. Otherwise, the company seems to have taken its corporate social responsibilities seriously. It provided an ambulance and a vehicle for one of the chiefs, installing him on the company's board with a monthly salary of approximately US\$ 205; royalties were also deposited into a Community Development Trust.<sup>33</sup> Yet while the contributions seem to be comparatively significant, the land acquisition affected no one from the Chief's village directly and the Chief and those close to him are perceived to have captured the bulk of the benefits. Moreover, a complaint was raised that the company tends to employ people from outside the local community rather than those from affected communities.

In the case of a large-scale plantation project in Mpongwe District, a leasehold title had already been allocated to previous operators. Thus land was not directly acquired from the chiefs or government. Before the current investor acquired the 45 457 ha of land in 2008, the company's three

estates were formerly state farms and then, for over two decades, run by a foreign-owned development finance institution.<sup>34</sup> When the company took over, the previous owners had developed only 34% of the area, making it vulnerable to encroachment. As the company sought to develop *jatropha* plantations on the unutilised land, it rekindled a land conflict that had begun under the earlier lease holder. A second conflict with encroachers also ensued under the new leasehold. The courts settled both conflicts in favour of the company (one prior to the recent land acquisition, and one following it).<sup>35</sup>

In Kalulushi District on the Copperbelt, when a mining company purchased a large idle commercial farm for development into an industrial zone, an entire village of encroachers was displaced without compensation (Schoneveld *et al.* in preparation). Thus, while in theory the purchase of long-standing leasehold titles should minimise land-use conflicts, with many old commercial farms defunct even these lands are rarely free of occupation in practice. With no legal provisions to protect encroachers, they often have fewer legal avenues than customary land users to contest displacement.

Land acquisition and environmental permitting procedures were found to have been carried out in most, if not all, cases – even if implemented in a way that was haphazard or against the spirit of legal provisions. Although these regulations provide a number of important checks and balances to protect customary land rights and manage adverse community impacts, their effectiveness is questionable at best.

The effectiveness of land negotiation and environmental impact procedures is undermined by at least three factors: conflicts of interest on the side of the government, opportunities for personal enrichment by chiefs and the widespread underlying faith in the potential of large-scale investments. Furthermore, the phrasing of

32 Reported impacts included loss of orange groves and cassava fields in the uplands, and the loss of sugarcane and mango trees and a declining fish population (from the establishment of pump irrigation for the nursery) in the swamps.

33 Interview with company representatives, 22 May 2010.

34 Interview with company representative, 20 May 2010.

35 In the conflict that was rekindled, affected households that had moved back into the area were given transport, food and tents to support the relocation in an extra-legal settlement; in the other, settled in the Supreme Court following a repeal of an earlier ruling by the company, the only ruling in the community's favour was reportedly a grace period to allow crops to be harvested prior to relocation.

legislation as ‘actor X must declare’ rather than ‘outcome Y must be ensured’ (Table 3) leaves much wiggle room for those operating in their personal interest.

Compounding the effect of these processes on the livelihoods of customary land users are lack of both legal literacy and access to mechanisms to contest infringements on rights. For example, the Lands Tribunal, which was developed as a mobile and accessible means to deal with land conflicts, has lacked sufficient funds to deal with cases involving customary rights or to become accessible to people outside of Lusaka (Brown 2005, Committee on Agriculture and Lands 2009). High expectations of customary land users regarding long-term development impacts also undermines the fairness of negotiations. As captured by one affected land user in Mpika, ‘Lusaka was also at one time a village, but now it is a town’. There also appeared to be no awareness about the duration of the land lease or that alienation could be permanent.

While the EIA process should in theory ensure proponents adopt appropriate mitigation measures, it is questionable whether this process has sufficient rigour to capture the multitude of impacts. With only 12 inspectors responsible for monitoring compliance of permit holders throughout the country, the Environmental Council of Zambia (ECZ) also lacks the human resources to carry out its duties successfully.<sup>36</sup> Therefore, while regulations to protect customary land users are relatively progressive, poor monitoring and enforcement (caused in part by capacity constraints but also by the incongruity of ‘progressive’ legal provisions with the prevailing development philosophy), appear to weaken them to the point of ineffectiveness. In practice, the fate of affected land users depends more on investors’ discretionary employment of corporate social responsibility practices than on formal governance instruments.

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36 Interview with ECZ Director, 18 May 2010.



# 6

## Discussion and conclusions

### 6.1 Legal protection of customary rights

Findings reflect wide variability in the legal foundations and institutional mechanisms for the protection of customary rights and in the processes for consulting customary land users. This variation provides a basis for learning lessons on what more progressive legal protections might look like.

All of the case-study countries were found to have constitutional, policy and/or legislative provisions to safeguard customary land rights. All countries also forbid the sale of land to foreign entities. However, we observed significant differences regarding those who hold ultimate rights to land and may therefore issue leasehold title to investors.

Ghana has the most far-reaching provisions to protect customary landholdings from expropriation. Here, unlike other countries, the leasehold is granted by customary authorities rather than government. Yet similar to other countries, customary land in Ghana can be reclassified to state land through involuntary expropriation under the state's right to eminent domain when considered to be in the public interest. Mozambique also has far-reaching provisions to protect customary rights achieved through occupation or through the acquisition of leasehold title. It is claimed, however, that such rights have been scaled back in recent years through excessive administrative barriers to leasehold titling for customary land users (Nhantumbo and Salomão 2010).

All countries have provisions for investors to acquire leasehold title to land for extended periods

varying from 25 years (for biofuels in Tanzania) to 99 years (for Ghana, Zambia and all other land uses in Tanzania). In only one case-study country (Ghana) does customary or village land clearly revert to customary control following the expiry of land leases. In Mozambique, Tanzania and Zambia, transfer of customary land to leasehold title (if in the name of investors rather than customary land users) or 'general land' appears to involve the permanent transfer of customary to state land. The implications for current and future livelihoods are likely to be significant, suggesting that local awareness of these provisions is essential to an informed consultation or negotiation process.

From a legislative standpoint, provisions are needed to enable the rights acquired under leasehold to emanate from customary land owners rather than the state. This would prevent permanent alienation from the customary domain, even where a role is envisioned for the state to provide a legal grounding for related transactions. Ghana may be looked upon as an interesting case in this regard. Enabling the reversion of leasehold tenure to customary tenure would avoid the situation in which large tracts of land are transferred wholesale from longstanding rights holders to the state. Shorter-term and performance-based land transactions are also needed. These should balance the interests of investors (for minimum protections to minimise the risk of investment) with the needs of affected land users (for the opportunity to monitor the extent to which investors deliver on promises, to learn from experience what it means to be displaced or employed, and to support an evolution towards partnerships of mutual benefit).

Tanzania has made progress in this regard in limiting the duration of land leases in the biofuel sector. Zambia generally issues 14-year leases (unless the President approves otherwise) and investors can then apply for a 99-year lease after 6 years. In Mozambique, issuance of a full DUAT after the provisional two years depends, in theory, on the performance of the investment. However, the procedures for monitoring investor performance need to be strengthened to incorporate the performance concerns of affected communities and strengthen investor accountability to their commitments.

Processes for identifying suitable and available land for investment vary by country. Mozambique has the most far-reaching process, consisting of a nation-wide agroecological zoning, while in Ghana and Zambia national-level land-use planning frameworks are absent. Ghana, Tanzania and Zambia have all developed land banks through consultations with traditional authorities in cases involving customary or allodial land. In Zambia, in contrast to the other two countries, the government is attempting to convert land to state land even in the absence of an expression of interest by investors. Mozambique, Tanzania and Zambia also have agricultural development schemes to promote industrial-scale agriculture in prime agricultural land along major transport (road and rail) 'corridors'. Yet for these processes to be fully consultative, they must focus not on agroecological suitability and economic feasibility but on a thorough process for assessing land *availability*. This suggests that zoning and other processes of land identification are required at a scale sufficiently small to enable the identification of local communities and customary lands (including those without formal title). They must also employ criteria that provide for a wide interpretation of what constitutes 'utilised' land – including grazing, hunting, fishing and gathering (e.g. water, forest products). Carrying out national-level zoning at a scale that can identify such uses is likely to be prohibitively expensive. Thus, it is necessary to pursue legislative improvements in zoning (for suitability *and* availability) alongside improved processes for community consent and customary land delineation.

In all countries, two pathways exist for the consultation of customary land owners: land allocation processes and environmental impact assessments. In Ghana, the ownership of allodial land is fully in the hands of the Traditional Council, enabling customary rights holders to be in charge of land allocation decisions. All countries also have provisions to consult customary land users during land transfer. These include processes for seeking consent to transfer land (present in all countries, though in Ghana with limited legislative force), participatory processes for delineating customary land (which are most thorough in Mozambique) and processes for ensuring adequate compensation (which will be discussed below). Environmental legislation in all countries also provides for public consultations, many of these explicitly requiring that consultations be carried out with all affected parties. If these legislative provisions are evaluated based on the principle of free, prior and informed consent, however, greater specification is needed on the nature of information to be provided to affected land users ahead of and during negotiations and public hearing – including legislative provisions to protect their rights and procedures mandated by law on the one hand, and details on the project being proposed and its likely impacts – both positive and negative – on the other. The environmental legislation outlines impact criteria to be considered in such processes (albeit with considerable room for improvement). However, in no country are such details specified in land allocation procedures. Neither are efforts to improve legal literacy prior to project implementation a requirement. District authorities do play a role in authorising land transfers in all countries; however, their role in providing checks and balances on decisions emerging from local consultations (to ensure these decisions were fully consultative and in the collective interest) is only specified in Zambia – and, to a lesser extent, Mozambique.

Processes for the representation of customary rights holders place a strong emphasis on the role of traditional authorities in all countries except for Tanzania, where the chieftancy system was abolished under Nyerere's rule. Here, after a draft plan is presented at a stakeholder meeting for

comment and revisions made, project proposals must be discussed in front of the entire Village Assembly. This makes Tanzania's legislation far more progressive in creating the conditions for downward accountability to affected households than legislation in the other countries, a fact that stems in large part from innovations made during Tanzania's Socialist era. Mozambican legislation, on the other hand, has the most elaborate process for delineating community land and ensuring that the actual area allocated to investors does not conflict with existing land uses and occupation. In Ghana and Zambia, legislation places more far-reaching powers in the hands of customary authorities. This poses risks should these authorities pursue personal gain rather than the collective interest. Yet in all countries, the approval process passes through district or provincial authorities; in theory, this should provide an opportunity for placing checks and balances on customary authorities. Mozambique is the only country where government authorities also have a mandated role in the actual consultation process. Local administrative authorities and cadastral services participate in land identification and delineation, while technical bodies of relevant ministries assess the technical feasibility of land-use plans.

The main conclusion to be drawn from processes of local representation is that consent from customary authorities cannot be assumed to reflect true consent from customary land users and other affected parties. The legislation must spell out processes for consulting the wider community. This is true not only in land delineation, where lessons can be learnt from Mozambique, but also in decisions about whether to allow land transfer and under what terms, as is done in Tanzania. Yet despite the more progressive procedures outlined in these countries, past experience suggests that large community fora may not be an effective platform for less outspoken (often marginalised) groups to voice their concerns or question authority; complementary provisions for targeted consultations with these groups may also be necessary.

As for compensation to customary rights holders for land transferred to investors, only in

Tanzania are both private investors and the state legally required to compensate customary land owners for land acquisitions: the law requires the 'type, amount, method and timing of the payment' and 'full and fair compensation'. In Zambia, compensation is only mandated for forced expropriation by the state (in the form of replacement land) and to compensate for losses reported in Environmental Impact Assessments. In Ghana, compensation (in the form of cash payment for land improvements) is only required under cases of forced expropriation by the state. Thus, any compensation paid to affected customary land users in these countries is, by and large, extra-legal; it remains fully at the discretion of the investor and customary authorities, and dependent on the community's legal awareness and savvy in invoking its customary land rights to extract meaningful levels and types of compensation from investors.

The question of providing full compensation for the loss of customary land and resource rights is tricky. To do this effectively would require a full economic analysis of income derived from diverse land uses that are displaced, both current and future. It would also require customary land users to be fully aware of the value of the everyday cultural, economic and environmental services provided by these resources. That said, full compensation not only for land 'improvements' lost to investors but for the land itself – and the range of economic values that entails – should be a legal requirement. For this to occur, the economic values to be compensated should be spelled out in the legislation. Similarly, there should be a provision for independent evaluation of agreements reached on compensation (for fairness and for the degree to which they represent the views of all affected parties). Tanzania has taken important steps in this direction, but greater specification is needed to avoid abuses.

Legislation is also lacking in all countries to specify mechanisms through which financial or in-kind compensation is to be governed locally, both within communities and between affected land users and local government. This is evidenced by the many published cases of elite capture of benefits at the local level (Bigombé Logo 2003, Colfer and Capistrano 2005, Wittman and Geisler 2005, Oyono

*et al.* 2006, Ribot 2009). Unambiguous mechanisms for information disclosure to local communities and civil society to enable them to play a role in this capacity are also desirable.

Despite the limited provisions for compensation in land legislation, environmental impact regulations in all countries require impact mitigation processes. Moreover, formal institutions for dispute resolution provide an avenue for aggrieved parties to seek recourse. The tendency to focus on environmental over social variables or to leave this up to interpretation, however, hinders the effectiveness of environmental impact legislation in practice. Mozambican legislation pays lip service to social impacts through its emphasis on identifying the number of people affected. In Ghana, Tanzania and Zambia, however, legislation requires a full declaration of social impacts and, bar Ghana, investor commitment to appropriate mitigation strategies for socio-economic impacts. This environmental legislation, together with provisions to monitor the pace of implementation of investments, such as in the case of Zambia, provide the primary mechanisms for monitoring investor performance.

Yet for agencies monitoring the performance of investments, criteria tend to focus on alignment of actual land uses with land-use plans and, in the case of Zambia, ‘implementation rates’ (e.g. actual relative to proposed rates of capital investment and employment generation). But to have teeth for protecting customary land rights, environmental impact legislation should specify social indicators in detail. Moreover, environmental impact legislation and agencies monitoring project implementation should consider a wider set of indicators of relevance to customary land owners than aggregate employment (which is often a poor indicator of benefits flowing to affected land users). Mechanisms for dispute resolution should ideally include either general-purpose courts at multiple levels, or special-purpose mechanisms for dealing with disputes over land, environmental impacts or chiefly misconduct.

All countries have mechanisms in place to monitor environmental impact, while Mozambique and Zambia also have systems for monitoring

investment performance. However, in all countries more systematic inclusion and better definition of social indicators in EIAs are warranted to enable a more rigorous monitoring process. With respect to the monitoring of investments, investment licences should become a legal requirement (to make monitoring meaningful through more widespread coverage), and monitoring functions should be legislated (rather than leaving them as extra-legal procedures) and their scope expanded. While no country represents a model in this regard, the ZDA’s recent efforts to design and implement an investment monitoring system should be noted and nurtured.

## 6.2 Customary rights in the context of large-scale land acquisitions: Evidence from implementation

Our research points to wide variability in the legal underpinnings of customary rights and the legislated processes for large-scale land acquisition. Yet despite this variation, in the vast majority of cases outcomes are similar: customary rights to huge tract of land are lost, often permanently and with limited to no compensation. This poses an interesting analytical puzzle: are legal frameworks meaningless due to limited enforcement or do similar outcomes occur through diverse pathways?

Evidence presented from the four case-study countries suggests that, with uneven enforcement of legislation and a diversity of practices observed, both factors are at play. The primary factors involved may be categorised as follows: gaps in enforcement, processes employed by government in identifying suitable and available areas, roles played by three key sets of actors (government, customary rights holders and non-governmental organisations), and local people’s strong sense of need for – and expectations about – ‘development’. These factors will be discussed below, drawing on case-study findings to substantiate observations therein.

Five primary enforcement gaps may be noted. First, as observed in these case studies and in other sources (German and Schoneveld 2010, Schoneveld and German 2010), many projects are implemented in the absence of the necessary

approvals – whether an investment licence, a land title or an environmental permit. In the absence of enforcement of legally required approvals and monitoring of implementation, government oversight of operations is negligible and procedures for consulting customary land users will be overlooked. A second gap was found in efforts to ensure adherence to agroecological zoning, as in the case of Mozambique. Third, where upper limits are placed on the duration of leases and land areas which may be transferred to investors, as in Tanzania, we found cases where these limits were breached. Fourth, and perhaps most notably, is the failure of agreements reached in the consultation process to be adhered to and (to the extent that the law backs this up) for consent from communities to be ‘free, prior and informed’. Consultation processes were notably weak, even where legally mandated procedures for acquiring consent ensured some level of detail in the process (as in the process for delineating customary land in Mozambique, or for local representation - as in proposal review by stakeholder fora and Village Assemblies in Tanzania). Finally, rigorous monitoring of investments and sanctions for offenders are absent. This is the case for the EIA process in Mozambique and Zambia (where monitoring of projects is very poor and court cases few or non-existent), for zoning in Mozambique and for investment performance in Ghana and Mozambique. The last of these examples is significant, given the conflicting aims pursued by investment promotion agencies – promotion on the one hand and regulation on the other. With official policies emphasising investment promotion, agencies end up in a supportive role with little political backing to enforce investment and employment commitments. If the intention is to leverage meaningful economic benefits for host countries from large-scale investments, it is essential that monitoring and enforcement be sufficiently resourced and independent.

Turning to the role of different sets of actors, one of our most notable findings concerns the role of government actors. We find a significant disconnect between those media reports portraying large-scale ‘land grabs’ as a private sector-driven phenomenon and the active role of government in Mozambique, Tanzania and Zambia in availing sizeable areas of land to investors. In each of these countries,

investment promotion and lands agencies, and in several cases local government, are amassing sizeable areas of land for transfer to the public domain in the name of investment promotion for economic development and poverty alleviation. In these countries, community consultations are overwhelmingly mediated by government actors, often with transactions that are not fully disclosed. Several cases were reported where current or former government authorities coerced communities; in almost all cases, the benefits of outside investment are emphasized to the exclusion of its potential costs. Cases of coercion emanating from district-level authorities were identified in Tanzania (from those currently in office) and Zambia (from ex-officials). Coercion from higher level authorities was observed in Mozambique (where pressure was reportedly indirect, exerted by higher levels of authority on lower level authorities) and Tanzania (where the Ministry of Commerce and Industry pressured chiefs directly to approve land transfer). Claims in Tanzania that an investor drew up a contract with the District Council on compensation matters, if proven to be true, would be a case of gross misconduct.

These findings are worrisome since certain government agencies have clear legal mandates to protect customary rights at different stages of the negotiation process (land delineation, setting terms of compensation and approval of negotiated agreements between communities and investors), a process that often results in checks and balances working contrary to their intended purposes. Yet even in Ghana, where government agencies play a more passive role, land banks are being established to avail land to investors and inaction has often proven detrimental to the protection of customary land users.

The observed complicity of government with the interests of industry, which at times is in patent contradiction to their legal mandates, has a number of causes. The most fundamental cause is arguably ideological. Powerful modernisation discourses shape government commitments to the rapid expansion of industrial-scale production models. Government agencies seem to have fully bought in to notions that large-scale (predominantly foreign) investment is the most effective pathway

for economic development and poverty alleviation, improving the balance of trade, enhancing technology spillovers and linkages to other sectors of the economy and serving as a stimulus to rural development. This is perhaps best evidenced by case studies in Tanzania and Zambia where Members of Parliament intervened to attract investors to districts they represent, illustrating a firm belief that impacts will be positive. Discriminatory ideologies about customary land-use practices tend to underpin this trend. Assumptions are made that land without houses or permanent crops is unused and land uses involving fire or itinerancy (e.g. shifting agriculture, charcoal burning, grazing and hunting) are by definition backward or environmentally harmful. While such assumptions may, at times and according to certain indicators, hold true under scrutiny, they have more often than not been scientifically disproven (Conklin 1957, Dove 1983, Uhl 1987, Fairhead and Leach 1996, Pyne 1997, Kull 2004).

Yet there is also evidence to suggest that conflicts of interest and rent-seeking behaviour drive this trend. In all countries, central and district governments are faced with strong incentives not only to generate revenues but to create conditions for enhanced economic growth and poverty reduction. And in all countries, land rents acquired through financial flows to allodial title holders (in Ghana) or the transfer of customary land to state land (in other case-study countries) present an incentive for governments to facilitate large-scale land transactions. In cases where local government is using extra-legal means to leverage economic benefits from land acquisitions, as in the case of Tanzania, conflicts of interest emerge. While the protagonists may justify this behaviour on development grounds, it does introduce a conflict between capitalising local government coffers on the one hand and safeguarding village land rights on the other. Efforts are needed to ensure all countries eliminate conflicts of interest between (legal and extra-legal) rent-seeking and safeguarding customary rights. Most notably, this should occur by separating bodies receiving rents from those charged with safeguards and the monitoring and sanctioning of extra-legal practices.

Regarding the roles played by customary rights holders in the actual negotiation process, two key points must be underlined: the thoroughness of the consultation process and the processes through which those with authority over customary land are downwardly accountable. In evaluating the thoroughness of consultation processes, it is important to highlight the prevalence of short-cuts, coercion, extra-legal involvement of government actors, etc., which undermine the spirit of legislation in most countries. Yet the most telling indicators are the extent to which affected parties feel their interests have been considered and the nature and level of compensation.

In most cases customary land users welcome the prospect of development through a large-scale investment project (with expectations hindering on formal employment and improvements in social infrastructure). In Tanzania, Mozambique and Zambia, however, a sizeable number of negotiations have been the subject of concern, resistance or outright conflict. In Ghana, on the other hand, customary land users treated land access not as a right or entitlement but as a benefit that one acquires subject to the benevolence of the Chief. Here, the reaction was often therefore one of passive acquiescence.

As for compensation, the presence of a legal requirement to compensate (as in Tanzania) had a strong influence on whether such compensation was paid, for what (e.g. only jobs and social infrastructure, or compensation for loss of land and other resources) and at what level. This suggests that the choice of whether and how to compensate should not be left at the investor's discretion. Yet even in Tanzania, where legislated mechanisms for compensation are strongest, compensation for loss of access and for property remains highly variable and contentious. Here and elsewhere, where compensation was paid, problems of elite capture of benefits (by chiefs or district authorities), lack of information (on the law, the details behind project proposals and the real value of local assets) and coercion also tended to create a very uneven playing field for negotiations.

As for the downward accountability of those with the legal authority to make decisions over customary or village land, the evidence suggests that customary authorities tend to have a very limited understanding of their (often constitutionally mandated) responsibility to act *on behalf of* their constituencies. More often than not, decisions seem to be made based on chances for personal gain rather than collective interests. This suggests that checks and balances on customary authorities and the consultation process itself are urgently needed.

Many of our findings and related governance implications highlight the crucial role of government authorities in strengthening legislation and practice related to investment and large-scale land acquisitions. Yet the contradictory mandates of government agencies, deeply entrenched development and marginal land discourses and new opportunities for rent capture also point

to the inherent difficulties in realising this potential. Ultimately, a combined effort among key government agencies, civil society, grassroots organisations and upstanding private investors is likely needed to ensure effective safeguards to customary land rights and real discretionary authority to all affected land users. Yet even with the most enlightened legislative protections and negotiation processes, challenges of awareness and foresight will remain. This is because much of what is involved in a community's decision to give up its most valuable asset, and how it values these assets, has as much to do with its starting point as it does the legal underpinnings and processes of large-scale land acquisition. The desperate need for services and market outlets, and often unrealistic expectations (derived in large part from official discourse over large-scale land deals) about the 'development' this may bring, will continue to undermine the likelihood of a 'fair deal'.



# 7

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Rapid growth of emerging economies, emerging interest in biofuels as an alternative to fossil fuels and recent volatility in commodity prices have led to a marked increase in the pace and scale of foreign and domestic investment in land-based enterprises in the global South. Emerging evidence of the negative social and environmental effects of these large-scale land transfers and growing concern from civil society have placed 'global land grabs' firmly on the map of global land use change and public discourse. Yet what are the processes involved in these large-scale land transfers? This paper provides a comparative analysis of legal and institutional frameworks and actual practices associated with large-scale land acquisitions in Ghana, Mozambique, Tanzania and Zambia. Drawing on policy documents, interviews with government officials from diverse sectors and discussions with customary leaders and affected communities, we explore some of the deficiencies in legislation and practice which currently undermine the ability to safeguard customary rights in the context of large-scale land acquisition.

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