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# Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa

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# Processes of Large-Scale Land Acquisition by Investors: Case Studies from Sub-Saharan Africa

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## Abstract

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 direct investment in land-based enterprises in the global South. Recent publications on the social and environmental effects of these large-scale land transfers and growing concern from civil society have placed the subject of “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 by the private sector, but a supply-driven process in which governments are playing an active role – often bolstered by an unwavering faith in the role of foreign investment in national economic development. They also suggest that customary rights are seldom adequately protected in the context of land negotiations despite widespread legal recognition of these rights. The fact that results are strikingly similar despite a wide variety of legal and institutional frameworks for protecting customary rights and regulating large-scale land acquisition raises an analytical challenge which is discussed in the final section as a means of distilling implications for governance.

## Background

### *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). Yet while land reforms were a major concern for development thinkers seeking to enhance equity and efficiency in the first few decades following World War II, 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 southern African countries have gone through structural adjustment programs and policy reforms aimed at both recognizing customary rights and liberalizing the land market (Kleinbooi, 2010; Manji, 2008). These reforms have not been without controversy, due to the perceived lack of public

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<sup>1</sup> Recent scholarship has questioned use of the concept of “customary” to tenure relations characterized by a dynamic interplay between diverse sources of authority (e.g., traditional leaders, decentralized local authorities) and to contemporary situations which often confer greater authority to customary leaders than was true in pre-colonial times (Fitzpatrick, 2005; Platteau, 1992; Toulmin and Quan, 2000). 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 a fixed in precedent and practice (Brown, 2005). While recognizing 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.

participation, limited legal backing for rights of customary users, the conceptualization of development and related land reforms as market-based enterprises, the sheer scale of landholdings and the easing of restrictions on land ownership by foreigners (Brown, 2005; Andrianirina-Ratsialonana, 2011; Zambia Land Alliance, 2006).

Land is unquestionably recognized 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 (a subject of significant controversy) gains center stage – as does how to effectively translate these rights into meaningful economic benefits for the poor. The debate may be characterized by two camps, the first advocating for formalizing and individualizing customary tenure and the second advocating against it. In the first case, it is argued that the ambiguity, flexibility and negotiability of rights under customary tenure undermine tenure security and productivity-enhancing investment, and that formal titling increases the efficiency of land distribution while boosting agrarian productivity and capital accumulation (de Soto, 2000; World Bank, 1989). Since Hardin's seminal publication *The Tragedy of the Commons* (Hardin, 1968), it has also been argued that customary tenure regimes in which resources are managed as common property contribute to resource degradation by failing to regulate predatory behavior. The second position, which cautions against formal registration of property, finds its roots 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 marginalized groups than formalized tenure (Behnke, 1994; Gray and Kevane, 1999; Lastarria-Cornhiel, 1997; Niamir-Fuller, 1998). 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 highlight why the publication of de Soto's *The Mystery of Capital* (2000), which argues that the lack of formalized property rights has hindered development in non-Western countries due to the inability to collateralize this key asset, has led to so much support by some camps and controversy in others (Manji, 2008).

These trends in recognition of customary tenure have been bolstered by a wider move towards political and administrative decentralization, driven by the aim to enhance the efficiency and effectiveness of government by devolving key areas of authority and responsibility to local levels of government ('administrative decentralization') or civil society groups ('democratic decentralization') (Ribot, 2003). A review of experiences in 20 African countries found widespread policy and legal commitment to decentralization in the land sector as well as 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 policy emphasizing foreign direct investment as a pathway to local and national economic development and increases in the number and scale of land requests raises the question of whether increasing commercial pressures over land will advance or undermine the trend towards decentralized land and resource management. According to Wily:

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

The tendency for many decentralization reforms to extend down only to district or higher levels – thus binding them to government support and control, raises the question of whether the downward accountability envisioned in these reforms can be achieved in practice.

### *The “Global Land Grab”*

Global trends such as rising commodity prices and demand and policy commitments to alternative energy, together with aforementioned host country initiatives to liberalize land markets and attract private investment, have led to the rapid expansion in scope and scale of land-based investments (Cotula et al, 2009; Cotula, 2011; World Bank, 2010). Countries that until recently received limited foreign investment now host sizeable FDI stocks (UNCTAD, 2008). A World Bank study found 45 million ha of large-scale land deals to have been announced by the end of 2009 – with more than 70% of this emanating from Africa (World Bank, 2010). This has contributed to a situation in which the majority of production increases in the agricultural sector in sub-Saharan Africa, unlike in other world regions, have derived from area expansion – with only 34% achieved from yield increases (Smith et al, 2010).

The concept of a “global land grab” conjures up images of foreign governments or corporate interests operating single-handedly to secure large tracts of farmland to hedge against insecurities of food, fuel and fiber in their countries of origin. While the evidence to date confirms foremost a strong role of private investors, foreign capitals and exports, evidence also suggests these deals take a variety of forms – with state-owned companies (from producer and consumer countries), citizens (often from the diaspora) and political elites, private equity and hedge funds, and private investment companies reportedly involved, and many investors also targeting the domestic market (Cotula et al, 2009; Friends of the Earth, 2010; Grain, 2008; O’Brien, 2011; Schoneveld et al, 2010). The active role of governments in consumer and host countries alike has also been instrumental by providing financial, informational, technical and bureaucratic support to investors; providing regulatory frameworks to govern investment; investing in infrastructure; assisting in land acquisition; and providing government-to-government diplomacy and tied aid (Cotula et al, 2009; Ilhéu, 2010; Luo et al, 2010; World Bank, 2010) – with expropriation by the state to be widespread as a precondition or means for transferring land to investors (World Bank, 2010). Yet the very similar institutional structures (e.g., investment promotion agencies and “one-stop” centers) and processes (e.g., public “land banks,” land reforms, changes in “investment climate” and favorable investment incentives) despite widely varying historical, cultural and institutional contexts also points to the role of international financial institutions in the process (see, for example, Daniel and Mittal, 2010).

Thus, while increased interest in land-based enterprises by investors in the context of tenure reforms recognizing customary land rights presents an opportunity to stimulate local economies and alleviate poverty, the increased pace and scale of these developments – and the global drivers and broad scope of actors bolstering them – raise very real challenges to land governance on the continent. 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; see also O’Brien, 2011). This paper seeks to contribute to these lines of inquiry by shedding light on the disconnects between the legislation protecting customary land rights and governing large-scale land acquisitions on the one hand, and actual land acquisition processes on the other. In exploring why these contradictions occur and contrasting legislation and practice across countries, it also identifies gaps in the mechanisms currently employed to safeguard the interests of customary land users.

## Research Questions

The following questions guided research:

1. What are the processes through which large (foreign and national) investors are acquiring land in Africa, and with what consequences to local livelihoods?
2. Under what conditions is the security of customary rights ensured, and under what conditions is it undermined?

## Methods

The methodology for assessing the legal and institutional underpinnings of large-scale land acquisition and the actual practices involved consisted of 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, where possible, focus group discussion with affected households. In cases where fieldwork was limited (e.g., Mozambique), evidence from published case studies was employed as a means to assess land acquisition processes in practice.

Research on actual processes of land acquisition in each country consists 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. 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 situated 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 9 published case studies, five of these from the recent expansion of silvicultural plantations for pulp and paper in Niassa (spread across 3 districts) and four from biofuel plantations spread across three provinces (Gaza, Inhambane and Sofala). Of the latter, three are for jatropha and one for sugar cane. Case studies in Tanzania included two foreign-owned biofuel investments, the UK-based SunBiofuels (located in Kisarawe District) and Dutch company BioShape (located in Kilwa District). In Zambia, findings are drawn largely from four detailed case studies involving interviews with customary land owners, three in Northern Province (in Isoka and Mpika Districts) and one in Copperbelt Province (in 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 indicators to explore how the law supports different dimensions of customary rights in the negotiation process. These included:

1. *Types and duration of land rights afforded to investors* – This parameter captured the nature of land rights that may be acquired by investors (e.g., usufruct, leasehold or freehold), and the potential duration and renewability of these rights.
2. *Provisions to protect customary rights* – Here, any 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 (including the right to establish the terms under which customary land may be transferred, or to refuse) would be captured.

3. *Initiatives to guide land allocation* – This parameter aimed to capture government initiatives for identifying suitable and/or available land for particular types of uses (e.g., zoning); for identifying land available for large-scale investments within customary areas; and sector-specific initiatives for which land allocation is one component of a wider set of initiatives to promote 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. The analysis also included an assessment of three related parameters, namely:
  - a) *The role of intermediaries* – If the legislation specifies that certain government agencies or other actors should help to facilitate the negotiation process, this would be captured here.
  - b) *Mechanisms for local representation* – This captured the extent to which the legislation specifies mechanisms for representation of ‘local communities’ or customary rights holders in the negotiation process.
  - c) *Compensation mechanisms* – With this parameter, we sought to understand whether there are any legal provisions for negotiating compensation levels and if so, to whom is this paid and in what form.
5. *Impact mitigation requirements* – The scope of any legislation requiring that negative socio-economic impacts of large-scale investments be mitigated by project proponents would be analyzed here.
6. *Monitoring* – This includes key legislation where the monitoring of social impacts is required and, where present, the identification of social dimensions or indicators to be monitored.
7. *Dispute resolution* – Here we sought to understand any mechanisms for recourse for aggrieved parties.
8. *Changes in the status or classification of customary land* – This parameter sought to understand the ‘fate’ of customary land upon termination of investor land rights, whether it reverts to customary tenure or becomes state land.

## **The Statutory Underpinnings of Large-Scale Land Acquisition**

This section explores the statutory underpinnings of customary rights and how these rights are safeguarded in the process of large-scale land acquisition, as well as the institutional frameworks for allocating land to investors. Findings are presented in country narratives and summarized in Annex I.

### *Ghana*

Land ownership in Ghana can be classified into two broad categories; those under customary ownership, constituting 78% of the total land area, and those 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

their 'traditional area', typically by being the first to cultivate that land, through inheritance, or allocation. 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. Land under customary ownership is typically administered by a Traditional Council, comprised of the area's Paramount Chief and village elders, which holds the ultimate right to retract user rights and reallocate and alienate land – being what in Ghana is referred to as the 'allodial title holder'. It is thus the Traditional Council that holds the sole authority to negotiate with project developers over the leasehold terms. As a service to investors, the Ghana Investment Promotion Center maintains a land bank to connect investors to Traditional Councils willing to alienate land to investors.

Various statutory instruments, notably the Constitution, have specified the conditions under which the Traditional Councils are to administer (and therefore also alienate) its landholdings. For example, the Traditional Council has 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 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 1), land users aggrieved by land alienation to a development project (as a result of, for example, involuntary expropriation and inadequate compensation for the same), has available various avenues for seeking redress, at, for example, various sectoral ministries, customary institutions, and the judiciary.

Despite the various instruments that detail in general terms the duties and responsibilities of Traditional Councils and enable recourse, the existing framework 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, that specify resettlement and rehabilitation (R&R) procedures, or assigns responsibilities to this effect. Although the Lands Commission has to approve and ultimately allocate the formal leasehold title to the investors, land laws fail to specify criteria for approval – merely stipulating that the Lands Commission is to determine whether the project is 'consistent with existing development plans.' Furthermore, while project proponents are required to conduct a detailed Environmental Impact Assessment (EIA) (when converted more than 40 ha of land), which, in addition to environmental factors, also incorporates social and economic dimensions, laws legislating EIA procedures do not specify the responsibilities of proponents towards project affected persons (PAP). For example, the impact mitigation strategies proponents are required to adopt as part of their Environmental Management Plans (EMP) do not legally require them to account for non-environmental impacts.

### *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 through land occupation by individuals or local communities following customary norms and practices, land occupation by Mozambican nationals who intend to use the land for at least 10 years, or official authorization 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 may acquire DUATs, provided they are registered in Mozambique. 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 authorization of no more than 5 years (for Mozambican nationals) or 2 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 authorization 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 urbanization plans, the authorizing body is determined by the size of the landholding, with provincial authorities approving DUATs < 1,000 ha, the Minister of Agricultural and Fisheries approving DUATs for 1,000 to 10,000 ha, and the Council of Ministers approving 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 and initiate an agroecological zoning exercise, with the first zoning finalized in early 2008 at a scale of 1:1,000,000 (Nhantumbo and Salomão, 2010). In recognition of the inaccuracies of zoning at this scale, a second zoning exercise is being carried out at a 1:250,000 scale. According to some sources, the issuance of new DUATs is still on hold in Maputo and Zambezia Provinces<sup>2</sup>. Sectoral legislation restricting investments to areas authorized in the agroecological zoning, such as the Biofuels Policy and Strategy of 2009, provide a mechanism to align investments to areas identified as suitable.

The titling process requires former approval by local administrative authorities, which is in turn preceded by a community consultation to ensure the areas is ‘free’ and without occupants. The community consultation is carried out by a representative of the Cadastral Services unit, the district administrator and local communities and is intended to involve a highly participatory delineation process. This process of delineating customary land, whether for investors or for formalizing customary land rights, is described in far greater detail in Mozambican legislation than is true for the other case study countries. It involves following steps (Technical Annex of the Land Law Regulations, 2000):

1. ‘Information and dissemination’ on the proposed project, relevant laws, delineation objectives and methodology and advantages and implications;
2. Participatory diagnostic (documentation of history, culture, social organization, use of land and natural resources, spatial occupation, population dynamics, conflicts and mechanisms for their resolution, and participatory mapping);
3. A ‘sketch’ that geo-references local landmarks and community boundaries;
4. Devolution of the sketch to the local community and neighbors, to be signed by 3 to 9 community members, all title holders, those occupying neighboring properties and the district administrator; and
5. Launching in the National Land Cadastre.

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

Thus, the law gives communities veto power over land access by investors. Mining licenses are an exception to the rule, invoking the right to eminent domain and therefore involving compensation but no community consultation.

### *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<sup>3</sup> as per the Village Land Act of 1999. 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 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 Elder's Councils, whose endorsement is required for allocation and in dispute resolution. Overall 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 amounts of Village, General and Reserved land 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 village land. Such transfers require the approval of village assemblies and cannot exceed 250 ha of land. Transfers involving more than 250 ha (as with most land acquisitions by investors) must be approved by the Minister of Lands. To transfer these lands to investors, village land must first be re-categorized to general land, which is then vested in the TIC for allocation to investors.

Although the Land Act (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 is required to ensure that the purpose of any proposed transfer of village to general land is explained to the Village Assembly by the Commissioner of Lands or any official s/he assigns. Moreover, the investor is required to address the Village Assembly in order 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 and another 30 days is provided to allow any aggrieved party 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 investments 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. Leases can be renewed. They can also be revoked subject to the investor's performance in

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

upholding the terms of the lease. Compensation must be paid prior to transfer (Village Land Act, 1999; Land Act, 1999). It can be paid for by the investor if the President so directs (Land Act, 1999). As approximately 90% of villages do not have land use plans which document current and projected land use, these must be drawn up prior to transfer. This process is coordinated by district planning agencies, 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 into the planning process, including their verification and adjustment of the plan (Land Use Planning Act, 2007; URT, 2010).

Two key features of Tanzania's land acquisition requirements set it apart from others. First, 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. Two, a ceiling is 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. While widely cited statistics suggest that 94% of all land in Zambia is under customary tenure (Republic of Zambia, 2006a), though 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 that only 37% of land in Zambia is at present effectively controlled by traditional authorities – raising 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 and difficulty of accessing state land mean that most large-scale investments in practice target customary areas.

The primary pathway through which investors may access land in Zambia is by acquiring a leasehold title in the form of a Provisional Certificate, which is valid for a period not exceeding 14 years. After 6 years, the investor may apply for a 99-year Certificate of Title upon submission of a boundary survey in accordance with procedures stipulated in the 1971 Survey Regulations. 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). While colonial-era legislation placed restrictions on the conversion of customary land to Crown land, 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 it up to investors. In cases where investors acquire leasehold title from customary authorities, the State becomes the owner and administrator of the land and the title reverts to the state upon expiry – thus permanently extinguishing any rights of customary land owners/users<sup>5</sup>. Thus, while the Land Act recognizes existing rights to land in customary areas, it has also made it possible for foreign investors to convert land in customary areas to leasehold and to acquire title – provided the investor's proposed use of the land 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 ZDA or has obtained the President's consent in writing. The primary pathways envisioned in the law for acquiring

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<sup>4</sup> 14 May, 2010 interview with Bwendo Kabanda of Oxfam.

<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.

customary land is 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 first seeks consent from the chief with consultation of the village headman. If 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 the headman, 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 1,000 ha submits a letter to the President for his approval (Ministry of Lands, 1996).

The government has in recent years 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 the Land Reform Working Group, comprised of representatives from the Zambia Development Agency (ZDA) and the Ministry of Lands. The key responsibility of the Group is to request Chiefs to relinquish customary land to state land, for inclusion in a land bank (Ministry of Lands, 2009). In a related initiative, the Working Group has also supported the Farm Block Development Program established following the adoption of the National Agricultural Policy in 2004. Under this Program, the government is to acquire large areas of agro-ecologically suitable and strategically located land for development into integrated commercial farming estates, with publicly financed infrastructure. Each Farm Block is to consist of a so-called core venture, around which medium to small-scale satellite farms would be established.

Mechanisms for protecting customary rights in the context of growing commercial pressures on land are restricted to: (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 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 that they are 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’. Besides this, there are no legal requirements to compensate land users for their loss of access to land and land resources. When disputes surrounded the land alienation arise, aggrieved land users have access to Land Tribunals, established under the Land Act, and the High Court. Moreover, land users may contest the issuance of an environmental permit by appealing to the Minister of Environment and the High Court.

### **Land Acquisition in Practice: Evidence from Case Study Countries**

This section summarizes findings from the four case study countries related to the actual practice of land acquisition and the extent to which they are a reflection of legislated norms and processes. Findings are organized according to the key variables specified in the methodology.

#### *Ghana*

While the government of Ghana can acquire land on behalf of investors through their right to eminent domain, there was no evidence at the time of research of this having happened in practice for recent commercial large-scale land acquisitions. Similarly, there was no evidence of government leasing out

state land to investors either. Of the nine plantations visited in this research, all land accessed by the investors is on customary land. In order to help identify suitable land and Traditional Councils willing to lease out their land, investors can obtain support from the Ghana Investment Promotion Center (GIPC), who maintains a land bank. 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 it was observed that all investors, some with support from local middlemen, initiated contact with the Traditional Council, not the government. Traditional Councils subsequently negotiate directly with the investors on the terms and conditions for the leasehold contract.

In none of the cases was there evidence of any participation of the wider community, of civil society organizations, or government institutions in these negotiations. The GIPC indicated that when it links investors to landholders, it does not participate in negotiations. The absence of intermediaries exposes the negotiation process to iniquitous and exploitative conduct, from the side of both the Traditional Council and the prospective investor. Investors can exploit the ignorance of the Traditional Council as they may be unfamiliar with the true market of land, may not be attuned to potential long-term implications of alienation, and may be easily swayed by 'development' prospects. For example, four Traditional Councils (for four separate plantations by two different companies) entered into profit sharing agreements with the investor, for 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 cultivation businesses being zero-rated in Ghana), companies could easily concentrate future profits within the refining business to circumvent pay-outs. Moreover, there is a risk that Traditional Councils place too much faith in the good will of the investors. For example, at a plantation site in Pru District, according to the Traditional Council a verbal agreement was made with the investor that they would support the development of social and physical infrastructure in the traditional area's communities and adopt preferential hiring policies. The failure of the Traditional Council to contractualize these agreements illustrates well the lack of legal literacy of some Traditional Councils.

The lack of outside scrutiny and the absence of appropriate laws 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 land is allocated by the Chief, the recipient is required to present a token of allegiance or 'drink money' for the Chief's consideration. While this normally entails a bottle of alcohol and food products, it can also take the form of large cash payments. In this manner, 'drink money' can almost be considered a purchase price. Although by law all land revenues are to be reported to the Administrator of Stool Land (AOSL) and divided along a constitutional formula, drink money falls in a grey area since it is traditionally considered part of a social custom rather than income<sup>7</sup>. Consequently, it can be argued that Traditional Authorities may forego large annual rent payments, which are typically formalized as part of the land lease agreement, in favor of a more informal type of one-off contribution. However, in this research it proved impossible to collect concrete evidence to this effort. Moreover, community members were frequently found to have had no knowledge of even the most basic provisions of the contracts, illustrating well the opacity and secrecy of the land alienation process. In one case it was observed that communities were only notified of the land allocation when land occupations had already commenced.

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

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

At all the plantations assessed in this research, communities were required to relinquish farmlands, without having formally acquiesced. No direct compensation had been proposed at the time of research by any of the Traditional Councils, nor were promises of shares from future revenue flows made. Although it is difficult to accurately gauge the motives of Traditional Councils and speculate how well and to what ends future land revenues will be used, there is undeniably considerable risk of elite capture and self-interest with existing (legal) structures of power and control. Skepticism 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 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”. Similar observations have been made by others; particularly in relation to land alienations in the urban periphery (Alden Wiley and Hammond 2001; Kotey and Kasanga 2001; Ubink and Quan 2008). The failure of Traditional Councils to consult their constituents is in contravention of provisions in the Land Policy of 1999 and arguably in cases where land loss leads to long-term deterioration of livelihoods of 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, there are other avenues through which project affected persons can obtain redress. The environmental permitting process, for example, takes socio-economic issues into consideration. Although companies, by means of omission from environmental law, are not legally required to adopt impact mitigation strategies that are non-environmental, all three companies that at the time of research had obtained an environmental permit 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) subsidized access to agricultural inputs to enable agricultural intensification (since bush-fallow rotation is no longer feasible given land constraints). Though by no means entailing comprehensive resettlement and rehabilitation measures, it does illustrate the potential utility of the EIA process. However, a number of companies were found to be operating illegally, without having conducted EIA’s or obtained environmental permits. According to key EPA officials, the EPA lacks the human capacity, for lack of manpower, to effectively monitor these projects, and receives little support from other government institutions to ensure compliance (for a more detailed analysis 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 companies adopt appropriate corporate social responsibility practices, but also whether those practices are actually complied with. Although project affected persons can claim their legal rights through the judiciary, amongst others, none of the projects were formally contested, despite the fact that in some cases there has been an extensive deterioration of livelihood quality as a result of land loss (Schoneveld et al., in press). On the basis of community discussions, this appears to have a threefold cause; communities lack the capacity to claim their legal rights, have excessive deference for chiefly authority, and unrealistic positive expectation of project development.

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

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

## *Mozambique*

While the 1997 Land Law is considered by many 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 is weak and fraught with difficulties. The law provides a solid basis for the protection of 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 that they can use the land productively (Nhantumbo and Salomão, 2010). Government officials in charge of implementing the law often position themselves in support of investors rather than exercising their responsibility to also safeguard customary rights (Ibid). In some cases, this political interference may emanate from higher levels of authority. In the case of Chikweti, district authorities reported that decisions come ‘from above’ as orders to be carried out (Sitoe, 2009).

Based on published case studies, the majority of irregularities have to do with the community consultation process. Despite the elaborate process for community consultation envisioned in the 1998 Land Law Regulations, evidence suggests this is often a token gesture, with most consultations concerning land access for biofuels 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 carried out based on maps produced at a scale that does not enable the identification of communities or community lands. Companies such as New Forest and Tree Farms ran into difficulties at the time of implementation, when they discovered that areas allocated for plantation establishment were superimposed on community farmland or entire communities (Sitoe, 2009). In the case of ProCana, a 30,000 ha sugar cane development in Gaza Province, approximately half of the land allocated for the project was found to overlap with areas set aside for the resettlement of those displaced through the creation of the Limpopo National Park. Villagers also complained that the company was encroaching on their land, showing no respect for the agreed boundaries (Nhantumbo and Salomão, 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 favor of investors’ interests – with a statement 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). This is also reported in the case of Chikweti, in which community leaders wrote a letter to Chikweti authorizing land occupation after a community consultation in which the same land was identified as reserved for community use (Sitoe, 2009).<sup>10</sup> As an indication of the poor quality of these consultations, land conflicts between communities and investors are rife (DNTEF, 2008).

Mechanisms for the representation of customary rights holders in the consultation process are also weak. In community consultations for biofuel projects, preliminary meetings held with customary leaders in the absence of wider representation are reported to have influenced outcomes of subsequent

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<sup>10</sup> Other irregularities observed in community consultations for afforestation projects in Niassa Province include: (i) the establishment of plantations in areas where community consultations were carried out but no DUAT had been issued; (ii) failure to certify existing land uses by local communities; (iv) plantation establishment outside of areas zoned for forestry plantations (as in the case of Chikweti) (Sitoe, 2009). Communities also complained about the failure to produce a map showing where farms would be relocated (ibid).

consultations in the favor of investors, and customary authorities and local party leaders were found to dominate discussions during the consultations themselves (Nhantumbo and Salomão, 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 (Sitoe, 2009). This has contributed to a situation in which the majority of affected land users lack information on the project or terms of agreement, and often become aware of a project only once it is underway – leading to conflict between community members and reforestation companies (Sitoe, 2009; WRM, 2009). In the case of Energem, who was allocated 60,000 ha in Gaza Province (much of it customary farmland and grazing land), community consultations were primarily conducted between community leaders (*regulos*) and the company (Ribeiro and Matavel, 2009). As an important member of the governing Frelimo party, the *regulo* of one community is reportedly feared by local residents. Customary land users also reported being pressured to hand over their land, as in the case of Chilengue Location.

The involvement of intermediaries also appears to be fraught with difficulties. One issue concerned the conduct of consultations without the required involvement of local authorities or provincial cadastral services. This was observed in the Chikweti case, where district administrators were unaware that consultations were taking place (Sitoe, 2009). Another irregularity involved political interference by intermediaries, which in each documented case resulted in processed biased towards the interests of investors. In the land acquisitions for biofuels studied by Nhantumbo and Salomão (2010), local government authorities and community leaders were encouraged to focus on potential benefits associated with large-scale land acquisitions and to minimize concerns about negative social or environmental impacts. In the ProCana case, the district administrator was reported to have introduced ProCana to 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. Recommendations made by Sitoe (2009) to establish mechanisms for controlling the consultation process to ensure that *regulos* and the 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 organization has been extensively involved in mediating land acquisitions for large forestry plantations. Niassa was identified over a decade ago by the Mozambican government and Swedish bilateral cooperation as a region with great potential for wood production, and more than 2.4 million ha identified for this purpose (WRM, 2009). The Malonda Foundation was created in 2005 by the Council of Ministers (Resolution Nº 3) as a private, “public utility” entity to incentivize 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 which have collectively acquired 395,000 ha of land. While the Foundation holds an environmental permit, is reportedly adhering to FSC principles and has its own corporate social responsibility mechanisms, they have also facilitated land deals with countless irregularities (Sitoe, 2009).

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 – with most successful outcomes occurring only following

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<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 their mission “to facilitate, in a sustainable way, improvement in the business climate.” See: [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) (accessed Mar 15, 2011).

resistance and protest to early injustices. The study of large-scale land acquisitions for biofuels carried out 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 reached were 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, this was usually framed through vague wording 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 two villages affected by ProCana, the request by members of two villages to be compensated for the loss of agricultural and forested land was never responded to (Manuel and Salomão, 2009). Energem also 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 materialized and the only copies of community consultation records are with the company and the local authorities (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 materialized (e.g., waged employment, wages for full-time employees considerably higher than the minimum wage, water supply points, support to 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.

While in the majority of cases customary lands and land use rights were ceded in the absence of meaningful compensation, where serious grievances have been voiced communities have managed to re-draw the boundaries of land acquired by investors or reach a compensation agreement (Nhantumbo and Salomão, 2010; Siteo, 2009). In the case of Tree Farms, boundaries of the plantation were re-drawn with communities (Siteo, 2009). In the case of ProCana, resistance from some communities to cede their land led to more concrete commitments – including 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, a rural clinic, 5,000 houses, storage facilities, three water sources and two watering tanks for livestock (Nhantumbo and Salomão, 2010). The Malonda Foundation is reportedly involved in re-negotiating forestry plantation boundaries that they initially facilitated in cases of conflict (Siteo, 2009).

As the only impact mitigation requirements mandated by law are found within environmental impact legislation (Annex I), this section focuses on the extent to which environmental permits were received prior to initiating operations. While Mozambican legislation requires that an environmental license be obtained before any other licenses or authorizations are issued, Nhantumbo and Salomão (2010) identified several biofuel projects that had been initiated without having first carried out an EIA or securing an environmental license – including ProCana. The study of forestry plantations in Niassa (Siteo, 2009) also found cases where plantations had been established in the absence of an environmental license, such as the case of Chikweti – where indigenous forests were cleared in some sites. In December, 2010 the Provincial Assembly of Niassa Province issued a recommendation that all forestry companies be obliged to carry out environmental impact assessments to address a situation in which only one of the 5 large companies operating in the Province had complied with environmental laws<sup>12</sup>. In

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

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.

### *Tanzania*

In order to increase the amount of land available to investors, the Prime Minister in 2009 directed all regional and district governments to identify and survey their unallocated land for donation to the TIC land bank<sup>13</sup>. The “Kilimo Kwanza” (Agriculture first) policy encourages large scale agricultural initiatives. Under this initiative, 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>14</sup>. After meeting the minimum requirements for investment registration such as proving financial viability and providing a business plan, investors are typically introduced by TIC to village and district level authorities to ask for land. While some companies were found to go directly to district level authorities, others were first vetted by regional governments prior to establishing contact with district and village authorities. Guidance to investors with regards to land acquisition is heavily influenced by personal contacts and by the investors’ own preferences, as the TIC land bank is limited mainly to industrial land in urban areas and is not informed by a nation-wide land use/land suitability plan<sup>15</sup>. In 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 focused at the District level, and negotiated agreements with District Council members from early on in the land acquisition process. SunBiofuels, for example, signed a contract with the District Council, which obliged the Council to solicit villagers’ consent within land areas targeted for acquisition over a maximum period of 8 weeks, and to ensure that the company is 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 listed employment provisions, agricultural support programs and health and education as benefits the company would provide. 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 was reached between the District and Village Councils regarding the distribution of compensation, with 40% of the total compensation to be paid to the Village Council and 60% to the District Council<sup>17</sup>. This contract was drafted by a lawyer from the Lindi Regional Office who was 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 to be compensated 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,

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<sup>13</sup> CIFOR interview with the Director of the TIC, May 2010.

<sup>14</sup> CIFOR interview with the Director of the Land Use Commission, May 2010.

<sup>15</sup> CIFOR interview with the TIC Director, May 2010.

<sup>16</sup> Kisarawe District Executive Office. SunBiofuels file.

<sup>17</sup> Kilwa District Executive Office. Bioshape file.

which included constructing the Village Council office, providing employment to villagers, AND contributing to water development and health.

Compensation proved to be a highly contentious issue, mired by allegations of unfairness and characterized by a lack of disclosure of the valuation techniques and rationale used to generate compensation schedules. Compensation 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 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., in 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. Local level reports indicate that companies cleared forests as they established plantations. Villages compensated for loss of access to communal land were few, and 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 annual crops and the commercial value of land were not considered (Habib-Mintz, 2010; Cleaver et al, 2010; Mkindi, 2008)<sup>18</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 compensation paid to all 11 villages from which land was transferred. Field investigations also revealed that 'bare' land was not compensated and some places had not been subjected to valuation, even though villagers were provided with forms to specify their claims. Moreover, notices of the procedure to be employed in valuation were inadequate, as short as two weeks.

Villagers accepted the transfers for all the promises made and owing to threats from lands officials to the effect that land transfer is inevitable as it is 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 here believe they were misled by District Councils 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, SunBiofuels was instructed by TIC officials to pay compensation to the TIC; this was later reversed and the company instructed to pay the District Council instead<sup>19</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 and mostly are not fully disclosed. This dominance of government actors in the decision chain (to the exclusion of civil society) and the lack of disclosure reduce the likelihood that a disinterested third party

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<sup>18</sup> Habib-Mintz (2010) indicates that the company had claimed it would compensate 2840 households at a rate of USD 233 per household. SunBiofuels claims to have paid an average of USD 1644 per person, which translates to about USD 350 per ha (Cleaver et al, 2010). Overall, the land was grossly undervalued at USD77/ha as against a possible market value of USD570/ha.

<sup>19</sup> CIFOR interview with the SunBiofuels CEO, March 2011.

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 favorable contracts with powerful investors who are backed by government. That 'bare' land is not valued, or only perennial crops are valued on farmland, or trees in forests are not valued when calculating compensation severely undermines the intent of the law. Contrary to legal requirements, market values of land were not used in valuation. With villages, not district governments, the legally appointed land managers of Village Lands held under customary rights of occupancy (Sulle and Nelson, 2009; Gordon-Maclean et al., 2008; Songela and Maclean, 2008; Mwamila et al., 2008), the practice of paying compensation to District Councils is unjustified. The benefit-sharing aspects in which investors make promises to communities (which they invariably do not deliver) also demand re-evaluation. While consumers and shareholders increasingly view company undertakings of community development activities as desirable, an emphasis on corporate social responsibility over community development runs the risk of companies discounting their compensation obligations in favor 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 favorable compensation terms.

The Biofuels Guidelines require that land use plans be drawn up prior to land transfer to enable villagers to objectively determine 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. While some investors financed land use planning and mapping of village land they were planning to acquire, others did not – arguing instead that village land use plans are the responsibility of village authorities. Where land use planning was undertaken, technical officers at the district level led the planning, which included 10-year projections of anticipated use, involved village residents and was endorsed by Village Assemblies and Councils. While the logic motivating the drafting of land use plans prior to land transfer is sound, the use of 10-year projections to determine future land needs is untenable in the wake of a 99-year period of transfer. Where land use planning was not undertaken 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). In about three years' time, across 14 villages in 2 study districts, a total of 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 and fraught with intrigue. 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>20</sup>. Both the NEMC and investors 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 that the forest is part of the 21 global biodiversity hotspots, and did not consider the impacts of migration and settlement into the area (Mkindi, 2008; Gordon-Maclean, 2008). Moreover, the company set up a saw mill,<sup>21</sup> cut and sold timber<sup>22</sup> and cleared an elephant corridor. In addition to approving flawed EIAs, regulatory authorities took no actions to enforce compliance.

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<sup>20</sup> CIFOR interview with the Director of Environment, May 2010.

<sup>21</sup> Business Registration and Licensing Authority records.

<sup>22</sup> Letter to Director, Forestry and Bee keeping department. Undated. Letter to Director, FK Law Chambers from Permanent Secretary, Ministry of Natural Resources and Tourism. 25<sup>th</sup> April 2008.

A poor understanding of rights and entitlements to land among villagers and a lack of knowledge of and/or access to alternative institutional channels for the redress of grievances militates against local level efforts to safeguard claims or seek favorable terms of agreement. Mwamila et al. (2008) found that Village Executive Officers have little awareness of the Village Land Act and some do not even have a copy of it. It is unlikely that ordinary villagers would be better informed. Ultimately, it is absurd 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.

Finally, limited horizontal coordination and accountability among the agencies involved in the land acquisition process creates overlaps and ambiguities that create opportunities (and excuses) for investors' side-stepping process. The creation of a One Stop Center in the TIC and of an inter-sectoral supportive structure such as the Biofuels Technical Advisory Group within the TIC which acts as an advisory and approval mechanism for biofuel investments reduces 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 roles among the agencies involved. It is not obvious why TIC, for example, would advise an investor on to whom to pay compensation. Similarly, the TIC's recent intent to withdraw Bioshape's Certificate of Incentives was not communicated to the Ministry of Mines and Energy (the lead organization for biofuels) or to other members of the Biofuels Technical Advisory Group (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 for information in addition to tracking media reports.<sup>23</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 little awareness of broader environmental issues and lack budgets of their own<sup>24</sup>.

What do we learn from Tanzania's land acquisition processes? The checks and balances in the law worked contrary to their intended purpose. Several factors underpin this outcome. Both central and district government 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. The bias towards investors is exemplified by land leases in excess of legal limits for the biofuel sector, the approval of flawed environmental assessments, and ultimately by the overstatement of benefits of investments by politicians (including the President) – bolstering support from government officials and extinguishing critical debate on costs and benefits among villagers and local representatives. Re-categorization of village land to general land also contravenes the devolution of land administration and management championed by the Village Land Act and sets the stage for a marked and systematic re-centralization of land administration and management.

### *Zambia*

Government efforts to promote large-scale investments in agriculture were found to be widespread, but with a high concentration in the Northern Province – where agricultural land along a major communication corridor (the TAZARA railway) could be secured and where the prevalence shifting agriculture could justify the targeting of “degraded” land (based on the widespread perception about

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<sup>23</sup> CIFOR interview with the Investment Promotion Advisor of the TIC, March 2011.

<sup>24</sup> CIFOR interview with the Director of Environment, May 2010.

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 the support from government intermediaries, notably from the Land Reform Working Group (LRWG), with representatives from the ZDA and the Ministry of Lands. The Working Group assisted the investors in identifying suitable land and convincing chiefs to alienate land for the investment. One company acquired in this manner at least 302,749 ha in Mpika District, from 5 different chiefdoms, for the cultivation of jatropha.<sup>25</sup> The other company, also for jatropha, was at the time of research awaiting the finalization of the titling process for 79,300 ha in Kasama and Isoka District<sup>26</sup>.

While chiefs and their constituents have no legal rights to compensation, informal agreements were in most cases found to be made between chiefs and the investor to lubricate the alienation process – which in some of the chiefdoms in Mpika took the form of new ‘palaces’ for the chiefs. It is unclear what role these government intermediaries played in negotiating these extra-contractual terms and conditions of alienation. In both cases, the leasehold title was (in the process of being) allocated to the Zambia Development Agency (ZDA), who in turn sub-leased the land to the investors – which, according to the ZDA, was a mechanism 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. Although it would be conceivable that government agencies acquiring land could circumvent some of the titling procedures, on face value it did appear that procedures at district level were carried out as per regulations. 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.

At the time of research, while one of the investors was in the process of titling land from only three 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 Land Reform Working Group, members from a private sector biofuel association and the Ministry of Agriculture and Cooperatives (MACO) reportedly attended negotiations. The company reportedly declined some of the offered land due to its distance from key transportation routes. Any land not going to the company was incorporated into the government Land Bank for allocation to future investors. In contrast to land banks held by investment promotion agencies in Ghana and Tanzania, in Zambia the government was seeking to transfer customary land to state land even before an expression of interest by investors. This clearly reflects a strong desire by government to enhance its control over land resources. The President and the Minister of Land, together with other key government officials, have repeatedly urged traditional authorities to release land for investment, arguing that customary land is insufficiently utilized and developed and should thus be put to more productive use through large-scale commercial investments. This rhetoric reflects Zambia’s shifting economic and political ideology, as also clearly reflected in the FDNP and National Agricultural Policy of 2004 and by the various initiatives to implement these. This appears to be premised largely on the assumption that large-scale (predominantly foreign) commercial investments will contribute to sectoral upgrading and modernization. When one of the chiefs in Mporokosho District initially refused to cede land during the Land Reform Working Group’s visit to the area, the Minister of Commerce and Industry personally intervened – leading eventually to the Chief’s

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<sup>25</sup> The 10 sites specified in the company’s Environmental Project Brief amounted to 511,183 ha, though geo-referenced site plans were provided for an area covering 302,749 ha.

<sup>26</sup> The company was actively seeking to acquire more land. While media reports suggest 2 million ha were requested, according the ZDA, the company would gain access to approximately 300,000 ha (CIFOR interview with ZDA officials, November 2010).

acceptance<sup>27</sup>. Considering that the Minister originated from the district, and reportedly ‘did not want his district to be left out’, further reflects the implicit belief in the beneficial nature of such projects by key government officials. 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 by holding an investment promotion workshop with chiefs in 2008, where chiefs reportedly made commitments to give out 10,000 ha each<sup>28</sup>. Members of Parliament were also said to be facilitating large-scale land acquisitions in Chinsali and Mporokoso Districts<sup>29</sup>.

The heavy handed role of government is interesting, given the frequent portrayal of “land grabs” as processes driven largely by foreign governments and corporations. The most concerted of these efforts is certainly for the Farm Block Development Program, for which the government has managed to secure 947,000 ha of land, ranging from 45,000 to 155,000 ha in size, since the Program’s inception in 2004. While the ZDA should be credited for more recently trying to assimilate some of the pitfalls associated with their role as facilitators of large transactions in land,<sup>30</sup> the process certainly does not put them in a position to be neutral mediators in a process in which customary authorities retain the right to say no. The associated risk is amplified as government agencies position themselves alongside investors in seeking to wrest land away from customary authorities for government land banks. Moreover, with a government agency becoming such a large landholder, further conflicts of interest could arise, especially when sub-leasing land becomes an avenue for rent-seeking (see, for example, O’Brien 2011 for an account of Kenya’s experiences in “large-scale land graft”). Given that the land alienation process involves the conversion of customary to leasehold tenure and a permanent loss of customary land rights, it also raises serious concerns over the ability of the legislation to achieve the objectives in the 1995 Land Act of recognizing and protecting customary rights.

While the role of central government in this regard can be questioned, so too can the role of traditional and district-level authorities. For example, while chiefs are legally required to consult their constituency before alienating land, there was little evidence of this having taken place in a comprehensive manner. While in most cases the Chiefs involved village headman, this was reported to have been in a nominal role exclusively – with the headmen tending to disavow themselves of any responsibility for the decision to allocate land or the terms of agreement upon returning home. In the Mpika case a Village Development Committee consisting of 9 members was called upon following the negotiation process to agree whether to welcome the “development” and a decision was made to endorse the project. Furthermore, at a district level there too appear to be issues relating to conflict of representation and interest. For example, in Isoka, an acting chief indicated that the initial offer letter was prepared with the ex-District Commissioner of the district, who was reportedly travelling with the investors. “We came to agree because the DC said, ‘this is part of development,’ and we are behind in development in Isoka District.” The acting chief expressed concern that former DC was involved without the issue being tabled for discussion by the Council, illustrating the confusion surrounding the capacity in which the former DC was acting. And with the land delineation process reportedly occurring one-sidedly by government surveyors (following an initial letter of intent signed by chiefs in which land area or boundaries are rarely discussed), there is a significant gap in the consultation of even the chiefs themselves. This gap was

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<sup>27</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.

<sup>28</sup> CIFOR interview with Provincial Agricultural Coordinator of Northern Province, June 2, 2010.

<sup>29</sup> CIFOR interview with Kasama-based staff of an international NGO, May 31, 2010.

<sup>30</sup> As observed by changes in awareness and orientation that seem to have occurred between two periods of field research roughly 6 months apart.

apparent in Isoka, where an initial agreement was signed but later came to be questioned when the map specifying the area implicated was presented – presumably by the LRWG and investors.

One of the most crucial legal mechanisms to protect customary right is the requirement that both the chiefs and District Councils certify that people's 'interests and rights are not being affected by the approval'. With the land allocated to the investors in all the case study sites being used for shifting cultivation and various forestry related activities, little value can therefore be placed in this assurance – thereby effectively relegating these processes to protect customary rights to mere technicalities. In the case of the Farm Block Development Program many of the areas, being located in accessible, prime cropland areas, were also found to be actively used by communities (Ministry of Land, 2009). Moreover, considering that the land is officially declared 'free' by this process, there is a risk that there are no provisions to redress the effects of community land loss. Since the conditions of land access are determined "on the side," and are not part of the legislated land acquisition process, it is up to the discretion of the investor – and to the negotiation skills of customary rights holders – on the conditions of land transfer. While investors are required to adopt mitigation measures (which many include compensation for loss) as a condition of their environmental permit, it is questionable whether the EIA process adequately identifies impacts needing mitigation. For example, although the Mpika project did acknowledge loss of farmland in their Environmental Project Brief (EPB), it argued that "food security will increase due to labor 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 program'. The rigor and validity of this process is thus debatable, considering how the report assesses potential socio-economic impacts on the basis of untested and ideologically tinted assumptions, in the absence of a baseline survey.

For the land acquisition for an oil palm project in Mpika District, the involvement of government was less pronounced. The current investors, one of Zambia's largest agri-businesses, acquired land from the previous developer in 2008 and, thereby, also the oil palm project that the company was in the process of developing. Although the original investor had already completed an EIA for the project in 2006, prior to transfer, the land conversion was rejected by the President in 2007 for 'being too large for one project.' It had also become the object of an Anti-Corruption Commission investigation for the former Minister of Science and Technology's role in facilitating the land deal. Despite the issues encountered during the initial land alienation process, the leasehold title for 20,101 ha of land was approved soon after the acquisition by the current investor, on a 99-year lease. In contrast though to the two other cases, the leasehold title was directly allocated to the company, making it essentially incontestable. In the absence of provisional leases with implementation conditionalities, there is a 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 displaced for project development and two villages located near the nursery site reported to have lost agricultural land<sup>31</sup>. Although the company did provide displaced households with compensation in cash and kind, other affected households were not directly compensated. Otherwise, the company seems to have taken its corporate social responsibilities seriously by providing a vehicle for one of the chiefs and an ambulance, installing the chief in the company's board on a monthly salary of approximately US\$ 205,

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<sup>31</sup> Reported impacts included loss of orange groves and cassava fields in the uplands, and the loss of sugar cane and mango trees and a declining fish population (from the establishment of pump irrigation for the nursery) in the swamps.

and a royalty agreement to be deposited in a Community Development Trust.<sup>32</sup> Yet while the contributions seem to be comparatively significant, there is a perception that the Chief and those close to him are capturing the bulk of the benefits, despite the fact that nobody from his village was directly affected by the land acquisition. Moreover, a complaint was also 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 the Mpongwe District land was not directly acquired from the chiefs or government, as a leasehold title was already allocated to previous operators. The company's three estates, covering 45,457 ha of land, were formerly operated as state farms and then for over two decades by a foreign-owned development finance institution before being acquired by the current investor in 2008<sup>33</sup>. Only 34 % of the area had been developed by the previous owners at the time of acquisition, making it vulnerable to encroachment. As the company sought to develop *jatropha* plantations on the unutilized land, a land conflict that initiated under the earlier lease holder was re-kindled and a second conflict with encroachers ensued – both of which were settled by the courts in favor of the company (one prior to the recent land acquisition, and one following it)<sup>34</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 prep). Thus while purchasing long-standing leasehold title would in theory minimize land use conflicts, with many old commercial farms defunct, in practice even those lands are rarely free of occupation. Without any legal provisions to protect encroachers, they often have fewer legal avenues than customary land user to contest displacement.

In all the cases it appeared that most, if not all, the land acquisition and environmental permitting procedures were carried out – even if in a way that was haphazard or against the spirit of legal provisions. Although these regulations provide a number of important checks-and-balance to protect customary land rights and manage adverse community impacts, their effectiveness is questionable at best. Conflicts of interests on the side of the government, opportunities for personal enrichment by chiefs, and the widespread underlying faith in the potential of large-scale investments undermine the effectiveness of these mechanisms. Furthermore, the phrasing of legislation as 'actor X must declare' rather than 'outcome Y must be ensured' leaves much wiggle room for those operating in their personal interest. Compounding the implications of these processes on the livelihoods of customary land users is the lack of legal literacy and access to mechanisms to effectively contest infringements on rights. For example, the Lands Tribunal, which was developed as a mobile and accessible means to deal with land conflicts, has for lack of funds been unable to deal with cases involving customary rights or to become accessible to people outside Lusaka (Brown, 2005; Committee on Agriculture and Lands, 2009). Fairness of negotiations is also undermined by the high expectations that customary land users bring to the table regarding long-term development impacts. As captured by one affected land user in Mpika, "Lusaka was also at one time a village, but now it is a town." There too appeared to be no awareness about the duration of the land lease or the possibility that alienation could be permanent. While the EIA process would in theory ensure proponents adopt appropriate mitigation measures, it is questionable whether this process has sufficient rigor to capture the multitude of impacts. With only 12 inspectors responsible

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<sup>32</sup> CIFOR interview with company representatives, 22 May, 2010.

<sup>33</sup> CIFOR interview with company representative, 20 May, 2010.

<sup>34</sup> 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 favor was reportedly a grace period to allow crops to be harvested prior to relocation.

for monitoring compliance of permit holders throughout the country, the ECZ also lacks the human resources to carry out its duties successfully<sup>35</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 legal provisions to this effect with the government's development philosophy, render them essentially meaningless. In practice, the fate of affected land users depends more on the discretionary employment of corporate social responsibility practices by investors than on formal governance instruments.

## **Discussion and Conclusions**

### *Legal Protection of Customary Rights*

Findings suggest wide variability in the legal and institutional foundations for the protection of customary rights and processes of consultation of customary land users. This variability provide 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, significant differences were observed in those who hold ultimate rights to land and may therefore issue leasehold title to investors – with Ghana having the most far-reaching provisions to protect customary landholdings from expropriation. Here, unlike other countries, the leasehold is from 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. While Mozambique also has far-reaching provisions to protect customary rights achieved through occupation or through the acquisition of leasehold title, some suggest such rights have been scaled back in recent years through excessive administrative barriers to leasehold titling for customary land users. And while 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 of the case study countries (Ghana) does customary or village land 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 of a permanent transfer away from customary tenure for current and future livelihoods are likely to be significant, suggesting that local awareness of these provisions is a fundamental piece of information to support an informed consultation or negotiation process. Thus from a legislative standpoint, provisions are needed to enable the rights acquired under leasehold to emanate from customary land owners rather than the state, even where a role for the state in providing a legal grounding for related transactions is envisioned. Ghana may be looked upon as an interesting case in this regard. This would avoid the situation in which wholesale transfer of large tracts of land from longstanding rights holders to the state. Shorter-term and performance-based land transactions are also needed, balancing the interests of investors to have minimum protections so as to minimize the risk of investment while also giving affected land users the opportunity to monitor the extent to which promises made by investors are delivered, 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. 14-year leases are generally issued in Zambia (unless the President

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<sup>35</sup> CIFOR interview with ECZ Director, 18 May, 2010.

approves otherwise) and investors can then apply for a 99-year lease after 6 years. In Mozambique, issuance of a full DUAT after the initial provisional 2 year DUAT, is in theory conditional on the performance of the investment.

Processes for identifying suitable and available land for investment vary by country, with Mozambique having the most far-reaching process consisting of a nation-wide agroecological zoning. Ghana, Tanzania and Zambia all have land banks which are being developed 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 before 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 agro-ecological 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 that is sufficiently small to enable the identification of local communities and customary lands (including those without formal title) and must employ criteria that provide for a wide interpretation of what constitutes “utilized” land – including grazing, hunting, fishing and gathering (e.g., water, forest products). Since carrying out national level zoning at a scale at which such uses are identified is likely to be prohibitively expensive, it is necessary to pursue legislative improvements in zoning (for suitability *and* availability) and improved processes for community consent and customary land delineation simultaneously.

In all countries, two pathways were identified for the consultation of customary land owners: land allocation processes, and environmental impact legislation. With the ownership of allodial land fully in the hands of the Traditional Council in Ghana, placing the decision process fully in the hands of customary rights holders, provisions are made in all countries for the consultation of 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 have provisions for public consultations, many of these explicitly requiring consultations be carried out with all affected parties. If these legislative provisions are evaluated based on the principle of free, prior and informed consent (FPIC), greater specification is needed on the nature of information to be provided to affected land users ahead of and during negotiations and public hearings – 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. While the environmental legislation outlines impact criteria to be considered in such processes (albeit with considerable room for improvement), in no country are such details specified in land allocation procedures. Neither are efforts to improve legal literacy prior to project implementation a requirement. And while district authorities play a role in authorizing land transfers in all countries, specification of their role in providing checks and balances on decisions emerging from local consultations (to ensure these decisions were fully consultative and are in the collective interest) are only present in Zambia and, to a lesser extent, Mozambique.

Processes for the representation of customary rights holders tend to place 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, the requirement that project proposals be discussed in front of the entire village assembly, following a stakeholder meeting in which a draft plan is presented for comment and revisions made, makes Tanzania’s legislation far more progressive in ensuring downward accountability

to affected households than for other countries. 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 – posing risks should these authorities choose to act in pursuit of personal gain rather than the collective interest. Yet in all countries, the process of approval passes through district or provincial authorities, in theory providing an opportunity for placing checks and balances on customary authorities. The only country where government authorities also have a mandated role in the actual consultation process is Mozambique, where local administrative authorities and cadastral services participate in land identification and delineation and technical bodies of relevant ministries assess the technical feasibility of land use plans. The main conclusion to be drawn is that consent from customary authorities should never be considered consent from customary land users and other affected parties. The legislation must spell out processes for consulting the wider community – not only in land delineation, where lessons can be learnt from Mozambique, but 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 marginalized) groups to voice their concerns or question authority, suggesting that complementary provisions for targeted consultations with these groups are also necessary.

As for compensation to customary rights holders for land transferred to investors, only in Tanzania is compensation a legislated requirement for land acquisitions by both private investors and the state – where the ‘type, amount, method and timing of the payment’ and ‘full and fair compensation’ are required by law. In Zambia, compensation is mandated of 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 improvements) is only required under cases of forced expropriation by the state. Thus, any compensation in these countries is extra-legal, and thus fully at the discretion of the investor and dependent on the community’s legal awareness and savvy in evoking their 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 a tricky one, since to do this effectively would require a full economic analysis of income derived from diverse land uses that are displaced – current and future, as well as customary land users fully cognizant of the value of the everyday cultural, economic and environmental services provided from these resources. However, 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 that may be compensated should be incorporated into the law, as should a provision that the agreements reached on compensation be evaluated by independent parties (for fairness and the degree to which they represent the views of all affected parties) and then carry the force of law. 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, as evidenced by the many published cases of elite capture of benefits at the local level (Bigombé Logo, 2003; Colfer and Capistrano, 2005; Oyono et al., 2006; Ribot, 2009; Wittman and Geisler, 2005). Unambiguous mechanisms for information disclosure to local communities and civil society to enable them to also play a role in this capacity is also desirable.

Despite the limited provisions for compensation in land legislation, environmental impact regulations in all countries require impact mitigation processes and formal institutions for dispute resolution provide an avenue for aggrieved parties to seek recourse. The effectiveness of environmental impact legislation

is likely to be hindered by the tendency to focus on environmental over social variables or to leave this up to interpretation. While the Mozambican legislation pays lip service to the number of people affected, in Ghana, Tanzania and Zambia the legislation requires a full declaration of these impacts and, bar Ghana, investor commitment to appropriate mitigation strategies that are inclusive of socio-economic considerations. This environmental legislation, together with provisions to monitor the pace of implementation of investments (as in Zambia), provides 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). Yet to have teeth with regards to the protection of customary land rights, social indicators should be specified in detail in environmental impact legislation and agencies monitoring project implementation should incorporate 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 include either general-purpose courts at multiple levels, or special-purpose mechanisms for dealing with disputes over land, environmental impacts of chiefly misconduct.

Monitoring functions were found to exist for all countries in environmental impact processes, and for investment performance in Mozambique and Zambia. However, more systematic inclusion and better definition of social indicators in environmental impact assessments and for the purpose of monitoring is required in all countries. This is also needed for the monitoring of investments by making investment licenses a legal requirement (to make monitoring meaningful through more widespread coverage), legislating monitoring functions (rather than leaving them as extra-legal procedures) and expanding their scope. While no country presents a model in this regard, recent efforts by the ZDA to design and implement an investment monitoring system should be noted and nurtured.

#### *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 vast areas of land are lost – often permanently, with limited to no compensation. This poses an interesting analytical puzzle, as to whether legal frameworks are meaningless due to limited enforcement, or whether 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 categorized as 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 organizations), 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.

Four primary enforcement gaps may be noted. The first consists of project implementation in the absence of the necessary approvals, whether an investment license, a land title or an environmental permit – as observed in these case studies and in other sources (German and Schoneveld, 2010; Schoneveld and German, 2010). In the absence of such enforcement, government oversight of operations is negligible and procedures for consulting customary land users will be overlooked. The second gap is ensuring adherence to agroecological zoning, as in the case of Mozambique, and upper limits on the duration of leases and land areas which may be transferred to investors, as in the case of Tanzania. The third enforcement gap, and perhaps the most notable, is ensuring that all provisions in

the consultation process are followed and (in cases where the law backs this up) that consent is 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 Tanzania). A final gap in enforcement consists of the extent to which monitoring is carried out and sanctions applied for offenders, as observed in the EIA process in Mozambique and Zambia (where coverage is very poor and court cases few or non-existent), zoning in Mozambique and investor performance in Ghana and Mozambique. The latter case is notable, given the conflicting aims pursued by investment promotion agencies – investment promotion on the one hand, and investment regulation on the other. With official policies emphasizing investment promotion, agencies find themselves in a supportive role and 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 the most notable findings concerns the role of government actors. We find a significant disconnect between the portrayal of large-scale “land grabs” in the media, where the image of the greedy investor tends to be invoked, 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 communities were coerced by current or former government authorities, and 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), while 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 pressure was exerted directly by the Ministry of Commerce and Industry on chiefs 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, as government agencies are mandated 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 which often resulting in checks and balances working contrary to their intended purposes. Yet even in the case of 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 apparent complicity of government with the interests of industry despite variability in the roles they are mandated to play seems to have two different and complementary drivers. The first is ideological, with powerful modernization discourses shaping government commitments to the rapid expansion of industrial-scale production models. Government agencies seem to have fully bought in to notions that large-scale (foreign) investment is the most effective pathway for economic development and poverty alleviation through improving the balance of trade, enhancing technology spillovers and linkages to other sectors of the economy, and stimulating 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, with assumptions 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; Fairhead and Leach, 1996; Kull, 2004; Pyne, 1997; Uhl, 1987). Yet there is also evidence to suggest that this trend is driven by conflicts of interest and rent-seeking behavior. In all countries, central and district government are faced with strong incentives not only to generate revenues but to create conditions for enhanced economic growth and poverty reduction. 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 acquisitions. 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 actors involved may be justified this behavior on development grounds, it does introduce a conflict between capitalizing local government coffers on the one hand and safeguarding village land rights on the other. Efforts need to be made to ensure conflicts of interest between (legal and extra-legal) rent-seeking and safeguarding customary rights are eliminated in all countries – most notably by separating bodies receiving rents from those charged with safeguards, and monitoring and sanctioning of extra-legal practices.

Regarding the roles played by customary rights holders in the actual negotiation process, two key points merit discussion: 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, and ..., 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 taken into consideration and the nature and level of compensation. While 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), a sizeable number of negotiations in Tanzania, Mozambique and Zambia 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 which 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 discretion of the investor. Yet even in Tanzania, where legislated mechanisms for compensation are strongest, compensation for loss of access and for property remains highly variable and contentious. In Tanzania 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, whether by government agencies or civil society.

The above findings suggest there is a real and pressing need for a strong role to be played by competent and independent actors. This raises the question of the role played by non-governmental organizations (NGOs) within process of achieving consent – whether in the context of land negotiations or environmental impact processes. While the presence of civil society was noticeably weak in most countries, the case in northern Zambia illustrates the benefits that can come through the active involvement of non-governmental organizations. Yet where intermediary organizations are insufficiently independent, as in the case of land negotiations for timber plantations Mozambique, NGO involvement can undermine rather than support the protections of customary rights in practice. Efforts are needed to support the positioning of NGOs and the independent media at key stages in the process, such as: (i) designing legal reforms to address identified weaknesses; (ii) creating awareness on the law, potential risks and the value of local assets; (iii) providing checks and balances on the negotiation process and related agreements *before* land titles and environmental licenses go through; and (iv) supporting the monitoring effort and mechanisms for redress. Legal literacy efforts should encompass, minimally, the legal underpinnings of customary rights, land acquisition processes and land transfer; the duration and renewability of land leases; conditions of renewability (including whether local livelihood impacts are a consideration or whether affected parties have a say); and the permanence of rights foregone to the government and investors.

Ultimately, much of what is involved in a community's decision to give up their most valuable asset for almost nothing has to do with their desperate need for services and market outlets, and their expectations (derived in large part from official discourse over large-scale land deals) about the "development" this may bring.

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# ANNEX I – Policies and regulations on the 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 recognized and governed by customary law ( <i>Land Title Registration Law, 1986</i> ). The Traditional Council has to approve the alienation of Customary Land ( <i>Administration of Lands Act, 1962; 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 neighbors 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 recognized 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 recognized 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 Agro-ecological Land Zoning Exercise (2008), which considers both land suitability and availability ( <i>National Biofuel Policy and Strategy, 2009</i> ).                                                                                                                                                                                                                                                                               | 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 agro-ecologically suitable and strategically located land through a core-satellite structure – as a program under the <i>National Agricultural Policy, 2004</i> . The Ministry of Lands and ZDA have established land banks as a service to investors.                                                                                   |

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| 4. Process of consultation with customary land users | No interest in land belonging to an individual or family can be disposed off 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 leads 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> ).                                                    |
| 4.1. 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 neighbors, and be signed by 3 to 9 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. Regulation 2).                                                                                                                                                           |
| 4.2. 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 their 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' ( <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 upon by alienation ( <i>Customary Tenure Conversion Regulations, 1996</i> ). The Commissioner of Land and the |

|                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
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| 4.3. 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 'authorization 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-utilization of the affected area ( <i>Land Law Regulations, 1998</i> ). | Any person whose customary right of occupancy or recognized 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 (see below). |
| 5. Impact mitigation requirements                | Aside from 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 minimizing negative aspects, which may include socio-economic and cultural losses suffered by communities and individuals, whilst 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                                                                                                                                                                                                                                                                                         | EMP's, 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                                                                                                                                                                                                       | 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,                                                                                                                                                                                                                               | 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</i>                                                                                                                                                    |

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|                                                              | proponents must produce an EMP to guide 'self-regulation' and submit an annual environmental report ( <i>Environmental Assessment Regulations, 1999</i> ).                                                                                                                                                                                          | authorization (max. 2 yrs for foreigners) may be revoked if development plans are not carried out and there is no reasonable justification ( <i>Lei de Terras, 1997</i> ).                                                                                                         | in consultation with relevant ministries, may monitor 'all environmental criteria and phenomena' and conduct audits (Environmental Management Act, 2004).                                    | <i>Assessment Regulations, 1997</i> ). The ZDA may also make inspection to determine whether the investment is being implemented as per investment license conditions ( <i>ZDA Act, 2006</i> ).                                                                                                                                       |
| 7. Dispute resolution                                        | 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 the House of Chiefs over chiefly misconduct ( <i>Chieftaincy Act, 2008</i> ). | Local communities participate in conflict resolution ( <i>Land Law, 1997</i> ). Policy intention to strengthen community and district tribunals to address eventual conflicts related to DUAT titles ( <i>National Land Policy, 1995</i> ).                                        | 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> ). | Any person aggrieved with a direction or decision of a person in authority may apply to the Lands Tribunal for determination at his 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> ). |
| 8. Changes in the status or classification of customary land | 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> ).                                                                                                                                                          | The Land Law of 1997 only specifies the fate of 'non-removable improvements' upon termination of DUAT, which become state property. While the fate of land is unclear, the process of delineating community land is likely to place all other land with DUATs under state control. | Village land must be transferred to general land prior to its acquisition by investors ( <i>Land Act, 1999</i> ).                                                                            | Customary land must be transferred to state land prior to its acquisition by investors ( <i>Lands and Deeds Registry Act, 1914</i> ).                                                                                                                                                                                                 |