

# Over the heads of local people: consultation, consent and recompense in large-scale land deals for biofuels projects in Africa

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## Abstract

Rising prices of energy and commodities in recent years are driving investment in production of biofuel feedstocks. Highly publicized large-scale land deals are raising prospects for macro-level benefits in recipient countries, but also carry the threat of appropriation of land and natural resources from the poor local people that depend on these assets. This paper examines the extent to which local people are party to land allocation processes, considering both at the procedural issues of consultation and consent and at the distributive issues around compensation.

## Keywords

Africa; biofuels; land tenure; land grab; land transfer; lease; consultation; consent; compensation

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## Introduction

Highly publicised large-scale land deals for biofuel production in Africa are raising prospects for macro-level benefits in recipient countries, but also carry the threat of appropriation of land and natural resources from the poor people that depend directly on these assets at the local level. These people are not a homogenous group in terms of their claims, uses and preferences with respect to land and natural resources; indeed there may be considerable pre-existing contestation among individuals and groups, for example between cultivators and pastoralists, that may be further exacerbated by commercial land claims. This paper presents recent empirical research into the process and context of current large-scale land deals to explore the extent to which local land users are included in deal-making and compensation.

Land in Africa is subject to commercial claims for production of both food and, the subject of this paper, biofuels. Biofuels are processed fuels derived from plants, animals, fungi and bacteria. More than 90% of global biofuel production comprises liquid biofuels used for transport, though solid and liquid biofuels are also available and there are non-transport applications such as cooking, lighting and electricity-generation. Commercially produced liquid biofuels for transport are mostly manufactured from purpose-grown crop feedstocks, either carbohydrate-rich crops for bioethanol (e.g. maize, sugarcane) or oil-rich crops for biodiesel (e.g. rapeseed, oil palm, jatropha). Developing countries with a history of economic dependency on commodity crops have comparative advantage in production of biofuel feedstocks (Dufey *et al.* 2007). Recognizing opportunities for agricultural development and attraction of investment capital at the national level, the governments of many African countries with high agricultural potential, like their peers in Asia and South America, are actively seeking to attract both foreign and domestic investors into large-scale land deals for production of biofuels feedstocks. In most cases, the two parties to such land deals are the host government and the project manager acting on behalf of one or more financial investors.

While increased investment may create new opportunities for local livelihoods and national economies, large numbers of people are vulnerable to dispossession as a result of changes in land use. There are two sets of issues here: firstly around procedural justice and people's rights to self-determination, and secondly around distributive justice and people's rights to fair compensation for foregone resource access and assets. The internationally recognized right to food arguably requires that, at a minimum, land takings in contexts where people depend on land for their food security must be offset by alternative livelihood assets so as to ensure at least the same level of food security. Furthermore land in Africa, as elsewhere, has important spiritual and social values, so that purely economic calculations are unlikely to capture local perceptions about proposed land deals. Global normative standards for consultation, consent and recompense are framed by the principle of free, prior and informed consent (FPIC).<sup>4</sup>

The extent to which national policy legal frameworks provide adequate safeguards for local land and resource rights, and effective mechanisms for local participation in decision-making, will frame whether increased agricultural investments will translate into new opportunities, or further marginalization. National governments across Africa have enacted legislation and policy in recent decades to provide increased recognition and protection of formalized and customary land tenure in rural areas. Rationales and approaches for increasing legal and policy support around land tenure fall into two categories (Assies 2009). The market-based rationale seeks to increase beneficiaries' ability to leverage the value of the land and its resources in the marketplace, through, for example, ability to sell the land, use it as collateral, or make capital-intensive investments without fear of losing these. The rights-based rationale seeks to improve, through greater security in land-holdings, people's capacity to achieve human rights such as the right to food and the right to shelter. In practice, government policy may seek a mix of these goals,

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<sup>4</sup> FPIC is formalised through article 32 of the 2007 UN Declaration on the Rights of Indigenous Peoples. Its fundamental principle is that indigenous people have the right to approve or veto proposed developments on their lands, based on full information, representative institutions and iterative, culturally sensitive negotiation, backed up by effective systems for grievance, redress and mitigation are in place (Colchester and Ferrari 2007).

for example through forms of land registration that confirm customary land tenure but do not allow individual or alienable property rights.

However well intentioned reformist legislation may be, it is enacted within institutions of limited resources and competing interests. More powerful interest groups have greater access to favorable interpretation and use of the law. Police and judiciaries do not apply the law evenly. A strategic response among activists has been a focus on legal empowerment to strengthen the extent to which people can be confident that they will not be arbitrarily deprived of their access to, and benefits from, land (Cotula 2008). In addition to subjective elements (people's perception of the security of their rights), this confidence entails objective elements that are both substantive and concerned with distributional factors (nature, content, clarity and duration of rights) and procedural (certainty of enforcement, bargaining power). Proponents of legal empowerment acknowledge that outcomes are not necessarily win-win and that ability to wield legal rights is only as good as the underlying legislation, and therefore legal empowerment is only effective as part of a broader political agenda (Banik 2009). In this context, attention to bureaucratic and administrative procedures in land deals is not simply a technical exercise but a means to identify specific mechanisms that reinforce power differences before the law, and hence opportunities for action and change.

This paper presents empirical evidence on the procedures of recent large-scale land deals in six African countries to provide opening commentary and analysis on the following issues:

- Key trends in land acquisition for biofuel feedstock production
- Land tenure and legal options for transfer
- Administration of land deals by host governments
- Mechanisms for consultation and consent, and implementation of these mechanisms
- Recompense through direct compensation and dispersed benefits

A final discussion section brings together the evidence to consider the core question of whether improved rights over land provide the necessary bargaining power for local land users to achieve better outcomes from the deal-making process – for example to make definitive decisions to reject or accept deals, or to shape deals that provide a better-than-expected distribution of benefits to the range of local interests.

## **Study methods**

The paper is drawn largely from two recent collaborative studies (Cotula *et al.* 2008; Cotula *et al.* 2009). The more recent of the two studies draws on quantitative national inventories of approved land acquisitions between 2004 and early 2009 in four African countries (Ethiopia, Ghana, Madagascar and Mali), on qualitative case studies in Mozambique and Tanzania (Salomão and Nhantumbo 2009; Sulle and Nelson 2009) and on legal analysis of national law and of a small sample of investor-state contracts. The national inventories involved recording in standardised format the details of all land acquisitions over 1000 hectares within the country over the five year period. These records were derived primarily from host government sources (such as investment promotion agencies and ministries for agriculture), cross-checked through multi-stakeholder interviews.

While the national inventories may be particularly useful for understanding trends and drivers, it is important to recognize the limitations of this work. The ability of government institutions to keep track of land deals varies across countries. All country data sets are incomplete due to gaps in the information about specific investments available at government agencies. Some land deals may not have been recorded at all. In Madagascar, for example, constraints on access to data on domestic investment, mainly due to political reasons, are likely to have skewed the data set towards foreign investment. More generally, official government statistics are likely to lag behind real-world negotiations for

proposed deals. Thus much of the ferment highlighted by recent media reports is likely not to be fully captured in publicly available government data.

A further limitation is that most commercial biofuels projects in Africa are in early stages of development and therefore it is too early for detailed assessments of the impacts of land transfers on food security and access to natural resources for specific local groups. It is difficult to comment on whether the current spate of land acquisition is qualitatively or quantitatively different to earlier decades, since comparable data are not available.

## **Land-based investments in Africa: key trends**

### *Rates of land acquisition*

Exact quantitative assessments of the scale, geography, trends and players in the so-called 'land grab' phenomenon are not yet available. Some aggregate estimates of scale, based on media reports of land deals, are available. For instance, the International Food Policy Research Institute (IFPRI) estimated that between 15 and 20 million hectares of farmland in developing countries have changed hands since 2006 (von Braun and Meinzen-Dick 2009). But a high level of uncertainty and the limited reliability of some media reports mean these figures must be treated with caution.

The inventories carried out in Ethiopia, Ghana, Madagascar and Mali (Cotula *et al.* 2009) do suggest that levels of activity are indeed significant: land acquisitions in the study period total some 2 million ha in the four countries. Foreign investment accounts for about three fourths of this land area. Single acquisitions can be very large, up to 500,000 ha. While high food prices and food security concerns are a key driver of recent land-based investment, the biofuels boom is also a major driver – with agrifood and biofuels accounting for approximately even shares of aggregate land acquisitions in the four countries. Despite this flurry of acquisitions, agricultural development of lands appears to

be lagging behind the rate of formal land transfers; many allocated areas are not yet in production.

Much public attention has focused on large, plantation-based projects. In Mozambique, for example, a lease for 30,000ha land for a biofuels project (“Procana”) in Massingir district, in the Southern province of Gaza, involves a sugar cane plantation and a processing plant to produce bioethanol (Salomão and Nhantumbo 2009). In Tanzania, the subsidiary of a UK-based company has acquired 8,211 ha in Kisarawe district, in the country’s Coast Region, while a Swedish-owned company is planning to produce sugarcane for bioethanol through acquiring roughly 22,000 ha in Bagamoyo District and up to several hundred thousand hectares of land in Rufiji District, also in the Coast Region (Sulle and Nelson 2009). Other production models involve various types of collaboration between small-scale and large-scale. In Mali, for instance, a Dutch company works with more than 4000 small-scale jatropha farmers in three regions of Mali to produce biodiesel through decentralised processors. The company provides technical assistance to farmers through a network of field staff, so as to improve their agricultural practices. A union of local farmers (*Union Locale des Sociétés Cooperatives des Producteurs de Pourghere a Koulikoro*, ULSP), owns 20% of the shares of the company. The company receives funding from the government of the Netherlands (Pallière and Fauveaud 2009).

### *Natural resources and marginal lands*

Plantation-based investments create direct risks of loss of land, water and natural resources for local people. In turn, this can have major repercussions for local food security, particularly given the high level of dependence on natural resources for food security in much of rural Africa. The national inventories from Ethiopia, Ghana, Madagascar and Mali (Cotula *et al.* 2009) suggest that land acquisitions over the past five years account for relatively small shares of total land suitable for agriculture in any given

study country (ranging from 0.6 per cent in Mali to 2.3 per cent in Madagascar<sup>5</sup>). But some approved deals may not have been recorded and figures on allocations are conservative. More importantly, while much rhetoric focuses on the use of “marginal” lands for large-scale production of biofuel feedstocks and other industrial crops, the reality is that higher-value lands – with higher rainfall, access to irrigation and proximity to markets – are more commonly subject to acquisition. In Mali, for example, all recorded land deals are concentrated in the country’s highest potential agricultural zones (Cotula and Vermeulen 2009).

The higher-value lands that are most attractive to investors are also most likely to be under existing claims and existing use. While there is a perception that farmland is abundant and under-utilised in certain countries, these claims are not always substantiated. In many cases land is already being used – yet existing land uses go unrecognized because people using the land have no formal land rights or access to the relevant law and institutions. In Ethiopia, for example, all land allocations recorded at the national investment promotion agency are classified as involving “wastelands” with no pre-existing users, but the likelihood is that some, if not most, of these lands have been used for shifting cultivation and grazing (Cotula *et al.* 2009).

### *Population growth and climate change*

In addition, properly assessing the implications of land takings for agricultural investments requires a good understanding of the broader context shaping pressures on land in a given country or locality. Many parts of Africa have experienced strong demographic growth over the past few decades, and projections suggest that population increases are likely to continue over the next few decades, albeit at slower rates (United Nations 2008). This will lead to substantial increases in population densities, though such population changes may not be concentrated in rural areas alone. Non-agricultural demands on land exert additional pressure. In the Massingir district of Mozambique, for

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<sup>5</sup> Based on FAO definitions and estimations of land suitable for agriculture.



example, the Procana project has exacerbated land scarcity by using land promised to people being resettled from a new national park, with knock-on effects on neighbouring communities. If these issues are considered, allocating even small shares of the best land can have disproportionate impacts on access to resources, food security and livelihoods.

Climate change is a central element that distinguishes the current spate of large-scale land acquisitions from previous developments of plantations and concessions during the nineteenth and twentieth centuries. As the global climate changes, water is likely to be an increasing constraint in many parts of Africa, and competition for water may prove a source of conflict (Brown and Crawford 2009). Very large-scale agricultural projects may impose further stress on the capacity of local ecosystems and people to be resilient to climate change, through a fall in groundwater and surface water supplies, losses to wild and domesticated biodiversity, and access to seasonal resources, for example. Impacts and conflicts might be local, or manifest downstream and in the wider vicinity. For instance, the rise in large-scale irrigation projects upstream in the Office du Niger area of Mali will impinge on water availability to downstream users – including downstream irrigators in the Office du Niger area, farmers, herders and fishers in the seasonally flooded Inner Niger Delta of Mali, and users in neighbouring Niger. It is not yet clear how local institutions and trans-national river basin bodies (in this case the *Autorité du Bassin du Niger*) will cope with increased water demand (given land-based investment) and increased vulnerability of water supplies (with climate change).

### *Local contestation*

Finally, although contract farming and similar collaborative arrangements with local farmers have no direct implications for the distribution of land rights, changes in land access and resource may occur in the longer term. Depending on the prior land use, specific groups may suffer differential losses, for example loss of “wasteland” gleaning areas for collectors of wild products, grazing areas to pastoralists, waterways to fishers or irrigated farmland to cultivators. Local elites may be better able to seize the opportunities

created by the greater intensification and commercialization of agriculture, including access to employment and production contracts, and by the ensuing shifts in land use patterns.

Also, cash crops controlled by men may encroach upon lands previously used by women for food crops. Farming contracts are often with male household heads, even where it is women who do the bulk of the work. In a rare documented example, the introduction of contract farming for rice in an area previously used for sorghum, traditionally grown by women, led to conflict which was solved through negotiations between husbands and wives (Eaton and Shepherd 2001).

### **Contexts: land tenure and legal options for land transfer**

In many African countries, land is primarily under control of the state. For instance, land is nationalised in Ethiopia, Mozambique and Tanzania. In these cases, outright purchases are outlawed. Other countries do allow private land ownership, which may be acquired through land registration procedures (e.g. Kenya, Madagascar and Mali). In Ghana, part of the land is owned by the state but 80-90% of all undeveloped land is held under customary tenure, through chieftaincies that have the capacity to act as legal entities (Kasanga and Kotey 2001). Certain countries have introduced private ownership where this was previously ruled out (e.g. Burkina Faso), or enabled transfers of “underdeveloped” state lands even if radical title ultimately remains vested with the state (e.g. Tanzania, under article 6 of the Land (Amendment) Act 2004).

With some exceptions (e.g. Kenya and South Africa), private land ownership is not widespread in Africa even where it is formally recognised, particularly in rural areas. The World Bank estimates that, across Africa, only between 2 and 10% of the land is held under formal *de jure* land tenure and that this is mainly urban land (Deininger 2003). In Cameroon, only about 3% of the land has been formally registered and is held under private ownership (Egbe 2001), mainly by urban elites such as politicians, civil servants

and businessmen (Firmin-Sellers and Sellers 1999). Similarly, in Sudan, although private land ownership is formally recognised, about 95% of all the land is *de facto* state-owned.<sup>6</sup> Some commentators regard administrative complexity as a limiting factor to land registration (Djiré 2007). More importantly, where customary tenure systems are functioning and perceived as legitimate, local resource users may feel they have sufficient tenure security under these systems without needing to seek formal title.

The majority of rural residents' land rights in many African countries entail use rights that are acknowledged but not necessarily protected within national law, mediated by customary tenure managed at the local level. The extent to which national legal frameworks protect local land claims varies among countries, but is often limited because customary tenure is subservient to state land title within the law. Acknowledging the shortcomings of the law in protecting the interests of their rural majorities, some African countries have recently taken steps to strengthen the protection of local land rights, including customary rights - even where land is state-owned or vested with the state in trust for the nation. Customary rights are protected, to varying degrees, under Mali's Land Code 2000, Mozambique's Land Act 1997, Tanzania's Land Act and Village Land Act 1999, and Uganda's Land Act 1998.

But even here legal protection may be conditioned to "productive use", such as under "*mise en valeur*" conditions specified in the legislation of much of Francophone Africa (including Mali) and under similar requirements elsewhere, such as Tanzania. Lacking a clear definition of what constitutes "productive use" and given the ensuing broad administrative discretion, these requirements may open the door to abuse, and undermine the security of local land rights. This is particularly so for those groups, particularly pastoralists, whose resource use is often not considered as "productive enough" due to widespread misconceptions (Hesse and Thébaud 2006). More fundamentally, legal provisions may not alter entrenched perceptions among key decision-makers about the value of local land rights. This is illustrated by an interview with a government official

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<sup>6</sup> Interview with Sudanese government official, 22 February 2009.

from the national land commission of an African country that does legally protect customary land rights, at least officially, who referred to local land users as “squatters”.<sup>7</sup>

### **Administration of land deals**

Rising prices for food and biofuel feedstocks in recent years and the associated renewal of commercial interest in agriculture have prompted a range of African governments to put in place administrative mechanisms to enable large-scale investment in agricultural land by foreign and domestic investors. Given the complex contexts of state control over land coupled with local customary land tenure that predominate in Africa, government-allocated leases are the principal mode of large-scale land acquisition, particularly for foreign investors. In Mozambique, investors (whether foreign or domestic) can only obtain 50-year, renewable leases (article 17 of the Land Act 1997). All the 16 biofuel projects documented by Salomão and Nhantumbo (2009) involve such leases. In Tanzania, leases are available up to 99 years, though in practice many are agreed for shorter periods subject to renewal (Sulle and Nelson 2009). In Ethiopia, all projects documented by the national inventory for 2004-2008 involve allocations of (or applications for) government leases for diverse durations of 10, 30 or 50 years, while in Mali, the majority of documented projects (7 out of 13) involve 50-year renewable leases. Leases with private or community landholders tend to be of similar durations. In Madagascar, a contract between the Indian agribusiness Varun and 13 associations of local landowners involves a 50-year deal combining lease and contract farming arrangements, renewable for up to 99 years. In Ghana, all documented lease arrangements from 2004-2008 involve terms of over 50 years, generally signed in a private capacity by customary chiefs (stools) on behalf of their communities (Cotula *et al.* 2009).

Many African countries have developed sets of formal procedures for land acquisition, which tend to combine procedures at both national and local level, and are overseen by a specific national-level agency. These procedures entail a considerable level of institutional

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<sup>7</sup> Interview with government official, 18 February 2009.

and legal complexity. Each deal may involve multiple contracts and legal instruments, from a framework agreement outlining the key features of the overall deal, whereby among other things the host government commits itself to making the land available to the investor (a particular feature of government-to-government deals) through to more specific instruments, contractual or otherwise, that actually transfer the land or subsections of it. These contracts may in turn be framed by higher-level legal agreements, such as bilateral investment treaties.

Many governments have established investment promotion agencies (or equivalents), responsible for attracting investment, particularly foreign investment, including to the biofuels sector. The extent to which, and the ways in which, these agencies work to facilitate land access for prospective investors varies widely, ranging from facilitating investors' dealings with government land agencies to a more direct role in allocating land to investors. In Ghana and Mozambique, for example, investment promotion agencies act as one-stop-shops, facilitating the acquisition of all necessary licences, permits and authorisations. Their direct role in facilitating land access seems focused on helping investors in their dealings with other agencies. In Mozambique, while investment legislation makes no explicit mention of the role of the *Centro de Promoção de Investimentos* (CPI) in facilitating land access, the application form for prospective investors to seek government approval of the investment projects does mention, among possible areas where CPI assistance is sought by the investor, the "identification and licensing of land".<sup>8</sup>

A somewhat more hands-on role is played by Tanzania's investment promotion agency, the Tanzania Investment Centre (TIC). Under the Tanzanian Investment Act 1997, the TIC is mandated, among other things, with identifying and providing land to investors, as well as with helping investors obtain all necessary permits (article 6). This entails identifying land not currently under productive use and directly allocating it to investors. Under this arrangement, the land is vested with the TIC and transferred to the investor on the basis of a derivative title (under article 19(2) of the Land Act 1999). After the end of the investment

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<sup>8</sup> CPI website ([www.cpi.co.mz](http://www.cpi.co.mz))

project, the land reverts back to the TIC (article 20(5) of the Land Act).<sup>9</sup> The TIC has been active in identifying and negotiating access to land for foreign biofuel investors.

Investors' perspectives confirm that despite the steps taken in some countries to streamline procedures, the process to acquire land is usually complicated and often unclear to those involved. There may be significant problems in identifying the multiple land claims at stake, even where the land is classified as privately held and land certificate documents are produced.<sup>10</sup> One of the main complaints among investors is the long and uncertain period of time required for land acquisition and project negotiation, a factor that has material impacts on the attractiveness of the investment for their financial backers.<sup>11</sup>

### **Consultation and consent: mechanisms and reality**

Some level of interaction with local and affected people is usually incorporated in the formal approval process for land deals (Table 1). The most basic level is assessment, in which affected people are the subjects of evaluations of socio-economic impacts of the land transfer and project development. At this most basic level, several countries do require an environmental impact assessment (EIA) or an environmental and social assessment (ESIA) to be carried out prior to project approval, on which the land transfer is contingent (Table 1). Observers note, however, that the criteria for approving or failing land deal applications on the basis of the ESIA may not be explicit (Sulle and Nelson 2009) and the results of these assessments may not be available for scrutiny by the public. ESIA necessarily involve interactions with local and affected people as the primary subjects of the social assessment, but in its simple form this constitutes simply a technical study in which the subjects are passive respondents.

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<sup>9</sup> Tanzania's Land (Amendment) Act 2004 introduced another land access arrangement - the establishment of joint ventures between foreign investors and local groups (under article 19(2)(c) of the Land Act, as amended). Under this arrangement, local groups retain land rights while the investor obtains lesser land rights from the local group.

<sup>10</sup> Interview with an FAO country officer, 11 February 2009.

<sup>11</sup> Anonymous personal communications.

In some countries, the required procedures for ESIA specify consultation with communities, in other words eliciting and reporting their opinions as well as researching their socio-economic status. Examples include Ethiopia and Madagascar. Consultation provides greater voice for affected people within the process but does not confer any authority to veto or shape the terms of the investment – it is far short of consent. Although principles of free, prior and informed consent have not yet been incorporated into national policy in any African country, several countries have enacted legislation or policy that requires at least some level of consent from local and affected communities as part of the land transfer process. Ghana, Mozambique and Tanzania, for example, require that all land transfers must be approved by the communities or customary leaders that have rights over the land in question, with further requirements for protection of access rights, fair compensation and opportunities for review of the agreements.

Under Mozambique's Land Act, investors are legally required to consult "local communities" holding rights in the land area sought for the investment project (article 12 of the Land Act 1997 and article 27 of the Land Act Regulation 1998). Community consultation must be undertaken regardless of whether the land has been registered. The consultation process is required before land use rights are allocated to investors; the specific purpose of this consultation is to ascertain that the land area is "free" and "has no occupants" (article 13(3) of the Land Act; see also article 24 (1)(c) of the same Act). The mandatory community consultation process is meant to pave the way for the negotiation of benefit-sharing agreements between local groups and the investor applying for land.

**Table 1. Examples of policy and practice with respect to assessment, consultation and consent of local and affected people in six African countries**

Country	Requirement for EIA and SIA	EIA and SIA in practice*	Requirement for local consultation	Requirement for local consent	Local consultation in practice*
Ethiopia	EIA	Data not available	Yes - within EIA	No - only from government at district level	Consultation largely confined to clan leaders and sub-national government bodies - no evidence of community consultation in 6 of 6 cases
Ghana	ESIA	ESIA completed in 11 of 11 cases; ESIA publicly available in 11 of 11 cases	Yes - to develop social responsibility agreement	Partial - from stool (customary leadership) or private landholders	Good - evidence of local consultation in 5 of 5 cases
Mali	EIA or risk assessment ( <i>Etude d'impact sur l'environnement ou notice d'impact sur l'environnement</i> ), depending on risk level	EIA completed in 6 of 13 cases; ESIA publicly available in 2 of 13 cases	No formal requirement	No - from legally recognised landholders only	Mixed - no evidence of community consultation in 3 of 3 cases, but better record in development-oriented agricultural projects
Madagascar	EIA (MECIE: <i>Mise en compatibilité des investissements avec l'environnement</i> )	MECIE completed in 5 of 10 cases ESIA publicly available in 1 of 10 cases	Yes - within MECIE	No - from legally recognised landholders only	Fair - evidence of local consultation in 7 of 10 cases
Mozambique	EIA	No quantitative data, but evidence of EIA in qualitative case studies	Yes	Yes - from resident communities	No quantitative data available, but qualitative case studies demonstrate that consultation does occur
Tanzania	EIA	No quantitative data, but evidence of EIA in qualitative case studies	Yes	Yes - from resident communities for designated village land	No quantitative data available, but qualitative case studies demonstrate that consultation does occur

\* Assessed on basis of available investment cases



However, even where policy frameworks are well developed, practice may be unsatisfactory. In Tanzania and Mozambique, which have arguably among the most progressive legislation in Africa regarding community consent to land transfer, relevant procedures are implemented partially rather than fully. Procedural issues identified in these two countries (Salomão and Nhantumbo 2009; Sulle and Nelson 2009) include:

- What is defined as community consultation may be confined to village elders, officials and elites. While it should not be contingent on an investor to resolve issues of local governance, there is little sign that efforts are made specifically to include significant social groups such as women, or user groups such as pastoralists. Indirectly affected communities, for example those affected by migration out of project areas, have not been included to date.
- Where community-level meetings occur, they tend to be dominated by community leaders (traditional chiefs, local party leaders), who have often participated in preliminary meetings with the investor to promote the investment.
- There are no mechanisms to identify or resolve different priorities and preferences among members of externally defined communities.
- Information flows to communities are poor. They tend not to receive full information on the proposed investments and the terms of land deals prior to formal consultation meetings with government agencies or companies.
- Consultation tends to be a one-off event rather than an ongoing interaction through the project cycle. Opportunities for sharing information at early scheduling meetings are often forsaken.
- Records of meetings are often incomplete and vague about timeframes, targets and responsibilities. Communities do not usually have the opportunity to approve minutes before they are shared with other agencies.
- Agreements on social investment, benefit-sharing, guaranteed resource access or other arrangements between the community and the investor are generally not documented in formal documents or legally binding contracts.

Where problems with the process have been identified, government agencies have prioritized the concerns of commercial land acquirers, taking steps to reduce what are perceived to be constraints on investors' access to land. In Mozambique, for example, a 2002 government decree set a 90-day time limit for the processing of investor land applications (including community consultations). The tightening of the legal regime around local consultation processes is putting pressure on the quality of these processes. The period of 90 days may seem long, but meaningful consultation among large communities in contexts characterised by significant power asymmetries between private companies and local groups would require sustained investment in time and effort in order to build local capacity to engage in consultation and negotiation exercises (Kanji *et al.* 2005).

### **Recompense: direct compensation and dispersed benefits to local people**

Land transfers invariably involve a set of fees and other forms of compensation payable by the investor to those relinquishing their rights to occupy or use land during the lease period (or in perpetuity in the case of sales). Where land is owned by the state, as is typical in Africa, formal lease payments and royalties tend to be captured at the national level. These, however, may be very low, as the explicit policy of an increasing number of African countries, including Tanzania, Ethiopia, Madagascar and Sudan, is to attract foreign investment through nominal rental fees, tax holidays, duty exemptions and other financial incentives. In Mozambique, land fees are extremely low, ranging between 2 and 30 meticaïs per hectare,<sup>12</sup> and collection rates are very low. In Ethiopia, rent was required in four deals out of the six projects examined in greater detail, with prices ranging from US\$3 to 10 per hectare per year. In Mali (where the study looked more in depth at three projects), no upfront payment was required, but a fee of US\$6 to 12 per hectare per year was required in two projects. Governments consider the direct value of investment

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<sup>12</sup> 1 US dollar is about 30 meticaïs.

projects to come, not through direct financial gain, but rather through broader economic benefits, such as employment generation and infrastructure development.

A small number of African countries have provisions for land rental fees to be shared at the local level. This may involve payments to decentralised arms of government, for example in Madagascar, where fees are payable at Commune or Region level, or direct payments to community institutions or affected individuals. Ghana, for instance, has an established system of rent-sharing between government and landholding chieftainships (stools). More commonly, however, legal requirements for compensation at the local level are commonly limited to recompense for loss of harvests and improvements, without any specific payment for loss of access to land or other resources, such as water (Table 2).

**Table 2. Examples of policy and practice with respect to compensation of landholders and other rights holders in six African countries**

Country	Landholders eligible for compensation	Paid by	Assets compensated	In-kind compensation allowed?	Compliance	Deemed sufficient to restore livelihoods
Ethiopia	All legally recognised rights holders	Government in theory, investor in practice	Value of improvements and 10-year harvest	Yes	Mostly	No
Ghana	All legally recognised rights holders	Investor	Loss of land and improvements based on national rates	Yes	Yes	No - the values used by the Land Valuation Board are usually the minimum rates; higher rates sometimes negotiated with investor
Mali	All legally recognised rights holders	Government in theory, investor in practice	Loss of improvements and harvests; also loss of land if ownership	Yes	Yes if ownership, otherwise dependent on negotiation	Yes for ownership, not for other rights
Madagascar	All legally recognised rights holders	Government in theory, investor in practice	Loss of land if ownership, loss of improvements	Yes	Mostly	Yes, but problems experienced in resettlement
Mozambique	All legally recognised rights holders	Government in theory, investor in practice	Loss of improvements	Yes	Mostly	Not yet clear
Tanzania	All legally recognised rights holders	Government in theory, investor in practice	Loss of improvements	Yes	Yes	No - some protracted disputes

Compensation in kind is possible in several of the countries covered by the research study. This may be advantageous in contexts where cash compensation is unlikely to restore local livelihoods, for instance due to limited local land markets, banking services and experience with handling relatively large amounts of cash. A large-scale irrigation project in Mali's Office du Niger area, affecting some 800 households, is reported to involve compensation in the form of irrigated land: five ha per household, of which two are free and three paid for over a 20-year period (L'Essor 2008). The Varun contract in Madagascar has an equivalent arrangement to provide for 30% of produce to be paid to local landholders.

It is not clear yet how enforceable investors' promises on local benefits are in legal or practical terms. However, compliance with regulations on compensation seems to be mostly considered effective (Table 2). On the other hand, levels of compensation are not always considered adequate. In particular, cash compensation for improvements and non-land assets may not be enough to provide access to alternative land where demographic pressures are growing and land markets are not fully developed. Recent experience in Tanzania illustrates that levels and terms of compensation are seldom straightforward (Sulle and Nelson 2009). In formal terms, compensation is payable by the government, but in practice it is the investor that negotiates and pays compensation directly to local land rights holders and users. There are substantial differences in opinion and confusion over the amount of compensation and the entitled beneficiaries. Improvements and resources are difficult to value in the absence of active monetized markets.

Beyond formal compensation, other benefits from agricultural investment projects are more dispersed and indirect. There is no guarantee that benefits will accrue to those dispossessed of their land, but broader communities may gain, particularly in three areas: employment, supply chain involvement and infrastructure. Jobs are prized as the key local benefit. The GEM deal in Madagascar does not involve rental fees for the farming rights over 450,000 ha, but instead promises to bring local development benefits and local

employment, with around 4,500 part-time workers in the field at various times (Benetti 2008). But these jobs tend to be unskilled, short-term and small in number relative to the size of the investment. Out of 150 Ethiopian land deals recorded in the quantitative study, 130 offered fewer than 50 full-time equivalent jobs,<sup>13</sup> and there was no trend towards higher levels of employment with higher capital investment.

A growing trend among African governments is to require that investors contribute to local development through direct involvement of local farmers and small-scale businesses in the supply chain. New policy in Sierra Leone requires that 5 to 20% of the shares be held by Sierra Leoneans and inclusion of outgrower schemes (MAFF 2009). Provisions for small-scale farmers can also feature in contracts. The Varun deal in Madagascar combines contract farming with lease arrangements, and also includes a clause on “local content” in which the company agrees to conduct a certain proportion of business with local enterprises and the local workforce. Most outgrower schemes and other inclusive approaches to production are, however, voluntary rather than a response to government regulation. The biodiesel company Diligent in Tanzania is sourcing jatropha from a network of small-scale farmers under loose contractual terms.

Recompense in terms of infrastructure for local communities may not be well targeted towards those who have rescinded their land and resource rights. High-capital infrastructure, such as irrigation equipment, typically returns to government at the end of the project lifespan and does not provide direct benefits to rights’ holders or their communities. Sometimes land deals may involve infrastructure unrelated to the agricultural project itself. According to media reports, the government of Qatar plans to lease 40,000 ha of land on the north coast of Kenya in return for a loan of several billion dollars to construct a deep-sea port elsewhere (Mathenge 2009).

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<sup>13</sup> The lowest recordable level on the records sheet; most are likely to offer considerably fewer than 50 full-time equivalent jobs.

## Discussion

The introduction posed the core question of whether improved rights over land provide the necessary bargaining power for local land users to achieve better outcomes from the deal-making process with incoming investors. The short answer is no. There is little doubt that greater recognition of land rights and procedural rights under policy and legislation, combined with enhanced ability to exert these rights, are *necessary* for more equitable returns from land use. However, recent experience with land acquisition in Africa begs the question of whether land rights are *sufficient* to constitute an asset for communities in negotiating with incoming investors. This paper's findings point to several interlinked and entrenched problems. Firstly, the set of procedural rights conferred under the more progressive bodies of policy, such as in Mozambique and Tanzania, remain weak, with few effective mechanisms for land users to either reject or shape deals. As this paper has illustrated, current practice in Africa falls well short of global normative standards for consultation, consent and recompense, as framed by the principle of free, prior and informed consent.

Secondly, insofar as local land users are superficially included within consultation and decision-making processes, they are further handicapped by the limitations of their set of bargaining strategies and points of leverage – which can be labeled as “bargaining endowments” to loosely adapt the vocabulary of Mnookin and Kornhauser (1979) cited in Cotula (2008, p16). These bargaining endowments include the substantive and procedural rights under the law that frame negotiations that are outside the court but nonetheless “in the shadow of the law”. Here the balance of power is skewed strongly towards the investor, particularly in the case of foreign investors with access to international legal advice and arbitration mechanisms. Additionally, that negotiations and contracts are framed in economic terms limits the space for rights-based rather than markets-based arguments and defense of land access. With weak monetized markets and low prevailing sale and rental prices for land in Africa, tenure over land does not constitute a valuable bargaining endowment. Both land and other assets held by directly affected people,

particularly labor and local expertise, are not economically scarce. Financial capital, in the hands of the investor, is the scarce resource.

These factors combine to put local individuals and communities into a highly unfavorable negotiating position with respect to investors. Without economically valuable assets to bring to the bargaining table, they are forced into a defensive position of negotiating in terms of what they can withhold – social license to operate – rather than what they can contribute. This is well illustrated by an observation of a researcher in Madagascar: “The GEM negotiation was very short, like a simulation, because rural communities were not in a good position to negotiate with the investor. Extreme poverty, joblessness, drought and absence of immediate alternatives basically obliged people and the regional and commune authorities to accept investor proposals rapidly.”<sup>14</sup>

A dominant theme in discourse on land tenure in Africa is that more secure rights over land, along with greater capacity to assert those rights, will enable rural communities and small-scale land users to achieve, along with other benefits, better economic returns from their land assets (CLEP 2008). The emerging evidence on land acquisition in Africa provides further support to the critique of Cousins (2009) that legal empowerment through legislative reform, while effective in certain important regards, is intrinsically limited by the quality of laws and institutions, and more fundamentally by the milieu of the political economy. A situation in which rural land users are structurally excluded from an array of economic options, as exemplified by the Madagascan quote recorded above, calls into question the extent to which rights’ holders’ can grant “free” consent to incoming commercial claims. A similar concern has been raised around forest concessions in the Congo Basin (Lewis *et al.* 2008).

Another slant of Cousins’ critique concerns whether entry into monetized markets for land, produce and labour constitutes a pathway out of or *into* poverty – a problem encapsulated in the concept of “adverse incorporation” (Hickey and du Toit 2007). Several

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<sup>14</sup> Written note submitted on data sheet, 13 March 2009



procedural and distributive features of documented recent land deals in Africa suggest that both exclusion and inclusion may carry disadvantages for different groups. The logic behind current policies that waive or play down direct payments for compensation is that the set of indirect benefits of investment projects (employment, supply chain opportunities and infrastructure) provide a substitute that is *more valuable* to affected people. The UN Special Rapporteur on the Right to Food places specific emphasis on the point that investment revenues should be used for the benefit of the local population (De Schutter 2009). In reality, these benefits are vague or dispersed. In particular, incoming agribusiness projects provide jobs that are largely short-term, unskilled and insecure: yet another “ephemeral resource” in the rural environment (Swidler and Watson 2009). Furthermore, benefits that benefit only a few will increase local differentiation, for example between waged and unwaged, in both economic and political senses.

Over time large-scale biofuels investments will have much deeper impacts on local and national economies, including more skewed land distribution, possibly lower fuel prices, and stronger links to international markets. These will have differentiated effects on urban and rural people, farmers and non-farmers, traders and consumers. Mechanisms for articulating and resolving differences in priorities and preferences within any populace at the receiving end of a large-scale land investment are, as yet, absent in documented cases in Africa. National governments and local government agencies play an ambiguous role in this regard, both actively enabling the conditions for commercial expansion, for example through dedicated investment centers, and simultaneously shepherding the expression and defense of local interests. The evidence presented in this paper suggests that while stated government concern for the protection of local land rights is not cynical, when tested within real negotiations, government agencies invariably align with the investor rather than the local land users.

This governmental position is underpinned by the “investment” imperative (through both government ideology and powerful protagonists) but is commonly played out as management rather than politics. Many of the immediate incentives for government

employees overseeing biofuels project negotiations are managerial incentives, to meet standards, targets and deadlines. Administrative procedures for land deals, designed in part to protect against local disenfranchisement, can inadvertently create a stranglehold of bureaucracy with the lack of alternative for both investors and local people. Rather than opening up choice and freedom to make informed decisions – perhaps on localities for project implementation, types of tenurial arrangements or possibilities for integrative business models – current procedures lock affected people into unfavorable negotiation and development pathways. Some would argue that resistance to current modes of land acquisition should focus on structural causes and transformative change rather than waste energy on incremental or reformist improvements. Another view is that the mechanisms of a specific negotiation – its administrative procedures and attendant opportunities for tactical small wins – are the arena for larger political change. Even where local claims enjoy no or little legal protection, civil society’s perceptions of their social and political legitimacy may lend them considerable weight. Long-term land leases over 50 to 99 years are unsustainable unless there is some level of local satisfaction. Thus the chinks in the administration of the current spate of land deals for biofuels in Africa may open new space for political organisation among the rural poor.

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