

# Contemporary Processes of Large-Scale Land Acquisition in Sub-Saharan Africa: Legal Deficiency or Elite Capture of the Rule of Law?

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**Summary.** — Growth of emerging economies, policy commitments to biofuels and volatility in commodity prices have contributed to a marked increase in the pace and scale of foreign direct investment in land-based enterprises in the global South. This paper explores the relationship between policy and practice associated with customary rights protections in the context of large-scale land acquisitions through a document review and case study analyses from Ghana, Mozambique, Tanzania, and Zambia. Findings point to the difficulty of safeguarding customary rights even in countries providing “best practice” legal protections, and point to the fundamental role of human agency in shaping outcomes.

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**Key words** — foreign direct investment, land governance, land grabs, large-scale land acquisition, sub-Saharan Africa

## 1. INTRODUCTION

A confluence of factors on the global stage has over the last decade led to a rapid expansion in the scope and scale of transnational investments in farmland. Increased demand for resources by China and other emerging economies, policy commitments to biofuels and renewable energy, rising and unstable commodity prices, and improved investment prospects given anticipated future demand for water, food, and energy have conspired to make land-based investments increasingly attractive (Anseeuw, Alden Wily, Cotula, & Taylor, 2012; Anseeuw, Boche, *et al.*, 2012; Cotula, 2011; de Schutter, 2011a, 2011b; World Bank, 2011). It is estimated that between 35% and 68% of farmland acquisitions are targeting sub-Saharan Africa (Anseeuw, Boche, *et al.*, 2012; World Bank, 2011). One source reports 56.2 million ha of publicly reported deals in Africa since 2000 (Anseeuw, Boche, *et al.*, 2012), while a more conservative estimate points to at least 21.8 million ha of land having been acquired during 2005–12—equivalent to 9.9% of the annual area harvested on the subcontinent (Schoneveld, 2011). What is clear is that Africa, historically sidelined by foreign investors, is becoming an increasingly attractive destination for farmland investments due to its relative abundance of cheap and agro-ecologically suitable land (Fischer, Hizznyik, Shah, & Velthuisen, 2009; FAO, 2008) and its increasingly liberalized trade and investment regime (UNCTAD, 2009).

These large-scale agricultural investments are viewed by some as an opportunity to enhance productivity through increased agricultural investment, stimulate the development of a land market, or make important contributions to Africa's

macroeconomic and poverty indices (Cotula, Vermeulen, Leonard, & Keeley, 2009; de Schutter, 2011a; Poulton *et al.*, 2008; World Bank, 2011). Leading authorities on agriculture and food security, however, have questioned these views while highlighting the risks. Jacques Diouf, director-general of the UN Food and Agriculture Organization, highlights the risks of a “neo-colonial pact for the provision of nonvalue-added raw materials in the producing countries and unacceptable work conditions for agricultural workers” and “short-term mercantilist agriculture.”<sup>1</sup> Olivier de Schutter, UN Special Rapporteur on the Right to Food, has predicted that the poorest farmers will get priced out of emerging markets for land rights and the interests of those depending on the commons will be ignored (de Schutter, 2011a).

While investors were once thought to be largely private foreign entities, recent evidence points to the involvement of a diverse array of actors: private investors from diverse world regions, producer and consumer countries; state-owned enterprises; citizens, the diaspora and domestic political elites (Anseeuw, Alden Wily, *et al.*, 2012; Anseeuw, Boche, *et al.*, 2012;

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Cotula, 2011; Grain, 2008; O'Brien, 2011; Schoneveld, *et al.*, 2011; World Bank, 2011). Governments in consumer and host countries have also been instrumental in providing financial, technical, and administrative support to investors; establishing regulatory frameworks conducive to investment; and, in the case of host country governments, assisting in land acquisition (Cotula *et al.*, 2009; Ilhéu, 2010; Luo, Xue, & Han, 2010; World Bank, 2011). The involvement of such a diversity of actors in promoting, enabling, or enacting such land acquisitions poses very real challenges to safeguarding the rights and livelihoods of groups until now at the periphery. With claims to land and resources in much of rural Africa still governed by systems of collective ownership under customary law<sup>2</sup> and investment flows increasingly contingent on ease of access to land (and arguably, water), strengthening customary rights and "investment promotion" may quickly become conflicting policy objectives—raising very real challenges to land governance on the continent.

This paper seeks to deepen our understanding of the processes through which customary rights are both safeguarded and marginalized in the process of negotiating large-scale land transfers to investors. It does this through a comparative analysis of the legislation protecting customary land rights and governing large-scale land acquisitions in different case study countries, and by contrasting legislation with actual land acquisition processes in each country. In contrasting legislation and practice across countries and exploring why contradictions between legislation and practice occur, we identify gaps in the mechanisms currently employed to safeguard the interests of customary land users. The analysis is based on original field research and document review in four countries that are among the primary targets for large-scale land based investments in Africa: Ghana, Mozambique, Tanzania, and Zambia (Schoneveld, 2011). With three of these identified as best practice legal cases in respect of majority rights and common property resource protections (Alden Wily, 2011, 2012), it is also possible to explore a widely held assumption that the law is to blame (Alden Wily, 2011) and the solution lies in better land governance.<sup>3</sup>

Following a brief overview of customary tenure and land reforms in sub-Saharan Africa, the methodological approach employed in this study is described. Next, findings from the comparative analysis of legislation and practice are presented. The paper concludes with a reflection on findings and their implications for reconciling customary rights protections with the economic development imperative in host countries.

## 2. LAND POLICY REFORMS AND "CUSTOMARY" RIGHTS PROTECTIONS IN AFRICA: HISTORY AND IMPLICATIONS FOR THE CONTEMPORARY LAND GRAB PHENOMENON

Land reform has often been central to efforts to promote rural development (Brown, 2005). While such reforms were a major concern for development thinkers seeking to enhance equity and efficiency in the first few decades following World War II, they did not extend to Africa due to the perceived abundance of land and flexibility of communal land tenure institutions (Platteau, 1992). Yet with the virtues of modernization and state-led development thoroughly entrenched among Africa's new political elite, the post-colonial era saw numerous interventions aimed at modernizing the African peasantry and rationalizing land relations (Bonneuil, 2000; Hill, 1977). This involved, for example the nationalization of large areas of land for the purpose of resettlement and large-

scale state farming, which, among other things, sought to promote individualized landholdings (Berry, 1989; Scott, 1998). In the context of structural adjustment reforms in the 1980s, statist economic policies became increasingly unfeasible and pressure mounted to reform the land sector (Falloux, 1987; Platteau, 1992). Since the early 1990s, most countries in sub-Saharan Africa have gone through structural adjustment programs and policy reforms aimed at liberalizing the land market (Daniel & Mittal, 2010; Kleinbooi, 2010; Manji, 2006), including, in some cases, legal recognition of customary rights. These reforms have not been without controversy due to the perceived lack of public participation, limited legal backing for rights of customary users, the conceptualization of development and related land reforms as market-based enterprises and the easing of restrictions on land ownership by foreigners (Andrianirina-Ratsialonana, Ramarojohn, Burnod, & Teysier, 2011; Brown, 2005; Zambia Land Alliance, 2007).

Land is unquestionably recognized as a crucial asset for the rural poor. In the context of growing commodity prices and commercial interest in land, the question of how to protect customary rights while leveraging their potential to generate economic benefits for the poor gains center stage. Some have advocated for formalizing and individualizing customary tenure, arguing that the ambiguity, flexibility, and negotiability of rights under customary tenure regimes undermine tenure security and productivity-enhancing investment. In this camp, formal titling is viewed as a mechanism for increasing the efficiency of land distribution and boosting agrarian productivity and capital accumulation (de Soto, 2000; World Bank, 1989). Hardin's argument that customary tenure regimes in which resources are managed as common property will inevitably result in resource degradation by failing to regulate predatory behavior (Hardin, 1968) has also gained currency in global and regional discourse, lending support to privatization. Others have cautioned against formal registration and privatization of land rights, emphasizing 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 (Behnke, 1994; Gray & Kevane, 1999; Lastarria-Cornhiel, 1997; Niamir-Fuller, 1998; Ostrom, 1990). This literature has highlighted how formal titling can enable wealthier and more powerful groups to acquire rights at the expense of the poor (Lastarria-Cornhiel, 1997; Toulmin & Quan, 2000). Those advancing these critiques have proposed more endogenous policy reform processes cognizant of the weaknesses of extant administrative capacities; ensuring women's customary rights are assured during land registration and titling processes; making provisions for registering collective titles; matching the nature and degree of State intervention in customary land systems to the nature and causes of tenure insecurity; and leaving functional customary systems alone in land-abundant settings lacking an active land market (Brown, 2005; Fitzpatrick, 2005; Joireman, 2008; Lastarria-Cornhiel, 1997).

Another important trend in land governance is the push toward political and administrative decentralization over the last two decades, 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 or other downwardly accountable authorities (Ribot, 2003). Much of the scholarly work has tended to highlight the limited extent to which wider decentralization reforms have actually been put into practice, and to the limited or mixed evidence of success. Putting decentralization into practice has been hindered by vested interests in retaining central control over decision authority or resource rents, limited capacity, and the wide-

spread tendency to devolve responsibilities without corresponding resources and authority (Nsibambi, 1998; Ribot, 2003). Evidence also suggests that where carried out, the purported livelihood and sustainability benefits may not always accrue given the multiplicity of contextual factors that influence the natural resource management decision calculus (Blomley, Ramadhani, Mkwizu, & Böhringer, 2010; Tacconi, 2007). Furthermore, local elites and vested interest groups are often able to manipulate the opportunities created through decentralization to their own benefit (Oyono, 2005; Tacconi, 2007). On the other hand, a review of experiences in decentralization in the land sector in 20 African countries found widespread policy and legal commitment to decentralization 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 (Alden Wily, 2003). Yet the current emphasis on foreign direct investment as a pathway to economic development and the sharp increase in the number and scale of land acquisitions begs the question of whether increased commercial pressure over land will be compatible with the commitment to recognize customary land rights and decentralize land and resource management. As stated by Alden Wily (2003):

“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” (Alden Wily, 2003: i).

If, on the other hand, decentralization creates new opportunities for elite capture and special interest-politics through the political space it creates for re-negotiating community relations with the state (Bardhan & Mookherjee, 2006; Lentz, 2006), increased commodification of land in the context of decentralized land management could serve to entrench existing inequalities. 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).

A host of initiatives aimed at improving land governance have been launched at the regional and global levels. Several of these, such as the Voluntary Guidelines on the Responsible Governance of Tenure of the Food and Agriculture Organization (FAO) and the African Union’s Framework and Guidelines on Land Policy in Africa (AUC-ECA-AfDB Consortium, 2010; FAO, 2012), aim to bolster government commitment to sound land policies and provide frameworks to guide the development of national level policies and programs for strengthening customary tenure and its role in economic development. Others, such as the Principles for Responsible Agricultural Investment jointly developed by FAO, the International Fund for Agricultural Development, the United Nations Conference on Trade and Development and the World Bank (FAO *et al.*, 2010), outline a set of provisional principles to define “responsible” agricultural investment so as to capture the opportunities presented by private sector investment while minimizing its risks. Finally, the UN Special Rapporteur on the Right to Food developed a set of core principles for safeguarding human rights in the context of large-scale land acquisitions and leases by drawing on international human rights law, to inform the actions of host countries and investors alike (de Schutter, 2009). As emerging instruments of better land governance, it is important to note that none of these guidelines is designed to be “normative” in

the sense of being legally binding on host country governments or investors. Their potential to induce behavioral changes providing widespread protections for local communities and customary rights holders may therefore be considered akin to the wider set of voluntary codes of conduct promulgated by industry and multi-stakeholder fora to govern corporate behavior. In the absence of efforts to make such principles measurable and verifiable and to incorporate mechanisms for public disclosure and independent verification, they may do little to restrict the latitude for circumvention and discretionary action (Cashore, Auld, Bernstein, & McDermott, 2007; Haufler, 2001; Sethi, 2005). Thus, for the time being, the ability to guide land acquisitions in ways that maximize benefit while minimizing harm lie predominantly with host country governments and citizenry.

### 3. METHODOLOGY

The methodology for assessing the legal underpinnings of large-scale land acquisition consisted of a content analysis of key policies and legislation governing land tenure and acquisition, investment promotion, and environmental protection in focal countries. The methodology for assessing land acquisition *in practice* consisted of a comparative assessment of stakeholder experiences with land acquisition across multiple case studies. Findings were based on primary data collection carried out from June–August 2009 (Ghana), November 2010 and June 2012 (Mozambique), March–May 2010 (Tanzania), and May–June 2010 (Zambia). Methods consisted of key informant interviews with government agencies involved in land administration and investment promotion in national and provincial capitals, key informant interviews with district and customary authorities, and focus group discussions with affected persons. In Mozambique, where primary data collection was limited to interviews in national and provincial capitals, case study findings were derived from published literature.

While most findings are drawn from the biofuel sector, cases also include land acquisitions for food crop production and silvicultural plantations (Table 1). In Ghana, nine biofuel feedstock plantations were visited from six different companies. These were spread across four districts, one in Ashanti Region (Asante Akim North) and three in Brong Ahafo Region (Kintampo North, Nkoranza, and Pru)—all situated within the forest to savanna transition zone in central Ghana. Land acquisition processes in Pru district, where five plantation sites were located, were studied in more depth. Case studies for Mozambique draw on 13 published case studies, five of these from the recent expansion of silvicultural plantations for pulp and paper in Niassa (spread across three districts) and eight from biofuel plantations spread across four provinces (Gaza, Inhambane, Manica, and Sofala). Of the latter, four are for jatropha and four for sugar cane. Case studies in Tanzania included two foreign-owned jatropha-based biofuel investments, one located in Kisarawe District, Pwani Region and the other in Kilwa District, Lindi Region. 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 processes of large-scale land acquisition involved the development of a set of parameters to

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

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

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

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

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

#### 4. CONTRASTING THE STATUTORY UNDERPINNINGS OF CUSTOMARY RIGHTS PROTECTIONS AND LARGE-SCALE LAND ACQUISITION WITH PRACTICE

Analysis of the statutory underpinnings of customary rights suggests that despite some similarities, there is wide variability in the legal foundations and institutional mechanisms for the protection of customary rights in the context of large-scale land acquisition across case study countries (Table 3). This section draws on the above analytical framework to analyze these legislative provisions and to explore the extent to which they are reflected in land acquisition practices.

##### (a) Customary rights protections

Each focal country was found to have constitutional, policy and/or legislative provisions to safeguard customary land

rights, with customary law and tenure officially recognized. Individual titles in most countries tend to only be recognized through formal land delineation and registration processes; in Mozambique, however, formal use rights or DUATs (*direitos de uso e aproveitamento da terra*, or “land use and benefit rights”) may also be acquired automatically through “occupation based on customary norms and practices.” Mozambican legislation in this regard is widely recognized as providing greater protections to customary users by avoiding the need for costly registration procedures and acknowledging complex tenure systems including individual and communally-held rights. However, provincial cadastral services were observed to be using the formal community land delimitation process (often facilitated by NGOs) to identify land *within* the community available for investment; this suggests that procedures interpretable as providing protections for customary land rights may in fact facilitate land alienation—albeit with a more informed and participatory analysis of actual land use practices. The status of customary land rights protections also appears to be in flux in the country, with the recent centralization of DUAT registration and new conditions requiring that communities demonstrate their ability to use the land productively potentially undermining local land claims (Nthumbo & Salomão, 2010).

In case study countries, land may be transferred away from the customary, village, or community domain through involuntary and voluntary processes. Legislation in each coun-



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

Parameter	Ghana	Mozambique	Tanzania	Zambia
1. 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 and has fiduciary duties ( <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> ). 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> ).	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> ). “Nonremovable improvements” become state property upon the termination of DUATs ( <i>Land Law, 1997</i> ). “Definitive authorizations” of DUATs to individuals or groups, citizens or foreigners, are issued by the government ( <i>Land Law Regulations, 1998</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> ). Village land must be transferred to general land prior to its acquisition by investors ( <i>Land Act, 1999</i> ).	Customary tenure is recognized and governed by customary law ( <i>Land Act, 1995</i> ). 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> ). Customary land must be reclassified as state land prior to its acquisition by investors ( <i>Lands and Deeds Registry Act, 1914</i> ).
2. Types and duration of land rights afforded to investors	Investors may acquire leasehold titles ≤ 50 years (foreign investors) and 99 years (domestic investors), renewable ( <i>Land Title Registration Law, 1986; Constitution, 1992</i> ).	Investors may acquire 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> ). Provisional certificates are first awarded for a period of 2 or 5 years (for citizens and foreigners, respectively).	Derivative rights are granted through the Tanzanian Investment Council for noncitizens, and granted rights of occupancy or derivative rights for citizens ( <i>Land Act, 1999</i> ). Such rights are subject to an 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 6 years, investors may apply for a 99-year Certificate of Title ( <i>Lands and Deeds Registry Act, 1914</i> ).
3. Initiatives to guide land allocation	The Ministry of Land and the GIPC have established land banks as a service to investors. The Commercial Agriculture Project in the Accra Plains and northern savannah supports investor access to land, private sector finance, and input-output markets for smallholders.	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> ). Government programs aiming to develop major growth corridors linking the hinterlands to major ports include the <i>Pro-Savana</i> program in the Nacala Corridor.	The TIC has established a land bank as a service to investors; the <i>Kilimo Kwanza</i> policy encourages large-scale agricultural initiatives and has a target to increase general land to about 20% by converting village land. The Southern Agricultural Growth Corridor aims to foster inclusive agricultural growth in southern Tanzania.	In each province land has been earmarked for Farm Block Development, where infrastructure is to be provided by the government to stimulate commercial agricultural development on agro-ecologically suitable and strategically located land ( <i>National Agricultural Policy, 2004</i> ). The Ministry of Lands and ZDA have established land banks as a service to investors.
4. Process of consultation with customary land users	No interest in land belonging to an individual or family can be disposed of without consultation ( <i>National Land Policy, 1999</i> ). A public hearing may be required if concerns are raised over the content of the EIA before an environmental permit is issued ( <i>Environmental Assessment Regulations, 1999</i> ).	Community consultation in the process of ensuring land is “free and without occupants” and delineating community lands is required ( <i>Land Law, 1997; Technical Annex, Land Law Regulations, 2000</i> ). In the EIA process, public participation is required for all projects causing dislocation of communities or leading to restrictions in natural resource use ( <i>Environmental Impact Assessment Regulations, 2004</i> ).	Anyone proposing to use village land under a right of occupancy may, by invitation, address a Village Assembly meeting to answer questions about the proposed land use ( <i>Village Land Act, 1999</i> ). In the EIA process, the NEMC must solicit oral or written comments from those affected, notify the public, circulate the EIA for review, and convene a public hearing if requested ( <i>Environmental Management Act, 2004</i> ).	When alienating land, both Chiefs and District Councils must declare that “members of the community” were consulted ( <i>Customary Tenure Conversions Regulations 2, 1996</i> ). Project developers must seek the views of those to be affected by the project and describe “the socio-economic impacts . . . , such as resettlement” when preparing an EIA ( <i>Environmental Impact Assessment Regulations, 1997</i> ).

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4a. Mechanisms for local representation	Besides deciding on the alienation, the Traditional Council is mandated to represent its constituents in negotiations, having fiduciary duties to administer land in a manner beneficial to its constituency ( <i>Constitution, 1992</i> ).	The “community’s own mechanisms for representation and action” are fixed by law ( <i>Land Law, 1997</i> ). To ensure “representativeness of results and consensus,” the delineation of areas occupied by local communities must include men and women, diverse socio-economic and age groups and neighbors, and be signed by 3–9 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, Chiefs and District Councils must confirm that the land transfer to the applicant will not infringe on the rights of others ( <i>Administrative Circular, No. 1, 1985; Customary Tenure Conversion Regulations, 1996</i> , incl. <i>Regulation 2</i> ).
4b. The role of intermediaries	The GIPC should provide to an enterprise the assistance and guidance as the enterprise may require ( <i>Ghana Investment Promotion Act, 1994</i> ). The Lands Commission is required to approve that the development is consistent with existing development plans before titling ( <i>Constitution, 1992</i> ).	The Cadastral Services and local administrative authorities are to be involved in land identification and delineation; the District Administrator or 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 investment ( <i>Tanzania Investment Act, 1997</i> ). Both the President and Minister of Land have to approve the reclassification of Village Land to General Land, and the Commissioner of Lands the nature and extent of compensation ( <i>Village Land Act, 1999</i> ).	The ZDA, with the Ministry of Lands, “shall assist an investor in identifying suitable land for investment and ... applying to the responsible authorities for land” ( <i>ZDA Act, 2006</i> ). The District Council must approve the request of Chiefs to convert customary to leasehold tenure and certify that existing interests in land are not being infringed upon by alienation ( <i>Customary Tenure Conversion Regulations, 1996</i> ). The Commissioner of Land and the President must approve the alienation ( <i>Administrative Circular No. 1, 1985</i> ).
4c. Compensation mechanisms	Only legislated for land acquisitions by the State, for which replacement of land of equal value and suitability should be provided and “the cost of disturbance” covered ( <i>State Lands Act, 1962; Constitution, 1992</i> ). For all types of land acquisition, “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 nonutilization 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 receive compensation for the alienation and ground rents ( <i>Land Act, 1995</i> ). As part of environmental mitigation measures, project proponents should provide compensation (see below).
5. Impact mitigation requirements	Aside from the above compensation mechanisms, impact mitigation requirements apply only to environmental issues and should be included in the EMP ( <i>Environmental Assessment Regulations, 1999</i> ).	Projects requiring a 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, while enhancing positive aspects of the project” ( <i>Environmental Impact Assessment and Audit Regulations, 2005</i> ).	Environmental permit holders should adopt mitigation measures, “to ameliorate or compensate for adverse environmental impacts and losses suffered by individuals and communities and for enhancing benefits” ( <i>Environmental Impact Assessment Regulations, 1997</i> ).

6. Monitoring (social dimensions of, procedures)	The EPA is charged with ensuring "compliance with any laid down environmental impact assessment procedures in the planning and execution of development projects" ( <i>Environmental Protection Agency Act, 1994</i> ). Project proponents must produce an EMP to guide "self-regulation" and submit an annual environmental report ( <i>Environmental Assessment Regulations, 1999</i> ).	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 authorization (max. 2 years for foreigners) may be revoked if development plans are not carried out and there is no reasonable justification ( <i>Lei de Terras, 1997</i> ).	Under environmental impact regulations, project proponents must submit annually an environmental audit report, based on provisions in the EMP, to the NEMC ( <i>Environmental Impact Assessment and Audit Regulations, 2005</i> ). The NEMC, in consultation with relevant ministries, may monitor "all environmental criteria and phenomena" and conduct audits ( <i>Environmental Management Act, 2004</i> ). The TIC has an Aftercare Investment Service charged with monitoring investments.	The proponent should conduct an "environmental audit" after 12 months, and thereafter whenever requested ( <i>Environmental Impact Assessment Regulations, 1997</i> ). An inspector may undertake investigations relating to the implementation of the permit conditions ( <i>Environmental Impact Assessment Regulations, 1997</i> ). The ZDA may also make inspection to determine whether the investment is being implemented as per investment 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 with 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 their 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> ).

try provides for involuntary expropriation under the state's right to eminent domain, when it is considered to be in the public interest—provided formal compensation and assisted resettlement are provided. This mechanism was not observed in practice in the context of large-scale agricultural investments, with most transfers subject to some form of voluntary process. In countries where such voluntary surrenders are not accompanied by legislative provisions for the compensation of affected parties (e.g., Ghana, Mozambique, and Zambia), discretionary approaches to compensation are the result—leaving the presence, nature and degree of compensation up to the skills of the negotiator. Such voluntary transfers are the focus of the remainder of this paper.

For all but one project in Zambia, land acquisitions were found to involve a negotiated process over land located within the customary domain.<sup>4</sup> With freehold title for large-scale commercial investments prohibited in each country, negotiations revolved around the acquisition of long-term leasehold or usufruct rights. With most land emanating from the customary domain and leasehold titles in Tanzania and Zambia only issuable from state land, customary land in these countries must be reclassified in the process of land allocation—permanently extinguishing customary rights. In Mozambique the legislation is unclear on whether DUATs revert to customary users or the state in cases where the investment fails or following DUAT expiry. With the government holding the authority to issue "definitive authorizations" of use and benefit rights to customary users and investors alike, it is likely that such transfers result in the permanent loss of "community" land to the state. Land legislation which legitimizes the permanent loss of land from the customary, village, or community domain in the context of agricultural investment seems to contravene legislation devolving land administration and management (Tanzania's 1999 Village Land Act) and seeking to recognize and protect customary rights (Mozambique's 1997 Land Law, Zambia's 1995 Land Act). Ghana is unique in this regard, with land remaining in the customary domain during the leasehold period and reverting back to customary control following the expiry of leasehold title.

Despite substantial authority over land vested in community land management institutions, with the exception of Ghana the government rather than customary authorities was found to be the primary formal agent in transactions involving "customary" land. All cases in which rights to customary land were being negotiated nevertheless involved some form of consultation with customary leaders or land users. Details on government mediation of land transfers and community consultations are described in greater detail in the sections to follow.

#### (b) Type and duration of land rights afforded to investors

As for the nature and duration of rights afforded to investors, all countries forbid the sale of land to foreign entities but have provisions for investors to acquire leasehold title for periods varying from 25 years (for biofuels in Tanzania) to 99 years (for Ghana, Zambia and all other land uses in Tanzania). Importantly, several countries have established a system of provisional leases, enabling long-term leasehold to be conditional upon the early performance of investments and investor compliance with fiscal commitments. In Zambia, the Ministry of Lands issues provisional 14-year leases (unless the President approves otherwise), and investors can then apply for a 99-year lease after 6 years. The Zambia Development Agency (ZDA), which may acquire land on behalf of prospective investors, has implemented its own system of pro-

visional leasehold titles in which the land is held in trust by ZDA for the first 2–5 years—giving it oversight over investor performance in a bid to monitor commitments and minimize land speculation (Simwanda, 2011). In Mozambique, provisional authorizations of no more than 5 years (for Mozambican nationals) or 2 years (for foreigners) are issued, as a means to ensure investments are being implemented prior to the issuance of long-term DUATs.

In the absence of a practice of public disclosure of final agreements between investors and the government (the so-called “Investment Promotion and Protection Agreements”), it was impossible to verify the extent to which actual practice follows legislated terms of leasehold title. While land leases in excess of established sectoral limits for biofuels were found in Tanzania, no such irregularities were observed elsewhere. Efforts to track investor performance were only observed in practice in Mozambique and Zambia. In Mozambique, this resulted in the DUAT for one company being revoked due to noncompliance with contractual provisions. Although in Zambia authorities do periodically carry out site visits, the government was observed to assume a supportive rather than regulatory role when irregularities are discovered: identifying the reasons for noncompliance and exploring how the government can support investors in realizing their investment objectives and honoring related commitments. In Ghana, conditionalities are rarely incorporated into formal leasehold titles, suggesting that land cannot be repossessed in the case of project failure and/or misconduct.

#### (c) Government initiatives to guide land allocation to investors

Processes for identifying land for investment vary considerably across case study countries. Mozambique is the only country to employ nation-wide agro-ecological zoning as a means to identify suitable and available land for different purposes, with the first zoning at a scale of 1:1,000,000 finalized in early 2008 and a second zoning exercise at a 1:250,000 scale originally scheduled for completion in 2012. Sectoral legislation restricting investments to areas authorized by zoning, such as the Biofuels Policy and Strategy of 2009, provide a mechanism to align investments to areas identified as *suitable*. Mozambique’s Land Law Regulations of 2000 lay out an elaborate process for delineating community lands, presumably complementing zoning by assisting in the identification of *available* land. While other countries lack agro-ecological zoning, Tanzania’s 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. Detailed procedures are also spelled out for delineating the boundaries of community land and supporting community land use planning in Mozambique, but are not required prior to investment.

Each focal country has also developed agricultural development schemes to promote industrial-scale agriculture in prime agricultural land—much of this located along major road and rail “corridors.” Mozambique’s effort, consisting of major development corridors linking extractive industries in the interior to major ports, is anticipated to lead to a host of positive economic spill-overs for agriculture and small-scale enterprises.<sup>5</sup> The ambition of the *Pro-Savana* project, a trilateral cooperation between Mozambique, Brazil, and Japan, is to re-create the agricultural revolution of the Brazilian *cerrado* in northern Mozambique’s Nacala corridor. Tanzania’s *Kilimo Kwanza* or Agriculture First policy seeks to stimulate a green revolution through increased public and private investment, infrastructure development, fiscal incentives, and fast-track

land titling for citizens and foreign investors.<sup>6</sup> Its Southern Agricultural Growth Corridor, initiated at the World Economic Forum Africa summit in 2010, is additionally seeking to foster inclusive, commercially successful agribusinesses benefiting small-scale farmers.<sup>7</sup> Zambia, under the National Agricultural Policy of 2004, has established a system of farm blocks in each province. Thus far, eight farm blocks ranging from 100,000 to 147,000 ha have been established, each involving a core venture of approximately 10,000 ha surrounded by 1500- to 5000-ha commercial farms and a larger number of smaller outgrowers.<sup>8</sup> Infrastructure to stimulate investment is being provided through public and private sector contributions. Ghana’s Commercial Agriculture Project is the latest such program to be approved. Signed in March 2012, it consists of a US\$100 million World Bank loan to support investor access to land, private sector finance, and input–output markets for smallholders in the Accra Plains and Ghana’s northern savannah.<sup>9</sup>

Ghana, Tanzania, and Zambia have also established land banks in which customary land available for investment is identified through government consultations with local or traditional authorities. While in each country identified parcels are then held in reserve for prospective investors, the process through which subsequent leasehold title is negotiated differs by country. In Ghana, no reclassification of land in the customary domain is required for it to be registered in the land bank, and investors interested in acquiring identified parcels must negotiate directly with customary authorities. In Zambia, on the other hand, once land passes to the land bank it becomes state land and ZDA the custodian—holding land “in trust” for prospective investors. Here, a Land Reform Working Group (LRWG) was established under the Private Sector Development Reform Program to facilitate the identification of customary land for inclusion in the land bank and the farm block program (Ministry of Lands, 2007). In practice, the government was found to be actively reclassifying customary land to state land irrespective of an expression of interest in particular locations by investors—thus extinguishing customary rights even in the absence of investment. Similar to Zambia, ownership of the 2.59 million ha of land currently in the Tanzanian Land Bank (1.1 million ha of which for agriculture) is currently vested in the Tanzanian Investment Centre, from which investors acquire derivative titles.<sup>10</sup> While this land is considered “committed,” it is reportedly not yet surveyed and reclassified into General Land, a process required for the TIC to issue derivative titles to investors (Mousseau & Mittal, 2011).

Ghana’s Commercial Agriculture Project was not yet established at the time of fieldwork and the land bank was not yet driving investment activities. However, government programs for promoting or guiding land allocation for investment were found to have a significant impact on the practice of land negotiation in Mozambique, Tanzania, and Zambia. The agro-ecological zoning carried out in Mozambique was actively used to facilitate the identification of suitable lands. However, a study of commercial forestry plantations in Niassa Province found that land was initially allocated based on maps produced at a scale that did not enable the identification of communities or community lands, resulting in conflict and community resistance at the time of project implementation (Sitoe, 2009). This process was facilitated by the Malonda Foundation, a private, “public utility” entity established by the Council of Ministers to stimulate investment in the sector. Operating in the capacity of both investor and facilitator of land negotiations, the Foundation holds an environmental permit, is reportedly adhering to Forest Stewardship Council



principles and has its own corporate social responsibility mechanisms, but has facilitated land deals with countless irregularities (Sitoe, 2009). Involvement of higher level authorities in these projects has reportedly given local leaders little power to shape negotiations, and played a role in countering local resistance (Overbeek, 2010). The Government's Community Lands Initiative is supporting dispute resolution in the Province to address these conflicts. Whether zoning is playing a meaningful role in reconciling customary uses with investor interest in farmland elsewhere in the country is unclear, and lies beyond the scope of this report.

National agricultural development and land bank programs were found to be instrumental in entrenching a pro-investment stance and fomenting large-scale land acquisitions. In Tanzania, the Prime Minister in 2009 directed all regional and district governments to identify and survey "unallocated" land for donation to the land bank.<sup>11</sup> Under *Kilimo Kwanza*, the government aims to increase General Land to about 20% of the country's land area for industrial-scale agricultural investment, by reclassifying village land.<sup>12</sup> At the time of research, guidance to investors on land acquisition was largely shaped by personal contacts and the investors' own preferences, as the land bank was limited mainly to industrial land in urban areas.<sup>13</sup> Overstatement of benefits of investments by politicians and the President has bolstered support from government officials, tending to extinguish critical debate among villagers and local representatives. In Kisarawe District for example, a local member of parliament and close confidante of the president played a central role in introducing an investor to local communities and pressuring communities to accept the investment.

Some of the most ambitious programs were found in Zambia, where the government had secured 847,000 ha of land for the Farm Block program since program inception in 2004. The President, Minister of Lands and other key government officials<sup>14</sup> have repeatedly urged traditional authorities to release land for investment, arguing that customary land is insufficiently utilized and should thus be put to more productive use through large-scale commercial investments. This orientation reflects Zambia's economic and political ideology, as reflected in the Fifth National Development Plan (FNDP) and National Agricultural Policy—namely, its faith in large-scale (foreign) commercial investments as a pathway to sectoral upgrading and modernization. The Zambia Development Agency should be credited for recent efforts to address some of the critiques associated with its role as facilitator of large-scale land transactions; such an ideology, however, arguably constrains its ability to act as a neutral mediator in a process in which customary authorities retain the right to say no. As will be seen below, the risks to local communities are amplified when government agencies position themselves alongside investors in seeking to wrest land away from local communities.

(d) *Processes for consulting customary land users in the context of large-scale land acquisition*

Following a general overview of pathways through which affected persons are to be consulted in focal countries, this section explores specific sub-themes within the analytical framework: (i) the role of intermediaries; (ii) mechanisms for local representation; and (iii) compensation mechanisms. Included in the category of "affected persons" are individuals and households with longstanding (*de jure* or *de facto*) claims to the ownership or use of land and resources directly affected by investments, and who have been affected through the dis-

placement of customary land uses (individual or collective), displacement of areas of residence, or both. While indirect effects resulting from land use/cover and livelihood change are duly acknowledged, "affected persons" are here considered to be those experiencing direct effects (as a minimum).

While all countries have legislated procedures for consulting affected land users, these were found to fall far short of the concept of Free, Prior and Informed Consent (FPIC) enshrined as best practice in international law and voluntary codes of conduct.<sup>15</sup> Based on key provisions of various international legal instruments, FPIC may be defined as the right of affected persons to give or without their consent to proposed projects that may affect the lands, territories, and resources they customarily own, occupy, or use, as expressed through their own chosen representatives, in the absence of coercion or manipulation, based on a full sharing of relevant information, prior to the approval or implementation of legislative or administrative measures or project activities that may affect them (see Colchester, in preparation; UN, 2008). Some treaties also include "just and fair compensation" as a component of FPIC in the context of land transfers (United Nations, 2008). Applicable land legislation in each focal country contains provisions for consultation but not for consent, signifying the failure to confer any authority on affected parties to veto or shape the terms of the investment (Vermeulen & Cotula, 2010).

Focal countries have two pathways for consulting customary land owners: land allocation processes and environmental impact legislation. Ghana goes the furthest in placing the land alienation process fully in the hands of customary rights holders. However, all countries require some form of consultation of customary leaders or land users on land transfer, while some have participatory processes for delineating customary land and/or processes for ensuring adequate compensation. In none of the four countries do relevant laws provide for the consultation of *all affected individuals*. Mozambique and Tanzania are most advanced in specifying which claims are to be accommodated in the alienation process, with processes for consulting full villages or sub-groupings therein legislated for. In Ghana, on the other hand, traditional authorities hold the radical title in land and have full discretion to carry out transactions they consider to be in the interest of their constituencies. In Zambia, chiefs and district councils merely have to "declare" that "members of the community" were consulted. Such a mechanism leaves the consultation process vulnerable to misrepresentation by local leaders or poor representation of different interest groups within "the community."

Environmental legislation in all countries also has provisions for public consultations, many of these explicitly requiring consultations to be carried out with all affected parties. If these legislative provisions are evaluated based on the FPIC standard, however, greater specification is needed on the nature of information to be provided to affected persons ahead of and during negotiations and public hearings—including legal foundations of customary rights protections and land transfer, and details on the proposed project and its likely positive and negative impacts. While the environmental legislation outlines impact criteria to be considered in such processes (albeit leaving considerable room for improvement), in no country are such details specified in land allocation procedures. Nor are efforts to improve legal literacy prior to project implementation a requirement.

In most cases researched, the quality and depth of community consultations were extremely limited in practice. Even in Mozambique, the elaborate process envisioned in the 1998 Land Law Regulations often boiled down to a token

gesture—with many consultations conducted in a single meeting (Nhantumbo & Salomão, 2010). Over-reliance on agro-ecological zoning to identify communities and customary land and the observed failure of investors to respect agreed boundaries were also cause for concern (Nhantumbo & Salomão, 2010; Waterhouse, Lauriciano, & Norfolk, 2010). Common shortcomings of community consultations in Mozambique included land occupation in the absence of consent, including prime agricultural land; promises of benefits that are either vague or not time-bound; poor or biased documentation of deliberations (unenforceable, biased in favor of investors' interests or lacking in sanctions for noncompliance); failure to provide affected persons copies of consultation records; and failure of investors to comply with agreements (Manuel & Salomão, 2009; Nhantumbo & Salomão, 2010; Overbeek, 2010; Ribeiro & Matavel, 2009). In Tanzania, the Biofuels Guidelines requirement that land use plans be drawn up prior to land transfer was difficult to implement as most villages lack such plans. While some investors financed land use planning and the mapping of village land they were planning to acquire, others argued this was instead the responsibility of village authorities. Where it was not undertaken, village residents lacked clarity on how much land was given away; some villages gave more than 30% of their land to investors (Habib-Mintz, 2010). Where land use planning was undertaken, the resulting plans often relied on 10-year projections of anticipated use to determine future land needs, in stark contrast to the 99-year renewable land leases being negotiated by prospective investors.

Across all focal countries, fairness of negotiations was also found to be undermined by low levels of legal literacy (on such crucial issues as the duration, size and permanence of the land transfer) and unrealistic expectations about future benefits among affected persons. Each of these factors eroded local bargaining power and the ability to secure just compensation. As captured by one affected land user in Zambia, "Lusaka too was once a village"—a stark illustration of the often extreme inflation of anticipated benefits in the minds of local residents. In select cases where investors had engaged in good faith negotiations of some depth, communities were found to be content in the early stages; where such investments failed, contentment was also short-lived (Ribeiro & Matavel, 2009).

#### (i) *The role of intermediaries*

District or provincial authorities are mandated to play a role in authorizing land transfers in all countries. They also have a legislated role in land use planning in Ghana and Tanzania, and customary land delineation in Mozambique. Yet only in Mozambique do government authorities have a mandated role in community consultations over land, with local administrative authorities and provincial cadastral services working with community members to carry out land identification and delineation. This should in principle provide an opportunity for checks and balances against abuse by community leaders or manipulation by corporate actors by enabling local governments to verify that decisions were consultative and provisional agreements likely to be in the public interest. However, the reviewed legislation tends to leave such roles unspecified. Only in Zambia is the local government role in providing checks and balances on decisions emerging from local consultations clearly specified.

In practice, the role of government agencies and quasi-governmental institutions was highly variable across case study countries. Their presence was notably weak in Ghana, where all investors, some with support from local middlemen or partners, initiated direct contact with Traditional Councils with

whom they wished to acquire land. Regional land departments, responsible for allocating leasehold certificates, were found to play a merely bureaucratic role and have no influence over the conditions detailed in land alienation agreements. In other countries, investors typically pass through investment promotion agencies to qualify for fiscal incentives. Here, they are generally required to make investment pledges and present a business plan. In such cases, investors are typically introduced by investment promotion agencies to customary authorities or, in the case of Tanzania, to village and district level authorities, to ask for land.

The extent to which legislated roles and responsibilities of intermediaries were adhered to varied considerably within country. In Mozambique, where environmental and social impact assessment processes were carried out, government officials were observed to help balance local enthusiasm for the project by raising awareness about potential food security risks (Andrew & Van Vlaenderen, 2011). However, some consultations were held without the required involvement of local administrative authorities or provincial cadastral services (Sitoe, 2009). Higher level officials also reportedly encouraged local government authorities and community leaders to focus on the likely benefits and to minimize concerns about negative social or environmental impacts. Such behaviors fall outside of the government's legally mandated role of identifying DUATs acquired through occupation and specifying the terms of partnership between DUAT holders and investors (Nhantumbo & Salomão, 2010). Authorities in one site reported that decisions came "from above" as orders to be carried out (Sitoe, 2009). In Tanzania, the required involvement of district technical officers in village land use planning and endorsement of plans by District Councils was largely adhered to. However in negotiations for land alienation, 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 simply negotiated agreements with District Council members from early on in the land acquisition process. One company, for example, reportedly signed a contract with the District Council obliging the Council to solicit the consent of villagers falling 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 the future expansion of company operations.

In Zambia, on face value procedures followed by district authorities seemed to be carried out as per regulations: government surveyors had developed site plans for endorsement by chiefs, and District Councils communicated their recommendations on alienation to the Commissioner of Lands. Inter-ministerial cooperation was also apparent. However, in the absence of a national-level land use planning framework to guide land allocation, limited consideration was given to land availability. One case reportedly involved a one-sided land delineation process by government surveyors, following an initial letter of support from the chief in which the area and boundaries of land were not specified. Cases of conflict of representation and interest were also observed; in one site, an initial letter of offer was reportedly prepared by an ex-District Commissioner (DC) accompanying the investors without tabling the land transfer for discussion by the Council, thus circumventing legislated procedures. The Chief declared, "We came to agree [on land alienation] because the DC said, "this is part of development," and we are behind in development in [the] District."

It is interesting to note that in both the absence and the presence of government intermediaries, customary land rights have

been eroded rather than safeguarded at the time of negotiations. In Ghana, the absence of intermediaries exposed negotiations to potentially exploitative conduct by Traditional Councils and prospective investors. Investors who do not operate in “good faith” can easily exploit the ignorance of Traditional Council members, who are often unfamiliar with the true market value of land, unaware of the potential long-term implications of alienation, and easily swayed by “development” prospects. Traditional Councils, for their part, were found to under-report proceeds to government agencies and ignore or downplay their fiduciary duties in the face of opportunities for personal enrichment. In other countries where government intermediaries were present, the negotiation process was frequently subjected to pro-development rhetoric and at times coercion and intimidation. Cases were cited in Mozambique, Tanzania, and Zambia where investments were endorsed by the President, Prime Minister, Members of Parliament, or party leaders prior to establishing contact with district or village authorities, which was in turn instrumental in forging local acceptance of land deals (see, e.g., Overbeek, 2010). Active government involvement throughout the decision chain and undisclosed terms of agreement reduce the likelihood that a disinterested third party can effectively engage with or challenge the process, and greatly reduces the capacity of villagers to negotiate favorable agreements with investors.

#### (ii) *Mechanisms for local representation*

Legislated mechanisms for the representation of customary rights holders during consultations empower customary authorities in all countries except for Tanzania, where the chieftaincy 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, makes Tanzania’s legislation far more progressive in ensuring downward accountability to affected persons than that of other countries. Mozambican legislation, on the other hand, has the most elaborate process for delineating community land, supporting community land use planning and identifying areas to be allocated to investors that do not conflict with existing land uses. In Ghana and Zambia, legislation places more far-reaching powers in the hands of customary authorities as opposed to those they represent—posing risks of political patronage and undermining due process should these authorities choose to act in pursuit of personal gain rather than the collective interest. Legislation phrased as “chiefs must declare” or “chiefs must act in accordance to customary law” leaves much wiggle room for customary leaders motivated by personal interest. Where the legislation requires local government participation in community consultations on land alienation (as in Mozambique) or verification that the conversion of land from customary to leasehold tenure does not infringe on family or communal interests or rights (as in Zambia), it establishes the potential for further checks and balances on abuses by community or customary authorities.

In practice, where customary or local leaders have a responsibility to act on behalf of their constituencies (Ghana, Mozambique, and Zambia), abuse of their intended roles was common. In Ghana, where the authority of Traditional Councils is the strongest and their fiduciary duties outlined in the Constitution, no cases were observed where consultations had taken place with the wider community. Here, communities were often required to relinquish farmlands without any consultation. In some cases, community members had no knowledge of even the most basic provisions of leasehold contracts, and in one case only became aware of their land loss

when investor operations commenced. In Mozambique, community leaders were found to negotiate in the absence of the wider community, make commitments prior to wider consultations, bring family members rather than the required management committees to negotiations, dominate wider consultations when they take place, and authorize land alienation following community consultations reserving the same for community use (Nhantumbo & Salomão, 2010; Ribeiro & Matavel, 2009; Siteo, 2009). Furthermore, marginalized groups such as women and itinerant groups were often absent in community consultations (Waterhouse *et al.*, 2010).

In Zambia, while in most cases Chiefs involved village headmen, this was reported to have been in a nominal role exclusively. In one negotiation in Mpika District, a Village Development Committee consisting of nine members was called upon to agree whether to welcome the “development” and a decision made to endorse the project without further consultation. With most agreements involving new “palaces” or other benefits for Chiefs in addition to promises of “development,” Chiefs were easily swayed in favor of land alienation. Here, where the land is actively used for permanent cropping, bush fallowing and a diversity of gathering activities (charcoal burning, collection of nontimber forest products, fishing, and grazing),<sup>17</sup> the legislative requirement that both chiefs and District Councils certify that people’s “interests and rights are not being affected by the approval” suggests that existing mechanisms to safeguard customary rights are reduced to mere technicalities if not sidelined entirely. Moreover, the legislative requirement that the land be declared “free” during the alienation process poses a risk that the negative livelihood impacts of land loss will remain unaddressed. In Tanzania, where decisions are made through village assemblies, abuses by local leaders were much harder to find—pointing to the beneficial nature of such a process.

#### (iii) *Compensation mechanisms*

As for compensation to customary rights holders for land alienated from the customary or village domain, only in Tanzania is compensation a legal requirement for 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 Ghana, Mozambique, and Zambia, compensation is only mandatory in cases of forced expropriation by the State—where compensation is provided in the form of cash payment for “unexhausted improvements,” replacement land, or “an amount corresponding to the value of the harm resulting from the nonutilization of the affected area,” respectively. Thus, with the exception of any compensation emanating from environmental impact assessment and mitigation processes (described below), any compensation paid to affected persons in these countries is discretionary. This leaves the ultimate decision up to the investor or government agency negotiating with affected persons, and dependent upon the community’s legal awareness and savvy in evoking their customary land rights to extract meaningful levels and forms of compensation. In none of the case study countries is full compensation for the loss of all natural and physical assets (including land, economic improvements to land, and foregone rights to common pool resources such as forests and grazing land) required. In countries where compensation is not mandated, practices were found to be highly variable, depending on the good will and savvy of investors and local leaders alike. In Zambia, agreements were in most cases made between chiefs and the investor to lubricate the alienation process. It is unclear what role government intermediaries played in



negotiating the terms and conditions of alienation, and what proportion of resulting agreements is contractualized. At least one company seemed to have taken its corporate social responsibilities seriously, providing a vehicle for a chief and an ambulance, installing the chief on the company's board on a monthly salary of approximately US\$ 205, and establishing a royalty agreement to capitalize a Community Development Trust. While such contributions are comparatively significant, consulted land users believed that the Chief and those close to him were capturing the bulk of the benefits, despite the Chief's village not being directly affected by land alienation. A complaint was also raised that the company tends to employ people from outside the affected community. In Ghana, where land revenues and their allocation among traditional authorities and government agencies are legislated for, with the exception of one company that promised to pay US\$ 1 per acre per year to those losing land, no formal compensation measures had been proposed by investors or traditional authorities. In justification thereof, consistent expectations were expressed by traditional authorities that large-scale investments in the area would instead contribute to job creation, market opportunities and social infrastructure. Moreover, since land revenues are to be shared with local government, traditional authorities seemed disinclined to formalize annual land rents in favor of one-off payments.

In Tanzania, where the legislation is the most detailed on the nature of compensation to be paid and to whom, wide variation in practice was observed. As for the nature of compensation, one contract in Kisarawe District listed employment, agricultural support programs, and health and education benefits rather than cash payments as compensation. Aside from contravening established laws, this dissuaded local communities from demanding more favorable terms and may camouflage unfair compensation. Another (unsigned) contract between a company and village government in Kilwa District listed trees, finished and unfinished improvements, individual houses, crops, and loss of access to all communal lands as items covered under its compensation scheme. It also listed the construction of a Village Council office, employment for villagers, and contributions to water development and health. Yet the process was highly contentious, with uneven and undisclosed valuation techniques resulting in allegations of unfairness. Compensation was paid for tree crops but excluded annual crops. In some cases compensation was paid for loss of access to communal land, but not in others. While forest inventories were conducted in some cases, trees in forests and woodlands were excluded from valuation based on company allegations that forests were degraded from charcoal burning. Failure to compensate for "bare" land, annual crops and trees in forests severely undermines the intent of the law. These findings are supported by other studies pointing to insufficient compensation (Cleaver, Schram, & Wanga, 2010; Habib-Mintz, 2010; Mkindi, 2008; Sulle & Nelson, 2009). As for who received compensation, in one case payments were split between District Councils and Village Councils and in the other compensation was made to District Councils alone. In the latter case, investors were instructed to pay the TIC before being instructed to instead pay District Councils. With villages, not district governments, the legally appointed managers of Village Lands held under customary rights of occupancy, the practice of paying compensation to District Councils is unjustified (Gordon-Maclean, Laizer, Harrison, & Shemdoe, 2008; Mwamila *et al.*, 2008; Songela & Maclean, 2008; Sulle & Nelson, 2009).

### (e) *Impact mitigation*

Despite the limited provisions for compensation in land legislation, environmental impact regulations in all countries require impact mitigation processes. In Ghana, Tanzania, and Zambia the legislation requires a full declaration of environmental and social impacts and, bar Ghana, investor commitment to appropriate mitigation strategies that are inclusive of socio-economic considerations. While the Mozambican legislation requires that mitigation measures be matched to the number of people affected, there is little else ensuring effective mitigation of negative socio-economic impacts. In general terms, the analysis of legislation in focal countries suggests that the effectiveness of environmental impact legislation in mitigating social impacts is likely to be hindered by the tendency to focus on environmental over social variables or to leave this up to interpretation.

The effectiveness of Environmental Impact Assessment (EIA) in practice was highly variable both between and within countries. While companies are not required to adopt impact mitigation strategies that are nonenvironmental in Ghana, all three companies that at the time of research had obtained an environmental permit had adopted strategies to mitigate social impacts as part of their provisional environmental management plans. Typical mitigation efforts included preferential hiring policies, areas designated for community farming within leased land, and (temporary) agricultural input subsidies to enable agricultural intensification and offset the effects of land shortage on the viability of the traditional bush-fallow system. In Mozambique, environmental and social impact assessments, where carried out, were reportedly effective in shifting the boundaries of plantations and processing facilities to minimize displacement and in catalyzing the development of social mitigation plans (Andrew & Van Vlaenderen, 2011).

Despite these positive experiences, the effectiveness of EIA in mitigating negative social impacts in most countries is undermined by the failure of companies to obtain environmental permits, capacity constraints, insufficient independence of assessment processes, and/or limited political will. Companies in Ghana and Mozambique were found to be operating in the absence of required environmental permits (Nhantumbo & Salomão, 2010; Schoneveld & German, 2010; Sitoe, 2009).<sup>18</sup> Limited technical and financial capacity has also limited the effectiveness of environmental protection officials in understanding (so as to mitigate) social risks, enabled companies to operate in the absence of environmental permits, and hindered monitoring and enforcement. In Mozambique, very few land applications are subject to an EIA due to weak implementation; where conducted, agreed upon mitigation measures were often ignored (Norfolk, 2009; Waterhouse *et al.*, 2010). While environmental protection officials were observed to help raise awareness among affected households about potential negative impacts on food security (a highly publicized concern), other social risks were not addressed. The Environmental Council of Zambia (ECZ) had only 12 inspectors to monitor compliance of permit holders throughout the country.<sup>19</sup>

Lack of independence and political will to ensure compliance was also found to undermine EIA effectiveness in Ghana, Tanzania, and Zambia. In Tanzania, the National Environmental Council (NEMC) had not yet finalized a roster of accredited experts by the time most companies in operation conducted their EIAs; consultants were instead identified by investors. With one company's EIA falsely referring to mature coastal forest as degraded forest, not acknowledging that the forest is part of 21 global biodiversity hotspots, failing to



consider the impacts of migration into the area, and adding an author to the EIA who was not involved in the assessment, the independence of EIA is evidently compromised (Gordon-Maclean *et al.*, 2008; Mkindi, 2008).<sup>20</sup> Yet similar biases were observed in Environmental Project Briefs (EPB) prepared by accredited experts in Zambia. One EPB, for example, acknowledged loss of farmland but 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 program. Shortcomings in the impact mitigation process are partly attributable to the lack of political will to hold investors accountable. The Ghanaian Environmental Protection Agency was aware of investors operating in the absence of environmental permits, but did not issue stop orders since it “did not wish to obstruct development.” Similar biases in Tanzania are exemplified by the approval of flawed environmental impact assessments, failure to release EIAs otherwise approved by the NEMC and Directorate of Environment, and inaction in the face of noncompliance (see also Mwalyosi & Hughes, 1998). With the development imperative seemingly undermining the effectiveness or authority of government agencies mandated with regulatory duties, effective mitigation of negative social impacts often depends more on the discretionary employment of corporate social responsibility practices by investors than on formal governance instruments.

#### (f) *Monitoring*

The aforementioned environmental legislation, together with provisions to monitor the pace of implementation of investments (as in Mozambique, Tanzania, and Zambia), provide the primary mechanisms for monitoring investor performance. Social indicators for environmental impact evaluation were found to be limited in scope and specification, undermining the ability of EIA to contribute effectively toward social impact mitigation. Criteria employed by agencies monitoring the performance of investments (where practiced) focused on the alignment of actual land uses with land use plans, the extent to which fiscal duties to the state have been met, and—in the case of Zambia—“implementation rates” (e.g., actual relative to proposed rates of capital investment and employment generation). Such criteria are poorly suited to monitoring social impacts and the effectiveness of efforts to mitigate negative impacts.

In terms of implementation, monitoring was found to be extremely weak due to limited budgets, poor cross-agency coordination, and political interference. In Tanzania, for example, the NEMC relies on District Environmental Management Officers for monitoring and evaluation of projects, but most environment officers lack budgets of their own and are trained in forestry, have limited awareness of broader impacts.<sup>21</sup> In Mozambique, limited budgets and few satellite offices have led to a situation in which monitoring is concentrated on high-profile projects and those located near Maputo.<sup>22</sup> Furthermore, a system of penalties was only enacted in 2005 and came into effect as recently as 2009. That year, a total of 10 penalties were applied across all sectors, two of these in agriculture, and by the time of research there had been no court cases to prosecute environmental crime.<sup>23</sup> While monitoring in the country is also made possible through safeguards in land and investment legislation (in the form of provisional DUATs and time limits for initiating projects), these mecha-

nisms have largely failed due to “extremely weak” state capacity to monitor (Locke, 2009). In Ghana, only environmental permit holders were observed to be monitored. However, due to capacity constraints, the ease of circumventing the environmental permitting process entirely and observed reluctance of government agencies to “deter development,” companies are rarely reprimanded for poor social and environmental performance. In Tanzania, the TIC’s Aftercare Investment Service, charged with monitoring investments, is understaffed and relies heavily on regional governments and media reports for information.<sup>24</sup>

#### (g) *Dispute resolution*

Depending on the country, a host of mechanisms exists to address land disputes—from community level mechanisms (mentioned explicitly in the Mozambican and Tanzanian legislation) to the judiciary (all countries) or specialized land tribunals (in Zambia). Most countries also have grievance mechanisms related to the environmental impact assessment and mitigation process, and Ghana has a special mechanism for addressing grievances related to chiefly misconduct.

In our analysis of practice, disputes over land were identified in all case study countries except for Ghana. There, despite extensive displacement of customary land uses and users, none of the projects were formally contested at the time of research (Schoneveld *et al.*, 2011). This may be attributed to the deference exhibited by affected persons to chiefly authority, their inflated expectations about future development benefits, and their limited understanding of and capacity to claim their legal rights. In other focal countries, land conflict was more common. Yet here, only one case in Zambia was found to involve the judiciary, in a case initiated by the investor to deal with “encroachers.”<sup>25</sup> The Zambian Lands Tribunal, intended as a mobile unit accessible to rural areas, was designed as an inexpensive formal pathway for communities to express their grievances. However, for lack of funds it has been unable to deal with cases involving customary rights or to become accessible outside Lusaka (Brown, 2005; Committee on Agriculture and Lands, 2009). In Mozambique, a study carried out by the Centre for Legal and Judicial Training (CFJJ, cited by Norfolk, 2009) found that neither the judiciary nor local conflict resolution mechanisms have played a significant role in resolving conflicts between communities and investors. Yet cases were found where communities dispossessed of their land and with no meaningful compensation had found pathways to express their grievances—largely through informal pathways due to the financial and transaction costs involved with formal adjudication. 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 & Salomão, 2010; Siteo, 2009). Informal dispute resolution pathways were also observed in other countries, where local administrative authorities with limited familiarity of the law and/or prior involvement in facilitating land alienation or mediating conflict have been called upon to assist in resolving land conflicts. The absence of viable independent pathways for affected persons to seek redress beyond those through which land was originally acquired (i.e., District Councils) highlights a serious shortcoming in existing protections of customary rights. Poor understanding of rights and entitlements to land among villagers and lack of knowledge of and/or access to alternative institutional channels for the redress of grievances also militates against local efforts to safeguard claims or seek favorable terms of agreement.

## 5. DISCUSSION AND CONCLUSIONS

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—for many generations or permanently, and with limited or no compensation. This raises the question of whether legal frameworks are of limited effectiveness due to deficiencies in design and enforcement, or whether similar outcomes occur through diverse pathways. Evidence presented from the four case study countries suggests that both factors are at play.

A number of legislative provisions and gaps were found to play crucial roles in shaping the opportunities and risks faced by customary landowners and users, such as the rules governing the size, duration, and permanence of land acquisitions. The greatest risks to customary land owners are in countries where land transfer to investors involves: (i) the conversion of customary to state land (making the initial land negotiation of utmost importance in shaping future livelihood outcomes); (ii) no upper limit on land size—thus locking up land for outside users irrespective of its economic use and related benefit flows; and (iii) leaseholds of long duration in the absence of conditionalities or mechanisms to ensure compliance with agreements reached with the state and with local communities. Efforts are needed not only to reduce these risks through legislative reforms, but also to enhance local awareness of these legislative provisions prior to land negotiations. Shorter-term and performance-based land transactions are needed, balancing the need for investors to have minimum protections with the opportunity for affected persons to monitor the extent to which promises made by investors are delivered, to learn from experience what it means to be displaced or to rely on formal employment, and to support an evolution toward partnerships of mutual benefit. The experiences of Ghana (where leasehold is issued from customary authorities rather than the state), Tanzania (with upper limits on land area and leases of shorter duration), and Zambia (where provisional leases are combined with performance monitoring) present interesting models in this regard.

Critical weaknesses were also observed in legislated processes for identifying land and negotiating access. Land identification processes emphasizing agro-ecological suitability and economic feasibility should not be conflated with the assessment of land *availability*. Carrying out national level zoning at a scale at which local land uses may be effectively identified<sup>26</sup> is likely to be prohibitively expensive for most countries. It is therefore necessary to pursue improvements in zoning (e.g., ensuring that both suitability *and* availability are considered) while simultaneously improving processes for community consent and customary land delineation within areas designated as “suitable.” Our findings suggest that the latter should include checks and balances on both customary authorities and government agencies playing a role in land negotiations to ensure they act in the interest of affected communities. In this regard, agreement from customary authorities should never be a substitute for 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. Explicit inclusion of the principle and practice of FPIC in land negotiations in lieu of simple “consultation” would significantly strengthen legislation in all countries. The presence of a legal requirement

to compensate (as in Tanzania) also had a strong influence on whether compensation was paid, for what and at what level, suggesting that the choice of whether and how to compensate should not be left at the discretion of the investor. With land both an asset and source of livelihoods, and increasingly recognized as a human right, full compensation for all displaced assets and livelihood resources (land, land “improvements” and communal resources) should be made a legal requirement, and mechanisms through which financial or in-kind compensation is to be governed within local communities spelled out, if compensation is to play a meaningful role in livelihood reconstruction. Finally, legislative provisions are needed to strengthen monitoring functions of government agencies and civil society—including more systematic inclusion of unambiguous social indicators in environmental impact assessments, more robust and regular monitoring of investor performance and full public disclosure of findings from the same.<sup>27</sup>

Our findings suggest that addressing the aforementioned deficiencies in the law should be considered a *necessary* but *insufficient* condition for safeguarding customary land rights in practice. Deficiencies in implementation and enforcement were found to be widespread, with human agency among those in positions of authority shaping individual and collective benefits in very profound ways. Project implementation in the absence of the necessary approvals, breaches of upper limits on the duration or size of land leases, the failure of agreements reached in community consultations to be adhered to, and extremely limited government oversight and monitoring of environmental performance, investment commitments or adherence to agro-ecological zoning jointly conspire to undermine the spirit of what are often relatively progressive laws. Yet even in cases where most of the land acquisition and environmental permitting procedures were carried out, these are often token gestures contravening the spirit of the law. Conflicts of interest or of mandate on the side of government agencies (e.g., investment promotion vs. monitoring and regulation), opportunities for personal enrichment by chiefs, and the widespread underlying faith in the benefits of large-scale investments undermine the effectiveness of these mechanisms in practice. With the actors in the system thus “making or breaking” effective protections of customary rights, one must wonder if—as Alden Wily has argued (2011)—the law really is to blame. The importance of human agency in shaping outcomes at multiple junctures points to the need for a deeper understanding of the motivations facing key sets of actors with instrumental roles to play in the land allocation process.

One of the most notable findings concerns the role of government actors. The government is playing an active role in facilitating investor access to sizeable areas of land in Mozambique, Tanzania, and Zambia. 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, with cases of coercion, undisclosed transactions, or simple inflation of benefits (with corresponding deflation of costs) being widespread. The apparent complicity of government agencies with industry seems to have a number of causes. The most fundamental is arguably 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 one of the most effective pathways for economic development and poverty alleviation. 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 by definition backward and environmentally harmful (German, Gumbo, & Schoneveld, *in press*). While such assumptions may at times and by some measures hold true under scrutiny, they have more often than not been scientifically disproven (Conklin, 1957; Dove, 1983; Fairhead & Leach, 1996; German *et al.*, *in press*; Kull, 2004; Pyne, 1997; Uhl, 1987). There is also some evidence to suggest that the government-industry alliance is driven by conflicting mandates or conflicts of interest among government agencies and representatives. In all countries, central and district governments are faced with strong incentives not only to create conditions for enhanced economic growth and poverty reduction, but to generate revenue. Land rents acquired through legally-mandated financial flows to allodial title holders (in Ghana) or the reclassification of customary land as state land (in other case study countries), and illegal rent-seeking (e.g., in Tanzania), present incentives for governments to advocate for large-scale land acquisitions. While the actors involved may justify this behavior on development grounds, it does introduce a tension between capitalizing government coffers on the one hand and safeguarding customary 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.

Customary rights holders also played a role in undermining due process during negotiations. The most obvious concern was the widespread absence of downward accountability of those with the legal authority to make decisions over custom-

ary or village land. More often than not, customary authorities were found to make decisions based on opportunities for personal gain rather than collective interests. The limited ability of customary land users to question the authority of local and customary leaders, whether due to custom, intimidation, coercion by outside actors, or legal illiteracy, was also paramount.

Observed shortcomings in legislation and practice might suggest to some the need for strengthening government authority and oversight in a bid to improve land governance. Yet the contradictory mandates of government agencies, deeply entrenched modernization and “marginal land” discourses, and new opportunities for rent capture also point to the inherent difficulties in realizing this potential. Findings related to community awareness and expectations also point to difficulties in translating true consent (if achievable) into sustainable benefits for affected communities. Even with the most enlightened legislative protections and negotiation processes, challenges of awareness and foresight will remain. This is because a community’s decision to give up their most valuable asset, and how they value these assets, has as much to do with their starting point as it does the legal underpinnings and processes of large-scale land acquisition.

With such egregious shortcomings in practice found in countries representing “best practice” cases from the standpoint of legislative protections (Alden Wily, 2011, 2012), one can only presume that customary rights and rural livelihoods in the context of large-scale land acquisitions are equally or more vulnerable elsewhere. These findings put into question the assumption that identified infringements on customary rights and rural livelihoods will disappear through additional legal and governance reforms. Should we not, as suggested by de Schutter (2011b), be looking for real alternatives to this kind of investment?

## NOTES

1. Available at: <<http://www.ft.com/cms/s/0/3d3ede92-6e02-11dd-b5df-0000779fd18c.html#axzz2LA9uGRAt/>> Accessed 17.02.13.

2. 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 & Quan, 2000). Mamdani (1997) 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 which granted chiefs a high degree of control over land use and allocation and treated customary land tenure and judicial processes as fixed in precedent and practice (Brown, 2005). While 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.

3. At the close of the World Bank’s Annual Conference on Land and Poverty in 2011, for example, World Bank Development Research Group lead economic Klaus Deininger (2011) declared that, “A consensus has emerged among stakeholders that improving land governance for the poor should be the top priority ... the need for adequate legal and regulatory frameworks applies to investors large and small” (see: <[http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/0,,contentMDK:23012956~pagePK:64165401~piPK:64165026~theSitePK:469372,00.html?cid=DEC\\_InternalNewsletter\\_M\\_INT/](http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/0,,contentMDK:23012956~pagePK:64165401~piPK:64165026~theSitePK:469372,00.html?cid=DEC_InternalNewsletter_M_INT/)> Accessed 17.02.13.

4. One observed exception to the rule involved the transfer of a longstanding leasehold title between private investors in Zambia.

5. See: <<http://www.africaneconomicoutlook.org/en/countries/southern-africa/mozambique/>> Accessed 15.09.11.

6. See: <[http://www.actanzania.org/index.php?option=com\\_content&task=view&id=121&Itemid=39/](http://www.actanzania.org/index.php?option=com_content&task=view&id=121&Itemid=39/)> Accessed 15.09.11.

7. See: <<http://sagcot.com/>> Accessed 06.02.13.

8. See: <<http://www.zda.org.zm/node/1911/>> Accessed 06.02.13.

9. See: <<http://www.worldbank.org/projects/P114264/ghana-commercial-agriculture?lang=en/>> and <[http://mofa.gov.gh/site/?page\\_id=7036/](http://mofa.gov.gh/site/?page_id=7036/)> Accessed 06.02.13.

10. See: <<http://www.tic.co.tz/ticwebsite.nsf/2e9caf3e472ee5882572850027f544/729d4c075f2b03fc432572d10024bea6?OpenDocument/>> Accessed 06.02.13.

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

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

13. Interview with the TIC Director, May 24, 2010.

14. The Provincial Administration (through the Office of the Permanent Secretary) was also found to play an active role in large-scale land acquisitions in Northern Province, holding an investment promotion workshop in 2008 in which chiefs reportedly made commitments to give out 10,000 ha each. Members of Parliament were also said to be facilitating large-scale land acquisitions in Chinsali and Mporokoso Districts. When a chief in Mporokoso District initially refused to cede land during the LRWG's visit to the area, the Minister of Commerce and Industry personally intervened—leading to the Chief's ultimate agreement to alienate. The fact that the Minister originated from the district and reportedly "did not want his district to be left out" illustrates the implicit belief among public officials in the beneficial nature of such projects.

15. The right to FPIC is articulated in the following key international instruments and associated jurisprudence: *United Nations Declaration on the Rights of Indigenous Peoples*; *International Covenant on Civil and Political Rights (ICCPR)*; *International Covenant on Economic, Social and Cultural Rights*; *International Convention on the Elimination of all Forms of Racial Discrimination*; *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention: C107)*; *Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention: C169)*; and the Conference of Parties' decisions relating to the implementation of the *Convention on Biological Diversity*. It has also been upheld by regional human rights bodies, including the African Commission on Human and Peoples' Rights, and is a guiding principle in the *FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Colchester, in preparation)*.

16. Kisarawe District Executive Office. SunBiofuels file.

17. In the case of the Farm Block Development Program many of the areas, being located in accessible, prime cropland, were also found to be actively used by communities (Muntanga, *et al.*, 2009).

18. In late 2010, for example, only one of the five large afforestation companies operating in Niassa Province, Mozambique had complied with environmental laws. See: <<http://www.portaldogoverno.gov.mz/noticias/>

[agricultura/dezembro-2010/exploracao-florestal-niassa-exige-estudos-de-impacto-ambiental/](http://agricultura/dezembro-2010/exploracao-florestal-niassa-exige-estudos-de-impacto-ambiental/)> Accessed 02.02.11.

19. Interview with the Director of the Environmental Council of Zambia, May 18, 2010.

20. This same company ended up establishing a saw mill to cut and sell timber and clearing an elephant corridor.

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

22. Interview with Maputo-based staff of MICOA, November 26, 2010.

23. Interview with Maputo-based staff of the Ministry for the Coordination of Environmental Affairs (MICOA), November 30, 2010.

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

25. This case involved the use of idle land under leasehold title to a private investor by local communities. When a new investor acquired the property and sought to develop jatropa plantations on the unutilized land, conflict ensued. This conflict and a prior conflict on the same estate were both settled by the courts in favor of the company.

26. And using criteria that provide for a wide interpretation of what constitutes "utilized" land—including grazing, hunting, fishing, and gathering (e.g., water, forest products).

27. For example, 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 (e.g., beyond employment, investment levels and fiscal responsibilities to long-term value creation for rural people). While no country represents a model in this regard, recent efforts by the ZDA to design and implement an investment monitoring system should be noted and nurtured.

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