III. CHARACTERISTICS OF THE LAND DEALS

This chapter discusses key features of documented land deals, including parties and negotiating processes as well as key provisions. The scope is limited to the aspects most directly relevant to the transfer of land – to the exclusion, for example, of other fundamental issues like environmental standards. It is recognised that each deal typically involves complex trade-offs (in very crude terms, loss of land versus investment promotion and jobs creation, for example), and must be analysed on a case-by-case basis. The study does not involve an economic analysis of the deals, not least due to data limitations and to the very early stages of many documented projects (the World Bank-led study features a major economic analysis component[24]). Access to only a small sample of land deals (see Table 1.1) also limits the ambitions of this section.

3.1. PARTICIPANTS AND PROCESS IN INDIVIDUAL LAND DEALS

Parties involved in the deal

In their basic form, land deals involve at least two parties. On the one hand, there is an acquirer. In the African context, this is generally a private or joint equity company, but it can also be a foreign government acquiring land directly – for example, under the 2002 Special Agricultural Investment Agreement between Syria and Sudan, mentioned above. On the other side of the deal is a land provider, either a government or, much more rarely, a private land-owner.

This apparent simplicity hides a significant degree of 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 (e.g. the Syria-Sudan deal in the sample); through to more specific instruments (contractual or otherwise) that actually transfer the land or subsections of it (e.g. the Office du Niger-Petrotech/AgroMali lease contract in Mali and the "DUAT" allocation instrument in Mozambique, both in the sample). The Varun contract farming agreement with local landowners, also in the sample, follows an earlier deal signed between the company and the administration of Sofia Region in Madagascar. The extent to which land deals are negotiated or standardised texts varies across countries and across the

24. See section 1.2.

different stages of negotiation – with instruments to allocate land tending to be more standardised (e.g. the lease contracts in Mali's Office du Niger).

Also, each deal typically involves a wide range of parties through the multiple stages of preparing, negotiating, contracting and operationalising the project. First, multiple agencies within the host government are engaged. Even in countries where there is a central point of contact ("one-stop shop") for prospective investors, usually an investment promotion agency, this agency alone will not deal with all aspects of the land deal. At a minimum, the investor is likely to need to engage separately with government agencies at the local level. In Tanzania, for instance, where the Tanzania Investment Centre (TIC) plays a hands-on role in facilitating land access (see below), formal approval for the investment is needed from the TIC (financial viability), the Ministry of Agriculture (agricultural viability), the Ministry of Lands and Housing Development (land registration) and the Ministry of Environment (environmental impact assessment). Coordination and communication among government agencies tasked with different aspects of the investment process can be poor, hampered in part by government departments' preference to report positive outcomes only, without sharing problems and setbacks (Sulle, 2009).

On the investor side, private investors have the advantage of being able to act as a single legal entity with a cohesive set of values. But, as discussed, the borderline between public and private investors is fluid. Among the various possible scenarios, the implementation of deals signed between governments may be driven by private operators, either from inception or as part of subsequent efforts to regain momentum. For example, the Syria-Sudan deal enables Syria to delegate implementation to the private sector, subject to this being cleared with the government of Sudan (article 14). In addition, implementation of a 1998 deal between the governments of Jordan and Sudan, whereby the former will rear livestock and grow crops in Sudan, is being resumed after having stalled for several years; the government of Jordan is reportedly planning to rely on private companies to run the investment (Hazaimeh, 2008).

One of the fundamental challenges for foreign investors is local knowledge and capacity, and associated issues of coordination between head offices in home countries and staff tasked with negotiating complex deals in host countries. The complexity and risk entailed in international land deals usually requires the involvement of a number of external service providers and intermediaries, such as agricultural advisors, consulting firms specialised in site location, and international contract lawyers. Some intermediaries based in recipient countries advertise their services on the Internet.[25]

Administrative processes

Examples from Ethiopia indicate that the land acquisition process first involves obtaining an investment licence from central government level (Ethiopian Investment Commission), then proceeding to find appropriate land in the target area. This can involve negotiations with clan leaders or local elders – but even here issues may exist as to the representativeness and downward accountability of these leaders towards their constituents. Contact is made at this stage usually with the sub-national (i.e. regional) investment office, where verification of capital is required and a project feasibility study is then carried out. After a lease agreement is signed with the sub-national investment office, the land is transferred to the investor. In some cases, local elders are party to the agreement. This broad-brush picture of land acquisition processes tallies closely with experience from other countries – such as Tanzania.

Some countries have streamlined the administrative processes that investors must go through in order to acquire land – which constitute a major barrier to land access in many jurisdictions. One-stop-shops and investment promotion agencies play a key role in this context. In Mali, Mozambique and Ghana, investment promotion agencies facilitate the acquisition of all necessary licences, permits and authorisations. Their direct role in facilitating land access focuses on helping investors in their dealings with other agencies. A more "hands-on" role is played by Tanzania's investment promotion agency, the TIC. This is mandated, among other things, with identifying available land and providing it to investors, as well as with helping investors obtain all necessary permits (article 6 of the Tanzanian Investment Act 1997). The TIC has set up a "land bank" – it has identified some 2.5 million hectares of land as suitable for investment projects.[26] Land is vested with the TIC and then allocated by this to the investor on the basis of a derivative title. After the end of the investment project, the land reverts back to the TIC.[27]

25. E.g. www.info-ghana.com/buy_land,_ghana.htm
26. www.tic.co.tz, particularly at http://www.tic.co.tz/TICWebSite.nsf/2e9cafac3e472ee5882572850027f544/729d4c075f2b03fc432572d10024bea6?OpenDocument.
27. Articles 19(2) and 20(5) of the Land Act 1999. 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). For more on the role of investment promotion agencies in facilitating investors' land access, see Cotula and Toulmin (2007).

Despite the steps taken in some countries to streamline procedures, the process to acquire land is usually complicated and often unclear to those involved. Investors visit the land in question, undertake official procedures and, being accustomed to clear deals based on private ownership, sound documentation and established business protocols, believe that the deal is clinched. However, land tenure contexts in many developing countries are not always so clear-cut. The deal may not account for the broader value of the land, perhaps in terms of environmental services, or to a particular social or ethnic group not represented in negotiations. 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.[28]

For a variety of reasons, including ethical concerns and the need for risk-management in long-term ventures, most investors will be motivated to ensure that deals are concluded to the broad satisfaction of all stakeholders, with appropriate levels of consultation and compensation. One of the main complaints among investors is the long and uncertain period of time required for project negotiation, a factor that has material impacts on the attractiveness of the investment for their financial backers.[29]

Transparency and civil society engagement

Land deals in Africa are framed by high levels of public concern over land rights and food security, both within countries and internationally. Commentators and insiders recognise the need to weigh the ambitions and potential of large-scale land-based developments against the concerns of host country citizens about sovereignty over local resources, as well as the vigorous criticism of some civil society organisations. Land issues are emotive: large-scale transfers to foreign interests raise the spectre of the "bad old days" of colonialism and exploitative plantations.

Lack of transparency is a major challenge in the negotiations of a land deal as well as of the broader government-to-government arrangement in which individual deals may fit. There is a general sense among observers that negotiations and agreements occur behind closed doors. Actual contracts between host governments and incoming or domestic investors are not public. Some data sources may be publicly accessible (e.g., in some

28. Interview with an FAO country officer, 11 February 2009.
29. Anonymous personal communications.

jurisdictions, the national land registry), but usually only for limited data on completed deals – and even access to the land registry for this research proved problematic in some countries.

In the course of this study, research revealed that in most of the focus countries (with the partial exceptions of Ethiopia and Sudan), basic data on the size, nature and location of land investments were not accessible through the national land registry or other notionally public sources. Researchers needed to make multiple contacts and meetings with government officials to access even superficial and incomplete information on land acquisitions over the past five years. Even in countries where there are official "land banks" available for investment, records may be incomplete, contradictory or not communicated to the relevant district administrations themselves.

While details about individual land deals may need to be sheltered to protect commercial confidentiality, lack of transparency seems particularly problematic for government-to-government diplomacy. Private sector interests are actively involved in such diplomacy from the start, but civil society has been largely absent. There is little evidence in most countries of civil society being invited to contribute constructively to emerging inter-governmental arrangements. The consensus among the sources interviewed for this report (government and private sector representatives as well as observers) is that it is difficult for the public to gain access to information on inter-governmental discussions and negotiations. Even within government, flows of information are incomplete, with a perception of a lack of coordination among ministries and agencies.[30]

Lack of checks and balances and of transparency in negotiations creates the breeding ground for corruption and for deals not in the best public interest. Some recently reported land deals were associated with allegations that investors had paid cash or in-kind contributions to business or other activities run by high government officials or even the president in a personal capacity (e.g. Hervieu, 2009).

It must also be noted, however, that although excluded from negotiation processes, civil society is increasingly making its voice heard with regard to the strategic policy choices underpinning those processes. The past few

30. Anonymous personal communications.

months have witnessed growing advocacy on international "land grabs", both nationally and internationally. NGOs, producer associations and community-based organisations have been active commentators on or critics of some high-profile land deals, such as agrifood in Kenya or biofuels and forestry in Uganda. Nyari (2008) discusses an experience from Northern Ghana, where village-level, NGO-supported resistance to a land allocation for biofuel production had significant national resonance. The Paris-based "Collective for the Defence of Malgasy Lands" has undertaken high-profile advocacy on land acquisitions in Madagascar, particularly the Daewoo deal.[31] But alliances with equivalent civil society groups from investor countries remain limited. This growing level of scrutiny of land deals, even though poorly informed by accurate and timely information, creates pressure for a more measured and multi-faceted approach on the part of investors and host governments.

Consultation and consent: participation of local rights holders and land users

Perhaps the most important area of concern is the extent and depth of engagement with directly affected people in the planning, approval and establishment of large-scale agricultural projects. There are major concerns in some countries about the weakness of provisions within national law for local people to steer development options and defend their own land rights. In other countries such rights are in theory substantially more secure, but concerns remain around implementation of the law and voluntary good practice on the part of investor companies.

At the international level, the strongest guidance on consultation and consent is the principle of free, prior informed consent (FPIC) and the methodologies and policies that are emerging around this principle. FPIC is formalised through article 32 of the 2007 UN Declaration on the Rights of Indigenous Peoples. The basic principle of FPIC is that indigenous people have the right to say "yes" or "no" to proposed developments on their lands. The consent needs to respect people's cultures, customary systems and practices and be secured through iterative negotiation with people's own representative institutions. Also, governments are responsible for making sure that effective systems for grievance, redress and mitigation are in place (Colchester and Ferrari, 2007).

31. http://terresmalgaches.info

Several countries are incorporating the principle of FPIC into national or sub-national legislation – early adopters include the Philippines and Australia. Companies are also beginning to adopt FPIC to guide engagement with local communities over issues of land and resource access. The pulp and paper company, APRIL, for example, is piloting a methodology based on FPIC in Indonesia (Wilson, 2009). Several methodological issues still need to be sorted out within the FPIC framework (e.g. what breadth of consultation is required among affected communities and over time) and there remain some legal questions (e.g. extension to "non-indigenous" local residents and whether rights are substantive or merely procedural).

Nonetheless, commentators suggest that FPIC is likely to become increasingly important as a principle and methodology for engagement between large-scale land investors and those whose land access is affected by such investments. For example, the Roundtable on Sustainable Palm Oil is considering whether and how to incorporate FPIC into its system of certification (Wilson, 2009).

While FPIC emerged in its original sense in relation to indigenous peoples as defined through the UN process, its key tenets can in principle be applied to any local rights holders and resource users. And although FPIC is not yet a framework for policies and procedures on consultation and consent in African countries, several countries have nonetheless enacted legislation or policy requiring consultation with 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 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.

However, even where policy frameworks are well developed, practice may be unsatisfactory. Boxes 3.1 and 3.2 summarise experience on the ground in two countries where policies and law on community rights to consultation and consent are on paper exemplary: Mozambique and Tanzania. In both countries, however, enabling national laws are implemented partially rather than fully. What is defined as community consultation may be confined to village elders, officials and elites.

BOX 3.1. STRONG POLICY BUT WEAKER IMPLEMENTATION: EXPERIENCE WITH COMMUNITY CONSULTATION IN LAND ACQUISITION IN MOZAMBIQUE

Mozambique's laws and policies on management of land and natural resources include provisions for participation of local stakeholders. There is special recognition of the rights and interests of local communities, including mandatory requirements for community consultations and hearings when land is transferred to new uses and users. However, implementation of these positive legal and institutional frameworks is often incomplete or unsatisfactory. National economic priorities may mean that district authorities have more incentive to promote the interests of investors over local communities. Local interests are also undermined by the fact that policy does not include terms for benefit-sharing. In addition, the actual legal weight of community consultation processes is unclear. As a result of this combination of factors, community consultations during land acquisition by investors are in practice fairly limited. The following findings from three case studies on commercial biofuel projects illustrate the shortcomings of practice on the ground.

1. Communities do not receive relevant information in advance of consultation meetings.
2. Most consultations are performed in one meeting only. When there is more than one meeting, the first is normally limited to organisational aspects, such as the indication of date and time of meeting, without passing any relevant information on the project at stake to the communities.
3. Consultation meetings are generally attended by community leaders (traditional chiefs, local party leaders), whose opinions are usually dominant. Preliminary meetings are held with the traditional leaders to ensure that the consultations meeting will produce an outcome favourable to the investor.
4. Despite being the majority of the workforce in rural lands, women are rarely involved in the consultation processes and they almost never sign the respective reports.
5. Most consultation records present incomplete or even conflicting data. While, on one hand, they may describe cultivated agricultural fields and other forms of evidence of human occupation, on the other hand they include a declaration stating that the land is not occupied for the purpose of the request at stake.
6. Consultation records often do not accurately reflect community opinions and viewpoints.
7. The provisions of consultation records concerning benefit-sharing are generally vague. There are seldom time-bound targets or measurable indicators of progress.

Source: Nhantumbo and Salomao (2009)

BOX 3.2. ROBUST LAWS AND INSTITUTIONS BUT INADEQUATE EXPERIENCE AND GUIDANCE: COMMUNITY CONSULTATION AND COMPENSATION IN LAND ACQUISITION IN TANZANIA

In Tanzania, investors can only lease and use 'general land', not 'village land'. Land can be transferred from 'village' to 'general' status with the permission of the local community. Prospective investors start at the national-level Tanzania Investment Centre, the one-stop-shop that facilitates investment in Tanzania, where they are required to demonstrate the financial viability of the proposed project in order to get a Certificate of Incentives. From here they go to the district level, as advised and facilitated by the TIC. In the simple case they take up previously identified and surveyed land, registered with the TIC "land bank". But if all or part of the proposed land area is still 'village land', negotiations with local communities are necessary. The investor must have the request for land transfer approved in turn by the Village Council (senior village representatives), the District Council Land Committee and finally the Village Assembly (comprising all adult residents of a village).

To date, about 640,000 ha, out of a total of 4 million ha requested by companies, has been allocated for biofuel production in Tanzania. Many companies have shown interest in acquiring lands that are underdeveloped 'general' lands. For instance, a Swedish company is in the process of securing 400,000 ha for sugarcane production in the Wami River basin in Bagamoyo District. Evidence suggests that about 1000 small-scale rice farmers on these lands will need to move, and are not eligible for compensation as the land is 'general' not 'village' land.

The process of negotiation over village land tends to be slow, in large part because of the lack of precedent and guidance. In one case, for instance, the investor FELISA completed the process, securing approval for 350 ha from two Village Assemblies, but was later sent a message from one of the villages withdrawing the offer as the land had apparently already been allocated to another individual. Intervention by local authorities resolved the issue in FELISA's favour, and arrangements have been made for community infrastructure investment and an oil palm outgrowing scheme, which have convinced villagers of the value of the investment. However, there are no formal documents to bind either party to these agreements.

There is a legal requirement that villagers be compensated fairly by the government when village land is transferred to general land. In practice however, investors themselves tend to pay compensation directly to the villagers. There are substantial differences in opinion and confusion over the amount of compensation and the entitled beneficiaries. Given the lack of an active land market in Tanzania, market-based per hectare rates have little meaning. Some companies compensate for the value of the resources on the land, such as trees and grazing, rather than the land per se. Access to water resources is of particular concern to both villagers and investors, as well as other competing interests (downstream users, conservation etc), and is a source of conflict in some instances – conflict that is difficult to resolve in the absence of clear regulations or guidelines from government on sustainable levels of water abstraction.

Source: Sulle (2009)

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. Consultation tends to be a one-off event rather than an ongoing interaction through the project cycle. An underlying problem is not so much reluctance on the part of local government and companies to "do the right thing" but rather a lack of experience and guidance to shape better practice.

3.2. NATURE OF LAND TRANSFERS

A key aspect in international land deals concerns the nature of the land rights being transferred, and between whom. From the investor's perspective, several factors are likely to matter when assessing options. These include the economic rationale of the investment project (e.g. whether driven by short or long-term concerns), and options provided by national law in the host state (which may restrict ownership rights).[32] Investors and their government backers are likely to favour longer-term land rights where these are required by the economic nature of the investment. This may include ownership or long leases, and legal availability of these options may influence the choice of recipient countries – as explicitly stated in the guidelines for Saudi Arabia's "King Abdullah Initiative for Saudi Agricultural Investment Abroad".[33]

In several African countries, land is nationalised or otherwise mainly controlled by the state. For instance, land is nationalised in Ethiopia (under Proclamation No. 31 of 1975 and the 1995 Constitution), Mozambique (at independence in 1975, and more recently under the 1990 Constitution and

32. Interview with an international consultant, 23 January 2009.
33. Available online at http://www.mofa.gov.sa/Detail.asp?InSectionID=3981&InNewsItemID=88796.

the Land Act 1997) and Tanzania (after independence and more recently under the Land Act 1999 and the Village Land Act 1999). In these cases, outright purchases are outlawed – although some African countries have introduced private ownership where this was previously ruled out (e.g. Burkina Faso in the 1990s), or enabled transfers of “underdeveloped” state lands even if radical title ultimately remains vested with the state (e.g. in Tanzania, under article 6 of the Land (Amendment) Act 2004).

Other countries do allow private land ownership, which may be acquired through land registration procedures (in Kenya, Madagascar and Mali, for example). In Ghana, part of the land is owned by the state but most of it belongs to private entities such as customary chiefdoms, extended families and individuals.[34] But with some exceptions (e.g. Kenya), private land ownership tends not to be widespread 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 land tenure; this mainly concerns urban land (Deininger, 2003). Thus, 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). And in Sudan, although private land ownership is formally recognised, about 95% of all the land is state owned.[35]

The limited spread of private ownership is partly due to the long and cumbersome procedures required to acquire it, particularly land registration (e.g., on Mali, see Djiré, 2007; on Cameroon, see Egbe, 2001). In addition, where “customary” tenure systems are functioning and perceived as legitimate, local resource users may feel they have sufficient tenure security under these systems. The implication is that, even where private ownership is formally recognised, most of the land is controlled by the state.

Specific restrictions on the acquisition of certain land rights by non-nationals may also exist. In some countries, non-nationals face restrictions on land ownership (e.g. in Ghana, under article 266 of the 1992 constitution) and on resource use (for example, in Tanzania foreigners may acquire land rights only

34. Kasanga and Kotey (2001) estimate that 80 to 90% of all undeveloped land in Ghana is held under customary tenure.
35. Interview with a Sudanese government official, 22 February 2009.

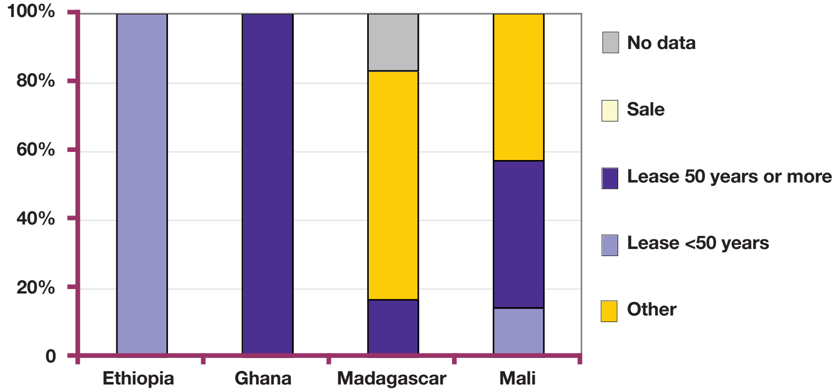
for the purpose of an investment project under the Tanzania Investment Act[36]). But under certain circumstances incorporation of local subsidiaries may enable foreign investors to overcome these barriers. And in countries like Mali there is no formal legal differentiation of treatment between nationals and non-nationals – though differences in practice may still exist. In Mozambique, foreign and domestic investors alike may acquire a renewable 50-year land use right, which for the first two years (five for nationals) is conditional upon the implementation of an agreed investment plan (articles 17 and 18 of the Land Act 1997).

Given this context, while outright purchases are used in Latin America and Eastern Europe, government-allocated leases seem to be much more common in Africa – irrespective of the degree of home government involvement in the land acquisition. This is the picture emerging from the interviews undertaken for this study,[37] as well as from media reports concerning much-publicised land deals in Sudan (for example, the leases over 25,000 and 400,000 ha of cropland reported to have been acquired by the Saudi company Hadco and by the US company Jarch Capital, respectively; Blas and Wallis, 2009), Madagascar (the now officially cancelled Daewoo deal was reported to involve a 99-year, government-allocated lease; Olivier, 2008) and Angola (Lonrho's announced acquisition of 25,000 ha of land is reported to involve a 50-year government lease; Burgis, 2009). This broad picture is confirmed by the legal analysis and in-country research undertaken for this study.

For example, in terms of legal analysis, the Sudan-Syria inter-governmental land deal, discussed above, involves a renewable 50-year lease; the government of Sudan commits itself to delimiting the land and delivering it to the government of Syria "free from any right" other than ownership, which remains vested with the government of Sudan (article 3 of the agreement). The contract between Varun and 13 associations of local landowners involves a 50-year deal combining lease and contract farming arrangements, renewable for up to 99 years. Similarly, in Ethiopia, the contract from Benishangul Gumuz Regional State examined by this study involves a 50-year lease (article 3). In Mali, land allocations to investors in the Office du Niger area also typically involve leases. This is the case of the draft Convention

36. Sections 19 and 20 of the Land Act 1999.
37. Interview with an international consultant, 23 January 2009; with a Sudanese government official, 22 February 2009; and with a government official from Uganda, 18 February 2009.

FIGURE 3.1. TYPE OF LAND RIGHTS TRANSFERRED (BY NUMBER OF PROJECTS)



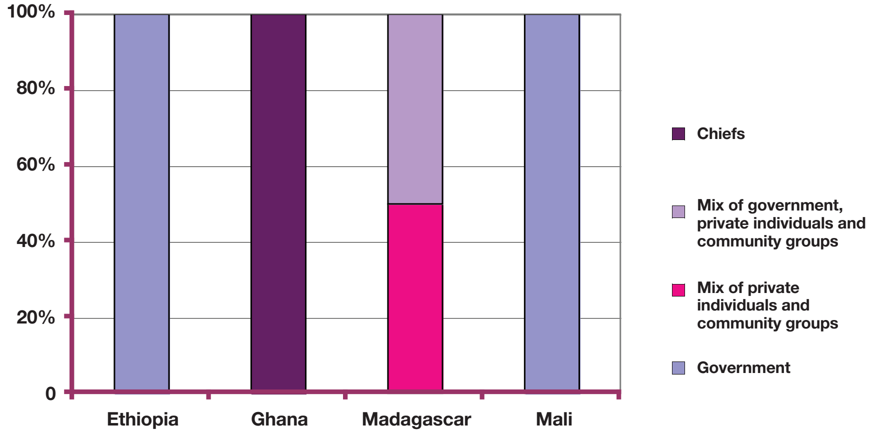
Data source: country studies. "Other" in Mali and Madagascar refers to projects involving contract farming or land distribution arrangements.

between the government of Mali and UEMOA, concerning 11,288 ha and involving a renewable 50-year lease ("*bail emphytéotique*"; article 3); and of the draft Lease Contract between the Office du Niger and Petrotech/AgroMali SA, concerning 10,000 ha and involving a renewable 30-year lease ("*bail ordinaire*"; article 2).

In quantitative terms, in Ethiopia, all projects documented by the national inventory involve allocations of (or applications for) government leases for diverse durations of up to 50 years (e.g. 10, 30 or 50 years). In Mali, the majority of documented projects (7 out of 13) involve 50-year renewable leases ("*baux emphytéotiques*"); one project involves a lease below 50 years ("*bail ordinaire*", for 30 years renewable); data is not available for the remaining five projects. In Ghana, long leases also seem to be the rule (see Figure 3.1).

The qualitative studies in Mozambique and Tanzania also support the finding that leases, not purchases, are predominant. In Mozambique, where land is nationalised, 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 Nhantumbo and Salomao (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, 2009).

FIGURE 3.2. LAND HOLDER BEFORE DEAL



Data source: country studies

Most documented land leases are granted by the government. This includes 100% of documented cases in Ethiopia, Mali and Mozambique, and the vast majority of cases in Sudan. In other countries there is room for private transactions, however. In Ghana, for example, leases may be granted by the Land Commission, by customary chiefs or by families or individuals, depending on who holds the land. All the land leases documented by the Ghana inventory were granted by private right holders, particularly customary chiefs purporting to act on behalf of their communities (see Figure 3.2).

3.3. DIRECT ECONOMIC BENEFITS OF LAND DEALS

Land fees and other financial transfers

While the financial terms of the land deals reviewed vary, a recurring theme is the relatively low importance and value of financial transfers compared to the expected broader economic benefits such as employment generation and infrastructure development.

In many government land allocations, official land fees tend to play a relatively unimportant role – they are often not charged, or charged at only nominal rates. This may be linked to low land rents and to the fact that, in the eyes of the government, expected benefits exceed opportunity costs. The absence or small value of fees emerges prominently in press reports. In the

Daewoo-Madagascar deal, no rent was reported to be required – job creation and infrastructure development were seen as the main benefits (Olivier, 2008). Findings from the research conducted for this report confirm this trend.

A Sudanese government official interviewed for this study stated that land rents in Sudan are extremely low, particularly in rural areas: a feddan (0.42 ha) may cost US$ 2 or US$ 3 in the Northern State, compared to US$ 15-20 in Khartoum. It is therefore government policy to only charge negligible rent to international investors: the main benefit of incoming investment is seen in its economic repercussions, and the emphasis in government decision-making is on the "seriousness" of the investment project.[38]

Similarly, a corporate officer interviewed for this study suggested that "the [Angolan] government are not interested in making money out of the land. The government is interested in stimulating the local economy, diversifying the primary economic base from past focus on mining and industry".[39] Limited development of formal land markets, ensuing uncertainty about land values, and weak negotiating position of the host government may also push land fees down, however.

In-country research confirms the general impression that land fees are low in monetary terms and an unimportant component of negotiations. 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. These fees are low in the international context, though land rentals are going up (in the Ethiopian state of Oromia, for instance). Several deals – including the contract from the Benishangul Gumuz Regional State, examined by this study – involve five-year exemptions from land fees (article 4(a) of the Benishangul Gumuz contract).

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 (the third being the one led by UEMOA, for which the draft Convention makes no reference to fees). The GEM deal in Madagascar does not involve rental fees for the exclusive 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

38. Interview with a Sudanese government official, 22 February 2009.
39. Interview with a private sector official, 20 February 2009.

times (Benetti, 2008). The Syria-Sudan deal contains an interesting provision, whereby the government of Sudan bears the rent for land under exploitation – which would create an incentive for Syria to develop the land (article 3).

It is plausible that land prices may be higher in private-to-private deals, though in these cases amounts paid tend not to be disclosed (in the acquisition by Jarch Capital in south Sudan, for instance). In Ghana, two of the private leases documented by in-country research involved significant cash payments.

Separate provisions may be included to deal with other fees. In irrigated contexts, water fees are an obvious example. For instance, in Mali the Office du Niger – Petrotech/AgroMali draft lease contract requires the investor to pay an annual water fee (article 6); non-payment for three years leads to the Office du Niger rescinding the lease (article 9).

A related question is the extent to which fees may be periodically revised. A government official from Uganda reported that, while rent is not likely to be increased in 49-year leases, it is re-negotiated (i.e. increased) every 10 years in 99-year leases.[40] In Mali's Office du Niger, water fees are not fixed in the contract but are determined by the relevant Minister (article 6 of the draft Petrotech/AgroMali lease).

Taxation may increase public revenues. But much depends on tax incentives granted by the government as part of efforts to attract investment. In Sudan, with agriculture now seen as a strategic sector, the government exempts agricultural concessions from custom duties, tax on all capital items, and income and profit tax.[41] The Syria-Sudan deal provides various tax and customs duty exemptions (article 10).

Similarly, in Madagascar, Mali and Ethiopia, the national inventories documented significant levels of tax incentives. In Ethiopia, for example, profit tax (estimated at US$ 20 per hectare per year) is usually exempted for a period of 5 years; for a total of 602,760 ha allocated to documented projects, it is estimated that the exemption of this tax for each project over 5 years amounts to US$ 60,276,000.[42]

40. Interview, 18 February 2009.
41. Interview with a Sudanese government official, 22 February 2009.
42. Based on figures from the Ethiopia country study (602,760 ha x 20ha/year x 5 years).

Financial transfers seem usually paid into general government funds. Specific provisions on how these revenues are distributed and used seem less common. But in Sierra Leone a policy document adopted in January 2009 by the Ministry of Agriculture requires land rentals to be split between local landowners (50%), local government (20%), national government (10%) and administration (20%) (MAFFS, 2009). A similar system of rent-sharing has existed for a long time in Ghana.

Commitments on investment, employment and infrastructure

As financial transfers per se are not a main host government benefit, investor commitments on investment, employment and infrastructure assume an importance they would not otherwise have in purely monetarised outright purchases. This is a key area where international land deals may constitute a development opportunity in recipient countries – by bringing capital and know-how, creating employment and developing infrastructure.

The quantitative country studies did find significant levels of investment commitments and job creation forecasts (see Table 2.2). With regard to employment, time constraints have prevented a detailed analysis of the quality of the jobs created or promised (full or part-time, permanent or temporary, labour conditions). Data collected suggest that investment commitment figures are the overall amounts for the projects documented, including all project costs (e.g. compensation for land takings).

Commitments on infrastructure development seem prominent in some deals – whether under the terms of the contract or applicable national legislation. In Mali's Office du Niger, investors granted long-term leases are required to develop irrigation infrastructure as a condition for their lease (under articles 45 and 55 of Decree 96-188 of 1996). In this context, the draft Mali-UEMOA and Office du Niger – Petrotech/AgroMali contracts require the investor to build and maintain irrigation infrastructure. Similarly, the Syria-Sudan deal requires the government of Syria to develop irrigation for 10,000 faddan (4,200 ha) outside the project area (which is 30,000 faddan) (article 8 of the agreement).

Although infrastructure commitments are part of the overall economic equilibrium of the deal, they may concern infrastructure unrelated to the agricultural project itself. According to media reports, the government of Qatar is leasing 40,000 ha of land in a fertile River Tana Delta in the North coast of Kenya. In return, it offered a loan of several billion dollars to construct a second deep sea port for Kenya in the island of Lamu. On completion, this port is expected to provide an outlet for trade from Ethiopia and Southern Sudan (Mathenge, 2009). This approach seems in line with the common practice of bundling land deals, other business transactions, loans and development aid. These bundled arrangements may be attractive to governments, but carry the risk that if one component falters, the entire package will fail.

A key issue is the extent to which commitments on investment, jobs and infrastructure are legally enforceable in the same way as government commitments to provide and maintain access to land. This is highlighted by the recent announcement by a biofuel investor in Madagascar to increase mechanisation – despite early promises to pursue a labour-intensive business model.

Contractual provisions and national legislation may clarify the legal value of these commitments, as well as monitoring mechanisms and sanctions for non-compliance. In Mali, legislation on the Office du Niger enables the Office management to terminate 30-year leases for failure to pay fees or maintain the irrigation infrastructure (article 59 of Decree 96-188 of 1996).[43] The draft Petrotech/AgroMali contract gives the investor three years from the feasibility study to develop irrigation; this period can be renewed if by the end of it at least 50% of planned investments have been made; if investment levels are below 50%, the land area is reduced proportionally; while in case of no investment the contract is terminated (articles 3 and 9(2)).

Subjecting the lease to compliance with investment plans seems common practice. In Ethiopia, all the six projects examined in greater depth required compliance with investment commitments as a condition for the continued enjoyment of land rights. The Benishangul Gumuz Regional State land contract analysed by this study requires project activities to be initiated within six months from the land transfer; non-compliance constitutes ground for terminating the contract (articles 5(2)(b) and 11(b)). In Sudan, land leases are usually granted first on a provisional, normally three-year basis, subject to

43. Somewhat strangely, the Decree features no similar provisions for 50-year leases.

compliance with the investment plan.[44] The Syria-Sudan agreement sets a time for the feasibility study (maximum one year), for the construction of irrigation infrastructure (three years after that) and for reaching planned production levels (two years after that; article 13). In Mozambique, large land allocations are usually accompanied by an investment plan annexed to the land allocation instrument.[45]

Timeframes for compliance may be differentiated between national and foreign investors. For example, under Mozambique's Land Act 1997 land allocations are subject to compliance with the investment plan within two years (for foreign investors) or five years (for nationals); in both cases, non-compliance would entail termination of the land lease, while compliance guarantees a definitive title for 50 years, renewable.

In practice, provisions of this kind are rarely applied by governments. Implementation may raise challenges with regard to government capacity to monitor and enforce these provisions. In some countries, no government agency has a clear mandate for this; monitoring is carried out on an ad hoc basis, if at all; and there is no mandate for taking action on any inspection findings.[46]

Apart from projects where investment relates to building the whole irrigation infrastructure within the specified timeframe, two or three-year timeframes may be too short to assess investor performance against a 30, 50 or even 99-year lease. One-off assessments leading to definitive confirmation of land rights allocation (as in Mozambique) do not enable continued monitoring and sanctioning of investment performance.

Specific-enough wording for compliance requirements to be enforceable and transparency in their application are key to ensure fair implementation in the public interest – avoiding on the one hand creeping expropriation of the investment through arbitrary government application of these requirements, and on the other collusion between government officials and investors to avoid sanctioning where investment plans are not complied with.

44. Interview with a Sudanese government official, 22 February 2009.
45. International consultant based in Mozambique, 2 April 2009.
46. This issue is relevant well beyond Africa – as highlighted by an interview with a government official from Laos, 21 February 2009.

3.4. REQUIREMENTS AROUND PRODUCTION MODELS AND MARKETING

Most documented large-scale land investment plans in Africa are based on a single simple model of concentrated production within a single plantation unit, operated for maximum efficiency. But an emerging trend among governments is that investors contribute to local development not only through job provision, environmental protection and social investments, but also through direct involvement of local farmers and small-scale businesses in the supply chain. Apart from considerations linked to the long-standing farm size efficiency debate (which is beyond the scope of the study and is briefly summarised in Box 3.3), the choice of production models may have major implications for the distribution of project benefits. Maximising local benefits may require developing collaborative business models, from properly negotiated contract farming with small-scale producers through to joint ventures (shared equity) with legally recognised community organisations.

National governments in countries such as Tanzania and Sierra Leone are taking first steps to promote involvement of local investors and smallholders. The government of Tanzania is developing standards for biofuels investments that include provisions for involvement of local small-scale producers. New policy in Sierra Leone requires that 5 to 20% of the shares be held by Sierra Leoneans. It also features an obligation to include outgrower schemes (MAFFS, 2009). But government officials may not be sufficiently familiar with contract farming to effectively promote such a model, particularly in the face of pressure from investors more interested in running the project themselves.[47] Provisions for small-scale farmers can also feature in the contracts themselves. The Varun deal in Madagascar (see Table 1.1) combines contract farming with lease arrangements, for instance. The draft Mali-UEMOA Convention provides for agricultural production to be undertaken by private farmers from Mali and other UEMOA countries (article 5).

Most outgrower schemes and other inclusive approaches to production reviewed here are, however, voluntary rather than a response to government regulation. Investors seek to create more robust business models and to pre-empt local conflict and international criticism through building local

47. Interview with a government official from Laos, 21 February 2009; this issue is likely to be relevant in the African context as well.

BOX 3.3. SMALLHOLDERS VERSUS LARGE FARMS

There has been long-standing debate about farm size and productivity. Some argue that the era of the smallholder farmer is over, and that for reasons of efficiency, small farms should be consolidated into fewer large holdings, allowing for economies of scale and increased mechanisation. They point on the one hand to impoverished peasant farmers on the margins of existence with little ability to generate a surplus for investment in the farm enterprise and limited capacity to adopt new technology, and on the other to profitable large farms, accessing world markets, and providing employment and good wages to the local rural workforce. Others refute such arguments and note that for many crops there are few if any economies of scale in agricultural production. They point on the one hand to dynamic smallholder production, in which innovation and investment are very evident, as people adapt to new market opportunities and changing environmental conditions, and on the other hand to inefficient, extensive large farms with few workers, low wages and poor productivity.

There is ample evidence to support either case, depending on the type of crop, the policy context, and forms of support available to different kinds of farmer. Small farms are generally family-run, may be subsistence-based or market-oriented, using few or many external inputs, working manually or with machinery, and tend to be more labour intensive. Large farms are generally market-oriented, may be family-run like small farms or corporate, and use few if any or many labourers. They may also rely on specialised management firms to run the agricultural business. Both small and large farms may be resource-poor or rich, use largely manual methods or machinery, and use the land extensively or intensively. Because of this great variation in farm types, any statements on the relative merits of small versus large farms can only be relevant within specific social, economic and biophysical environments. In addition, empirical research has documented a wide variety of business models involving diverse combinations of small to large-scale players; false dichotomies between small and large-scale should therefore be avoided (on biofuels, for example, see Vermeulen and Goad, 2006, and Cotula *et al.*, 2008).

Scale economies may be achieved by mechanisation in crops such as sugarcane, some cereals and soya, for example, while perennial crops such as rubber, fruit and vegetables tend to do better under intensive production with a significant proportion of manual input. In the absence of economies of scale, small farms may be more efficient than large ones because of the favourable incentive structure in self-employed farming and the significant transaction and monitoring costs associated with hired labour (de Janvry *et al.*, 2001).

Even where there may be few economies of scale in production itself, there are increasing upstream and downstream economies of scale related to access to finance, inputs and markets. Purchasers of commodities prefer dealing with a few larger suppliers because of the transaction costs associated with handling produce from a large number of individual smallholders, relegating these to less profitable local market outlets. Such local markets are also under threat where local produce is in competition with food grains, often subsidised, from countries with surplus stocks (Vorley, 2001). However, groups of smallholders may also organise themselves to jointly store, grade and sell their produce to gain access to large buyers.

Source: Toulmin and Guèye (2003), with integrations.

participation in from the start. Lonrho proposes contract farming as an integral component of its recent land investments in Angola.[48] Outgrower schemes are popular among biofuels initiatives, such as the D1-BP Fuel Crops project in Malawi, in which the company will augment jatropha production on its plantation with supplies from surrounding medium-scale and small-scale farms.[49] Other projects are exploring variations on this model. For example, the bioethanol company SEKAB proposes a gradual transition from a single-ownership plantation to franchised block-farming for sugarcane for 500,000 ha in Rufiji, Tanzania. Also in Tanzania, the biodiesel company Diligent is sourcing jatropha oil entirely from a network of small-scale farmers under loose contractual terms (Sulle, 2009).

But the vast majority of documented projects continue to be run as large plantations based on concessions or leases. As large areas of land are commonly offered on very favourable terms, an incentive is created for establishing company-managed plantations rather than promoting contract farming approaches. Even "local content" provisions requiring prioritisation of the local workforce in recruitment, common in extractive industry contracts, appear rare; an example is provided by the Varun deal in Madagascar. There is enormous scope here for governments to develop systems of incentives to promote more inclusive business models among large-scale investors.

Market outlets for agricultural produce is another key issue. As discussed in chapter 2, the production of cash crops for export to the investor's home country is a key driver in many recent land acquisitions, particularly those led by foreign governments concerned about their food security. Several host countries are at present food-importing countries, and in some cases recipients of food aid. The Qatar-Kenya deal, mentioned above, has drawn

48. Interview with a Lonrho officer, 20 February 2009.
49. Personal communication from staff at D1-BP Fuel Crops, 3 October 2008.

particular media attention as the project, implying the alienation of land and export of food crops, was revealed just as Kenya had experienced severe droughts and failed harvests, forcing the government to admit it would have to declare a national food shortage emergency (Ochieng-Oron, 2009). While these cases have great traction in national and international media, a counter-argument is that agricultural investment will bring yield increases that will benefit food security in the host country as well as the investor country.

Reconciling food security in both home and host countries requires careful policy responses. Media reports suggest that some investors may be pushing for explicit provisions guaranteeing full repatriation of produce, including where this requires amending the national law of the host state. Outside the African context, Pakistan's Investment Minister was recently reported as saying that incoming Saudi investors would be able to repatriate "100 per cent crop yield to their countries, even in the case of food deficit" (Shah, 2009). Eventually, this proposal did not go through; the current investment guidelines for the King Abdullah Initiative for Saudi Agricultural Investment Abroad provide for "reasonable percentages" of produce to be exported, so as not to exacerbate food insecurity in host countries.[50]

This issue would deserve to be dealt with in contracts – yet most of the sample contracts are silent on the issue. The draft Mali-UEMOA Convention explicitly mentions food security in the UEMOA as a goal in its preamble, but this is not followed up in the main text of the contract. The Syria-Sudan deal leaves Syria free to decide whether to export or sell on local markets (article 9(2)). The Varun contract in the sample provides for 30% of produce to be paid to local landholders, and determines percentages for export and local markets.

3.5. INVESTMENT PROTECTION

Legal devices to protect the investor's assets respond to the long-term nature of agricultural investments (exemplified by the renewable 50- or even 99-year leases documented by this study), coupled with the investor's vulnerability over project duration to host state action that may adversely affect the investment or even expropriate it altogether.

50. Although what such "reasonable percentages" may be is not defined in the guidelines (available online at http://www.mofa.gov.sa/Detail.asp?InSectionID=3981&InNewsItemID=88796).

Common contractual practice for investor-state deals suggests that provisions may explicitly restrict the expropriation of the investment by the host state, for instance requiring public purpose, non-discrimination, due process and payment of market-based compensation. "Stabilisation clauses" included in the contract may commit the host government not to change the regulatory framework governing the investment in a way that affects the project's economic equilibrium (e.g. by raising project costs), and to compensate the investor if it does so. Arbitration clauses may provide that disputes under the contract be settled by international arbitrators rather than domestic courts. While these mechanisms can help protect the investment against arbitrary host state action, if not properly formulated they may also restrict the ability of the host state to take action in the public interest (e.g. to improve social and environmental standards, where this raises project costs) over the long duration of the investment.[51]

None of the contracts included in the sample contains extensive examples of these provisions. The draft Office du Niger – Petrotech/AgroMali lease contains a brief clause requiring payment of compensation if the land is "withdrawn" for a public purpose (article 12); but jurisdiction for disputes is vested with domestic courts (article 13). The Varun deal in Madagascar does contain an arbitration clause, but this is to be carried out under the laws of Madagascar rather than through international systems. It must be borne in mind, however, that the largest investor-state deal in the sample is for under 13,000 ha; and that the much larger Varun deal in the sample is a contract with local landowners, which would not be expected to include the stabilisation commitments typically found in contracts with host government authorities. In moving forward, it would be interesting to extend the legal analysis to larger investor-state deals. It is possible that contracts for larger land acquisitions, possibly linked to ancillary projects such as processing plants (in biofuel production, for instance), may involve more sophisticated contractual arrangements that feature some of these clauses.

As discussed in section 2.1, the content of land deals can only be properly understood in light of their broader legal framework, including investment treaties. All covered countries have signed a number of these treaties (see Figure 2.4). Investment treaties typically contain provisions to protect the

51. For a more comprehensive discussion of these issues, see Cotula (2008b). Shemberg (2008) recently carried out a landmark study about the possible impacts of stabilisation clauses on the realisation of human rights.

investment against adverse host state action – including provisions on expropriation,[52] on non-discrimination (so-called "national-treatment" and "most-favoured-nation" clauses),[53] and on treatment standards like "fair and equitable treatment"[54] and "full protection and security".[55] International arbitrators have tended to interpret these provisions very broadly, and are likely to consider unilateral terminations of land deals by host governments as an expropriation of the investor's assets – and thus require payment of compensation. In addition, BITs may feature "umbrella clauses" that commit a state party to honour contracts with nationals of the other state party, thereby strengthening the legal value of the deal well beyond that of a contract under the national law of the host state.[56] BITs may also enable investors to access international arbitration in case of dispute, even where the contract is silent on this.[57]

National investment codes also typically contain provisions to protect investments, including for example with regard to expropriation (e.g. article 28 of Ghana's Investment Act, and article 13 of Mozambique's Investment Law 1993) and access to international arbitration (e.g. article 24 of Mali's Investment Code 1991, amended in 2005, and article 23 of Tanzania's Investment Act 1997).

Investment treaties and codes usually do apply to agricultural investment and land deals. Therefore, concerns already raised in other sectors about balancing investment protection with public interests (for instance, with regard to tensions between commercial confidentiality and public oversight in investment arbitration,[58] and to reconciling the investor's need for regulatory stability with host state capacity to regulate in the public interest over time[59]) would also apply to land deals.

52. E.g. articles 4 and 5 of the Ghana-China BIT 1989; article III of the Mozambique-US BIT 1998.
53. E.g. article 3 of the Mali-Netherlands BIT 2003; article III of the Mozambique-US BIT 1998.
54. E.g. article 3(1) of the Ghana-China BIT 1989.
55. E.g. article II(3)(a) of the Mozambique-US BIT 1998.
56. E.g. article 7 of the Tanzania-Germany BIT 1965.
57. E.g. article 9 of the Ghana-China BIT 1989. For a more comprehensive analysis of international investment law in Africa, with a focus on a country sample that partly overlaps with the focus countries for this study, see Cotula (2009).
58. See for instance Mann (2005).
59. As discussed in Cotula (2008b).

3.6. LAND TAKINGS

As discussed in section 2.5, most if not all productive land targeted for potential investment is likely to be already claimed by farmers, herders, hunters or foragers. Such land claims may be based on present, seasonal or future use. They may involve multiple and nested claims by communal groups (e.g. lineages, extended families), traditional authorities, households or individuals. They commonly draw on unwritten tenure systems founding their legitimacy on "tradition" – though in practice they have changed profoundly over time as a result of cultural interactions, population pressures, socio-economic change and political processes.

As many large-scale land deals are recent or in the making, reliable evidence of impacts on land access on the ground is still very limited. But land allocations on the scale documented in this study do have the potential to result in loss of land for large numbers of people. As much of the rural population in Africa crucially depend on land for their livelihoods and food security, loss of land is likely to have major negative impacts on local people. These may only partly be compensated by the creation of permanent or temporary jobs. While loss of land to the community is permanent, jobs may decrease as investment projects evolve towards less labour-intensive phases (e.g. through growing mechanisation during project implementation).

In addition to being a livelihood asset, land in Africa also tends to have important spiritual value, to provide a basis for social identity and networks, and to be a catalyst for the collective sense of justice. In this sense, purely economic calculations are unlikely to do justice to local perceptions about proposed land deals.

Secure land rights can help protect local people from arbitrary dispossession (through legally protected rights and fair compensation regimes, for instance), and also provide them with an asset they may use in their negotiations with government and investors. This is key to maintaining and improving local livelihoods, but also to realise fundamental human rights. For example, besides the safeguards provided by the human right to property, the internationally recognised right to food 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.[60]

The next few sections briefly analyse existing arrangements for protecting and compensating local land rights.

Security of local land tenure

The extent to which national legal frameworks protect local land claims varies among countries, but is often limited. As discussed (section 3.2), land is most commonly owned or otherwise held by the state, with important country exceptions like Ghana. Local people may enjoy use rights over state land. Land titles, whether individual or collective, are extremely rare in rural areas (see section 3.2). Overall, the current wave of FDI flows and land acquisitions is taking place in contexts where many people have only insecure land rights – which makes them vulnerable to dispossession.

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 for instance protected, to varying degrees, under Mali's Land Code 2000,[61] Mozambique's Land Act 1997,[62] Tanzania's Land Act and Village Land Act 1999,[63] and Uganda's Land Act 1998.[64]

But even here legal protection may be conditioned to "productive use" – for instance under "*mise en valeur*" conditions specified in the legislation of much of Francophone Africa (including Mali[65]) and under similar requirements elsewhere (in Tanzania, for instance[66]). 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 whose resource use is often not considered as "productive enough" due to widespread

60. The linkages between land rights and human rights were explored in greater depth in an earlier FAO-IIED collaborative study (Cotula, 2008a).
61. Articles 43-48.
62. Articles 12 (a) and (b), 13(2) and 14(2) protect use rights based on customary law or good-faith occupation for more than ten years.
63. For example, Tanzania's Village Land Act 1999 states that customary rights of occupancy have "equal status and effects" to statutory rights (section 18(1)).
64. Article 9.
65. See for instance articles 45 and 47 of the Land Code 2000 (*Code Domanial et Foncier*), which require "evident and permanent" productive use as a condition for the registration of customary rights.
66. Under Tanzania's Village Land Act 1999, section 29. On the other hand, legal protection of customary rights under Mozambique's Land Act 1997 is not conditioned to productive use.

misconceptions – particularly pastoral production systems (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 from the national land commission of an African country that does legally protect customary land rights, who referred to local land users as "squatters".[67]

Land tenure uncertainty is a central issue for investors. While having signed a deal with the government may make investors feel reassured of their land tenure, local contestation may create tenure insecurity and trigger backlashes that can ultimately threaten the deal. Even where local claims enjoy no or little legal protection, their perceived social and political legitimacy may lend them considerable weight. Social pressures and local resentment can create considerable challenges to investors even where they may have legally acquired the land from the government, as evidenced by the failed Daewoo project in Madagascar, mentioned in section 2.2 above.

Compensation

The terms and conditions for superseding local land rights vary among countries and even among projects within the same country. Where land is owned by the state, legal requirements are commonly limited to compensation for loss of harvests and improvements. This is the case in Ethiopia, Mali and Tanzania, for example (see Table 3.3). Cash compensation for these may not be enough to provide access to alternative land, however, particularly where demographic pressures are growing and land markets not fully developed. Shortcomings in implementation may also undermine the ability of compensation rates to restore affected livelihoods.

Compensation in kind is possible in several covered countries (see Table 3.3). 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. For example, 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: 5 ha per household, of which 2 free and 3 paid for over a 20-year period (L'Essor, 2008). This compensation package seems

67. Interview, 18 February 2009.

TABLE 3.3. COMPENSATION REGIMES

Country studied	For private ownership	For other legally recognised rights	Paid by	Rates	In-kind compensation allowed?	Compliance*	Deemed sufficient to restore livelihoods*
Ethiopia	Not applicable	Yes	Government in theory, investor in practice	Value of improvements and 10-year harvest	Yes	Mostly	No
Ghana	Yes	Yes		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; investors may through negotiation decide to pay higher rates
Madagascar	Yes	Yes	Government in theory, investor in practice	Loss of land, loss of improvements	Yes	Mostly (sometimes in the case of rights which are not legally recognised)	Yes, but problems experienced in resettlement
Mali	Yes	Yes	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
Mozambique	Not applicable	Yes	Government in theory, investor in practice	Loss of improvements	Yes		
Tanzania	Not applicable	Yes	Government in theory, investor in practice	Loss of improvements	Yes		

* As assessed by in-country researchers

influenced by the nature of the developer (the US donor Millennium Challenge Corporation) and of the project (which aims to promote "modern agrictural enterprises" in the areas; L'Essor, 2008).

As multiple and overlapping land rights are often held through diverse blends of individual to collective rights, a key issue needing to be addressed is who should receive compensation payments – with regard to relations within households (as illustrated by women's "secondary" rights on family land) and groups (in Tanzania, for instance, compensation must be paid to the village as a whole for loss of communal land, and to villagers for loss of their rights of occupancy[68]), as well as between groups (see the "secondary" land rights of "incomers" and non-resident pastoral groups).

Compensation costs may be borne by the governments or by the investor directly – in which case they become part of project costs.[69] In Ethiopia, for example, compensation is supposed to be paid by the government. However, due to budget constraints, it is paid by investors but considered as part of the cost of land lease. A similar situation exists in Tanzania, where in formal terms compensation is payable by the government when land is transferred from Village Land status to General Land status for purposes of leasing to large-scale investors; but in practice it is the investor that negotiates and pays compensation directly to local land rights holders and users.[70]

Involvement of international lenders may raise compensation standards – for instance where the project must comply with IFC or "Equator Principles" banks.[71] It may also provide redress mechanisms beyond those available under national law – for example through the IFC ombudsman. A commercial lawyer interviewed for this study suggested that these gains are likely to be absent in SWF or other government fund deals, as these have enough financial clout to implement projects without involving international lenders.[72]

68. Village Land Act Regulations, section 8.
69. Interview with a lawyer from an international law firm, 22 January 2009.
70. For a more extensive discussion of compensation regimes in selected African countries, see Cotula (2007).
71. "The Equator Principles – A Financial Industry Benchmark for Determining, Assessing and Managing Social & Environmental Risk in Project Financing". Adopted in 2003 and revised in 2006, the Equator Principles are voluntary guidelines adopted by a number of commercial lenders (www.equator-principles.com).
72. Interview with a lawyer from an international law firm, 22 January 2009.

3.7. REMEDIES FOR AFFECTED PEOPLE

Where local people feel wronged by a land acquisition, legal remedies against the government or the investor are mainly determined by the national legislation of the host state. A key issue is whether remedies are only available to owners (i.e. the few with registered land title), or whether they also benefit resource users not having full ownership rights. Whether communities can sue jointly for losses suffered by large numbers of community members is also key, as it would enable people to join efforts and pool resources.

Beyond legal issues, other factors may constrain local capacity to seek redress: lack of resources (with legal aid rarely being available for this type of litigation); low levels of legal and basic literacy; geographical, economic and linguistic inaccessibility of courts; and lack of independence of and trust in the judiciary.

With regard to litigation against investors, there have been rare suits brought against parent companies in their home country, rather than local subsidiaries in the host state ("transnational litigation"). The effectiveness of this strategy depends on the law in force in the home country. In the UK and the US, this strategy has led to some positive results. In the UK, courts may be prepared to hear a case if they are satisfied that "substantial justice [would] not be done in the alternative forum" (*Spiliada* case), including due to lack of legal aid in the host country (*Connelly* and *Lubbe* cases). In the US, transnational lawsuits have been brought under the Alien Tort Claims Act of 1789, which gives US courts jurisdiction over civil tort actions brought by foreigners for acts "committed in violation of the law of nations" – even if these acts occurred abroad.

Apart from major limits in access to these types of proceedings for most local people affected by land acquisitions, the extent to which similar legal principles would apply in some of the home countries involved in the recent wave of land acquisitions (East Asian and Gulf countries in particular) remains to be seen.

In those government-backed investments where land is acquired by a foreign state agency (central ministries, SWF, SOE), a particularly important issue is the extent to which that agency enjoys sovereign immunity from legal proceedings in the host state. Sovereign immunity does not remove liability. The state agency may still be held responsible, for instance through international law channels or where it waives its immunity. But it would make it more difficult for local people to seek redress against the investor.

The 2004 UN Convention on Jurisdictional Immunities of States and their Property regulates these matters but is not yet in force. As a result, rules vary across states depending on national legislation. Despite this diversity, a key principle emerging under customary international law and in most jurisdictions is the distinction between acts in the exercise of state sovereignty and commercial transactions, with immunity only covering the former. In other words, an entity controlled by a foreign state is still likely to be subject to challenges before courts in the host country (see Clifford Chance, 2008). Arguably, land acquisitions by SWFs or SOEs should be seen as commercial ventures and hence subject to host state jurisdiction, even where home country public policy (for instance, with regard to food security) played a role in investment decisions.

The borderline is less clear where the investor government signs the deal directly, as in the Syria-Sudan agreement. Although these deals should still be seen as falling outside acts in the exercise of state sovereignty, the investor government may well try to claim immunity. The draft Mali-UEMOA Convention explicitly states that UEMOA benefit from the privileges and immunities granted by the 1996 Additional Protocol on the Rights, Privileges and Immunities of the UEMOA (article 8 of the draft contract).