Partners for Euro-African Green Energy

pangea

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Land Grab Refocus

Roots and possible demise of land grabbing

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Executive Summary

PANGEA considers land tenure systems in Sub-Saharan Africa to be one of the greatest challenges underpinning the land grabbing debate. PANGEA prepared this analysis for its members in order to inform them of the enormous and often overlooked role land tenure systems play in the contentious issue of land grabbing, which is currently prevalent in developing countries and more specifically in Sub-Saharan Africa. It therefore seeks to illustrate how biofuels themselves are not at the root of the land grabbing quandary and simultaneously aims to identify steps investors, governments and civil society must take to improve the quality of land deals in these Sub-Saharan countries.

By analysing the tenure systems of three countries in distinct political regions in Sub-Saharan Africa: Ethiopia, Mali and Sierra Leone, PANGEA identified the following weaknesses that facilitate instances of land grabbing in these countries:

1. Lack of secure land rights
2. Lack of functional and consistent institutional framework
3. Lack of transparency between the various stakeholders in land deals
4. Lack of consistent community consultation
5. Lack of environmental and social impact assessments

PANGEA analysed these weaknesses and recommends that the following steps be taken by the various stakeholders (the government, then investors and the community or civil society) in order to avoid the occurrence of land deals that may be classified as land grab:

Recommendations for Host Governments:

1. Strengthen the country's tenure system by: carrying out comprehensive land use planning; strengthening land rights via land certification and registration; improving monitoring and enforcement of laws and investment requirements; ensuring transparency and public scrutiny of deals.
2. Ensure accountability to the people they represent

Recommendations for Investors:

1. Understand local tenure system, including its weaknesses;
2. Conduct inclusive and extensive social and environmental assessments and follow its recommendations;
3. Sign up to recognised certification schemes to make sure product was produced sustainably and contributed to the development of local community;
4. If the costs of sustainable and fair production are not economically viable, then perhaps the project should not be carried out.

Recommendations for Host Communities and Civil Society

1. Work with local groups to help inform, educate and support their claims to land and to make sure they have representation;
2. Create incentives for skill transfer – legal, representative – so locals can advocate on behalf of vulnerable communities;
3. It is necessary that local communities embrace their voice and capacity to influence land deals.

1. Background

1.1 What Is Land Grabbing?

Population growth and market development have given rise to ever-growing competition for land resources, particularly for land situated in desirable areas—such as land close to cities or in rural areas—and for productive fertile land.[1] Global food security concerns and growing demand for liquid biofuels have brought the issue of transnational land acquisition[1] to the public eye.[2]

Experts have described transnational land transactions as a "new neo-colonial push" to secure key natural resources, which are not easily accessible in their own countries.[3] This practice has been particularly prevalent in developing countries where foreign direct investment (FDI) is considered to be a means of economic development.[4] Consequently, many developing countries have sought to encourage FDI through the provision of financial incentives such as tax and duty exemptions, freedom of international capital flows and support services.[5]

More recently, European energy policy has been heavily criticised for its mandate encouraging biofuels as a substitute for fossil fuels. In 2009, all 27 EU Member States signed up to the Renewable Energy Directive (RED), which requires them to source 20% of their total energy from renewable sources by the year 2020. More specifically, the transportation sector must source 10% of their transport energy from renewable sources by 2020.[6] PANGEA believes that biofuels are likely to make up a large portion of the renewable energy utilised in order to reach these targets, as biofuels can have improved carbon footprints against fossil fuels.[7] In the case of Europe, there is insufficient arable land and a lack of accessible resources to grow biofuels in the necessary quantities to reach the renewable energy targets as set out by European environmental policy, resulting in the obligation to source biofuels outside of the European Union. As most of the Sub-Saharan climate is suited for growing biofuel crops and only 14% of Africa's 184 million hectares of arable land is under cultivation,[8] European producers have turned their attention to the potential of biofuel production in Sub-Saharan Africa, in most cases acquiring land to produce crops for biofuel production. Due to this increase in commercial interest in Sub-Saharan land by European biofuel companies, many now believe that biofuel production is one of the root causes of land grabbing in developing countries, even though statistics indicate that as much as three quarters of the land acquired is for crops other than for biofuels.[9,10]

Consequently, investors acquiring territory in countries with an apparent abundance of fertile and unused land are perceived to be buying soil fertility, water and sun with the view to shipping food and fuel back home, to the detriment of the inhabitants of the poorer, developing country[11]. This practice has led activists and some Non Governmental Organisations (NGOs) to adopt the term land grabbing to express concerns about the rights of vulnerable locals who rely on land for their livelihoods and are affected by land deals in developing countries.

Nevertheless, according to the International Land Coalition (ILC), a coalition of 83 organisations in 40 countries working together to promote secure and equitable access to land,[12] the term land grabbing refers to land acquired through illegal or illegitimate means.[13]

In May 2011 in Tirana, Albania, this definition was expanded upon and formalised when more than 150 representatives of civil society organisations, social movements, grassroots organisations, international agencies, governments and strategic partners of the ILC came together and signed a declaration containing the definition of land grabbing[14]:

> "Acquisitions or concessions that are one or more of the following: (i) in violation of human rights, particularly the equal rights of women; (ii) not based on free, prior and informed consent of the affected land-users; (iii) not based on a thorough assessment, or are in disregard of social, economic and environmental impacts, including the way they are gendered; (iv) not based on transparent contracts that specify clear and binding commitments about activities, employment and benefits sharing, and; (v) not based on effective democratic planning, independent oversight and meaningful participation". [15]

Still, due to the increased interest and media visibility of transnational land acquisition deals in developing countries, primarily for the purposes of food and biofuel production, land grabbing has become a widely used "catch-all" phrase to describe and analyse large-scale land transactions.[16]

[1] Particularly in Africa where once land was believed by many to be in abundance, however population growth and market development has increased competitions for resources within the continent.

Jarch Management Ltd

Philippe Heilberg, the CEO of New York based investment firm Jarch Capital, is reported to have entered a deal with Gabriel Matip, (the son of General Paulino Matip who is South Sudan's deputy commander in chief). The deal involved the leasing of a substantial parcel of land (400,000 hectares obtained by General Paulino Matip and the Sudan People's Land Army from the government) to Jarch Management Ltd, a Jarch Capital affiliate[26]. It enabled Jarch Management Ltd. to purchase a 70% interest in "LEAC for Agriculture and Investment Co Ltd", an agricultural company belonging to Gabriel Matip[27]. The terms of the deal stipulated that the land was only to be used for agricultural purposes. This land transaction was not carried out through normal legal means, but instead was most certainly the result of the General's exceptional bargaining position given his important position in the SPLA[28]. Heilberg reportedly said that he preferred to enter deals with General Paulino Matip as opposed to other officials in the government of South Sudan due to the fact the General wants a united Southern Sudan and to see all the people of Southern Sudan prosper. Heilberg felt that in order for his project to work, he needed stability in South Sudan and leaders with long term vision not looking for short term gains. Interestingly he failed to mention that the rebels led by Matip are suspected of committing war crimes[29]. This project constitutes a land grab under every aspect of the Tirana declaration definition.

1.2 How is a Deal Classified as Land Grabbing?

Whether or not a transaction can be classified as land-grab depends upon the context. In most instances, land allocations do not violate domestic laws as the majority of large-scale land leases involve state-owned land, which may be leased to tenants.[17] Still, the terms of the lease, how access to land was obtained and the local reactions to the land acquisition need to be considered[18] as investments can either create new opportunities, improving the livelihoods of the locals; or they can further marginalise the poor.[19] Research shows that if the lease has been properly structured and access to the land has been obtained in a responsible fashion, then genuine agricultural investments can provide benefits for the locals, bringing them increased capital, technical knowledge, jobs, improved market access and development of infrastructure.[20] On the other hand, if the community has not been consulted properly and people lose resources that have supported their livelihoods for generations without adequate compensation, then this could be considered a land grab.

Research shows that the scale of "land grabbing" is unclear, as quantitative assessments are not yet readily available.[21,22] Vidal (2009) estimates that the total land area already transacted by wealthy countries to alleviate food security concerns is more than twenty million hectares.[23] Another study conducted in 2009 by the Food and Agriculture Organisation of the United Nations (FAO), the International Fund for Agricultural Development (IFAD) and the International Institute for Environment and Development (IIED) concluded that between 2004 and early 2009 approximately 2 million hectares of land had been the subject of approved land acquisitions of 1000 hectares or more in just four African countries–namely Ethiopia, Ghana, Madagascar and Mali.[24] A recent report by Oxfam (2011) indicated that up to 227 million hectares of land has been sold or leased since 2001, the majority of which has been to international investors.[25]

Therefore, given the diversity of contexts where land grabbing may have occurred, it is possible to understand how the concept may be used indiscriminately to describe all sorts of transnational land deals. Moreover, the lack of reliable data makes it difficult to accurately estimate the extent of such practices. Very often, politically motivated IGOs sensationalise deals that are in the early stages, deals which might in fall through further down the line, but the IGOs can fail to follow up to determine if the deal has gone through to completion resulting in more deals being reported than actually come to fruition.

Daewoo Logistics Corporation

In 2008, the South Korean company Daewoo Logistics attempted to lease 1.3 million hectares of land in Madagascar for the production of maize and palm oil[30]. The South Korean government were believed to be participating in the project in order to secure a stable supply of grain, as they are unable to produce sufficient grain locally to support the growing population[31]. Unfortunately PANGEA has found that reports on this project to be vague, so information surrounding the project must be treated with caution. Some reports implied that between US$2 million and US$6 million would be invested in the development of infrastructure in the coming decades and that therefore the project required the creation of between 45,000-70,000 jobs[32]. The deal between Daewoo Logistics and the Malagasy president became public knowledge at the same time the locals learnt of the president's purchase of a jet plane, which inevitably led to a public outcry. Importantly, the locals had not been consulted or informed about the deal that was unfolding[33]. Ultimately, all the controversy surrounding the project led to its cancellation[34]. There were violent protests held by the local communities resulting in loss of life, forcing the Malagasy Government to put a stop to the plans, although it has been suggested that there still some smaller Daewoo projects existing in Madagascar to appease Daewoo Logistics35. In cases such as these, PANGEA suggests that the local communities are able to make it difficult for companies investing in large-scale land acquisitions if they are unhappy with the deal and have not been properly consulted.

1.3 Land Tenure and Land Acquisition Transactions in Africa

PANGEA considers the land tenure system in Sub-Saharan Africa, to be one of the greatest challenges underpinning the land grabbing debate. Foreign investors acquire land for a number of reasons, with what seems to be in some cases relative ease. The consequences of these land acquisitions can be unsavoury for the local farmers, who often have little means of defending their access to the land crucial for their livelihood. Land tenure is responsible for determining who has access to land and who can control the land, thus a functional, fair and transparent land tenure system needs to be in place to ensure that each individual's right to land is entirely transparent.

1.3.1 What is Land Tenure?

According to the FAO, land tenure is:

"—the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. (For convenience, "land" is used here to include other natural resources such as water and trees.) Land tenure is an institution, i.e., rules invented by societies to regulate behaviour. Rules of tenure define how property rights to land are to be allocated within societies. They define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints. In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions."[36]

In Africa, the history and social dynamics of a region can have a strong influence over the type of tenure system it has. There can be an overlap in rules and of those who have authority, thus there is an overlap between multiple individuals with their own different powers over land allocation or dispute resolution. On occasion, the rules can be contradictory without one prevailing over the other[37] which can lead to complications when deciding the true status of a parcel of land. Ministries of land and agriculture consider themselves to have full jurisdiction over land allocation and dispute resolution, whilst village chiefs consider themselves to have this jurisdiction within their village.[38] These difficulties can be compounded by the fact that the local communities themselves are unaware of the existing legal system.[39]

In simple terms, land tenure systems determine who can use what resources for how long, and under what conditions."[36]

The UN's Special Rapporteur on the Right to Food, Olivier De Schutter, indicated that a large portion of land in Africa is formally owned by the government, and in many cases, locals cultivate land without property title, i.e. they have no ownership rights.[48]

1.3.2 Land Tenure and Land Rights

Land tenure regimes can be either "secure" or "insecure". A land tenure regime is secure when land users can be confident that they won't be arbitrarily deprived of the rights they enjoy over a parcel of land or the benefits they derive from it[40]. Land security can be derived from social or legal recognition of rights, with enforcement mechanisms in the form of sanctions[41]. It is important not to confuse formal land tenure with secure land tenure, as the two do not necessarily go hand in hand1. The World Bank has conceded that security can be provided within customary tenure systems.[42] If land rights are not secure, then land users are at risk of dispossession.

In Sub-Saharan Africa, often the local tenure situation is very complex, particularly where customary practices are the norm as opposed to legal tenure (e.g. in Ghana and Cameroon)[43]. In other countries, land is nationalised or controlled by the State as is the case in Guinea Bissau and Mali[44]. The World Bank has indicated that across Africa, 2%-10% of land is held under formal land tenure, and furthermore, the majority of which is land in urban areas[45]. Further figures estimate that in Cameroon, for example, only about 3% of land has been formally registered, and the majority of this land registration has been undertaken by the urban elites of the country.[46]

1 Formal land tenure rights are registered land rights

In Africa, even in countries where private land rights are formally recognised, such as in Tanzania, the majority of the land is under state control.[47] The UN's Special Rapporteur on the Right to Food, Olivier De Schutter, indicated that a large portion of land in Africa is formally owned by the government, and in many cases, locals cultivate land without property title, i.e. they have no ownership rights.[48] Without ownership rights or rental agreements, the locals do not have access to legal services if they are evicted from the land following the conclusion of an agreement between the government and foreign investors over the transfer of the land.[49]

Most of the productive land that investors target is land likely to be used by farmers, or by herders, hunters and foragers[50]. Such individuals, groups, or communities claim the land is their own through tenure systems, which are founded on tradition[51]. PANGEA understands that for these individuals, to lose the land would be devastating as their livelihood and their food security depends on access to the land. For this reason, it is extremely important that secure land rights are in place to protect local farmers and land users from eviction. This might be achieved through the inclusion of legally protected rights to avoid people being indiscriminately forced out of their lands and fair compensation schemes for those who are dispossessed.

In the last two decades, many Sub-Saharan African countries have attempted to strengthen the protection of local land rights through undertaking land reform in some guise or another.[52] This is of particular importance for regions relying on customary rights. Customary land rights are now protected in Mali (Land Code 2000), Mozambique (Land Act 1997), Tanzania (Land Act 1999) and Uganda (Land Act 1998). [53] Still, as PANGEA will demonstrate in the following case studies, enactment of laws alone does not guarantee fair land deals. Proper use, monitoring, enforcement of legal frameworks as well as sanctions must be in place.

Furthermore, it is necessary to understand that most Sub-Saharan countries have just recently overcome situations of conflict and are now facing the challenge of implementing or reforming institutions in the post-colonial era. Nevertheless, if the country itself has not yet established a framework for land deals, it is the responsibility of investors and civil society to work alongside their governments to agree on terms that are satisfactory for all interested parties, as shown in section 4.

2. Land Tenure in Africa – Three Cases

This analysis aims to identify steps the three stakeholder groups involved inland acquisition in Africa can take to improve land deals: the investor, the host government and the host community along with civil society. As stated in the background section, tenure systems in Africa can be different from the legal tenure systems normally found in Western countries. Land ownership and use rights are often based on customary law, which is passed on by generations and in most cases is not found in written form. In addition, these customary laws are not consistent, even within countries.

In order to identify common themes present in the various tenure systems in Africa, PANGEA conducted a high-level analysis of three distinct countries from two different political regions in Africa: East Africa : Ethiopia, and West Africa: Mali and Sierra Leone. PANGEA selected these three countries as they are at different stages of tenure system establishment and implementation. Table 1 provides general information about the countries in this analysis.

According to the FAO[54], 'rules of tenure (...) define how access is granted to rights to use, control, and transfer land, as well as associated responsibilities and restraints.' Based on this definition, PANGEA gathered information on the three countries and analysed them according to the following criteria:

- **The country's land legal framework,**
- **The country's recognise d land rights and certification/registration efforts**
- **Investment information including:**
  - **How the country carries out land use planning – to define which land may be available for foreign investment**
  - **The requirements for land selection and availability for investors, to illustrate transparency of deals**
  - **Requirements of Environmental Impact Assessment (EIA) and community consultation**
  - **Enforcement of regulation and monitoring of deals**

This information is meant for PANGEA to identify the main characteristics of these countries' land tenure systems and to identify the main weaknesses experienced by them. Based on these weaknesses, PANGEA highlights steps that investors, host governments and host communities must take to ensure proper land transactions and to ensure a successful investment that does not negatively impact vulnerable groups.

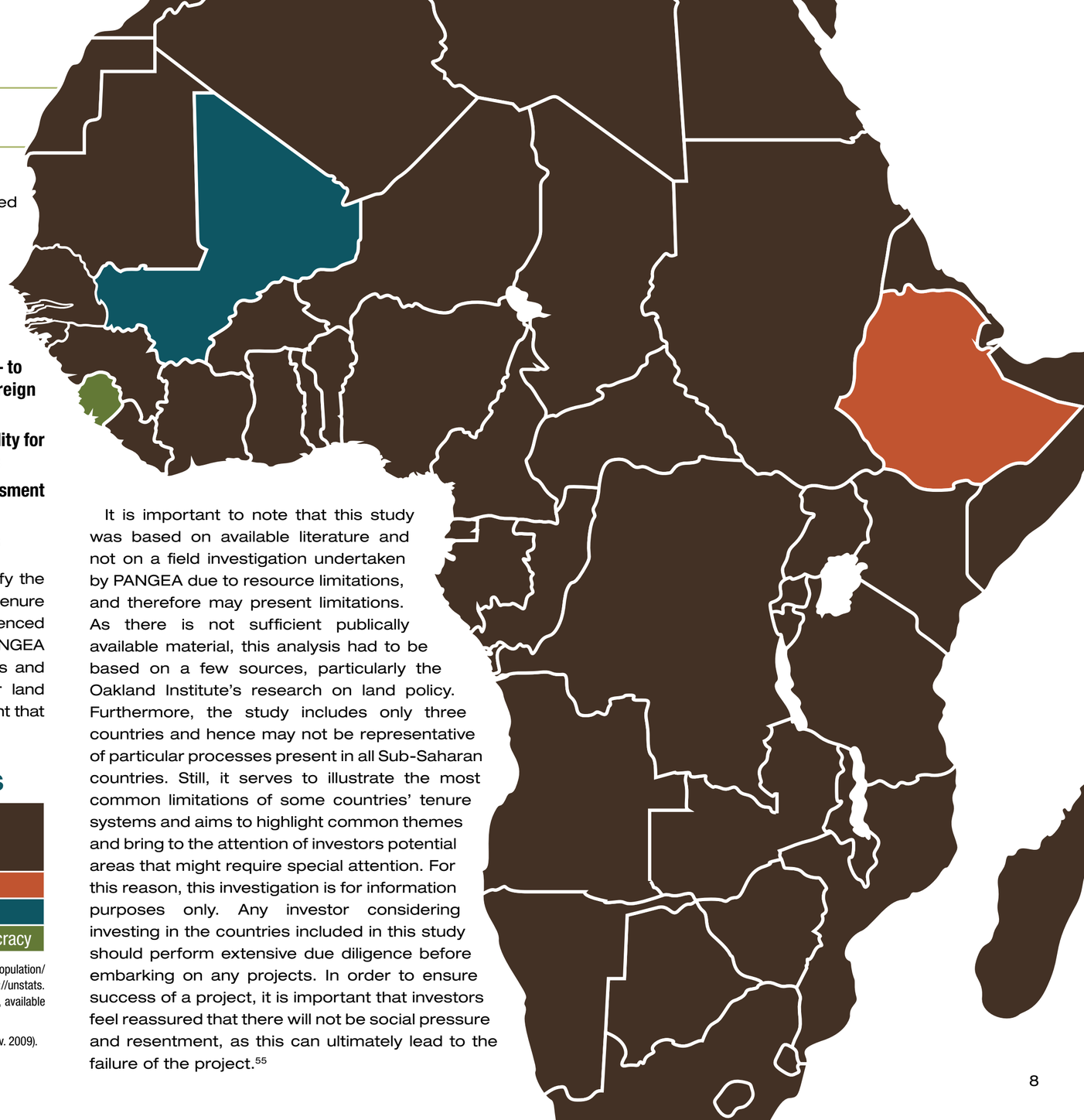
Table 1 – Country Profiles

Country	Population[a]	Percentage living in rural areas[b]	Agriculture as a percentage of GDP[c]	Percentage of labour force dependent on agriculture[d]	Political system[e]
Ethiopia	84,734	83	50	85	Federal Republic
Mali	15,840	64	39	80	Republic
Sierra Leone	5,997	62	51	NA	Constitutional Democracy

a) Population United Nations, Department of Economic and Social Affairs, Population Division (2011), World Population Prospects: The 2010 Revision. available in http://www.un.org/esa/population/unpop.htm ; supplemented by official national statistics published in the United Nations Demographic Yearbook 2008, available from the United Nations Statistics Division website, http://unstats.un.org/unsd/demographic/products/dyb/default.htm (accessed June 2011); and data compiled by the Secretariat of the Pacific Community (SPC) Statistics and Demography Programme, available from the SPC website, http://www.spc.int/sdp/ (accessed June 2011).

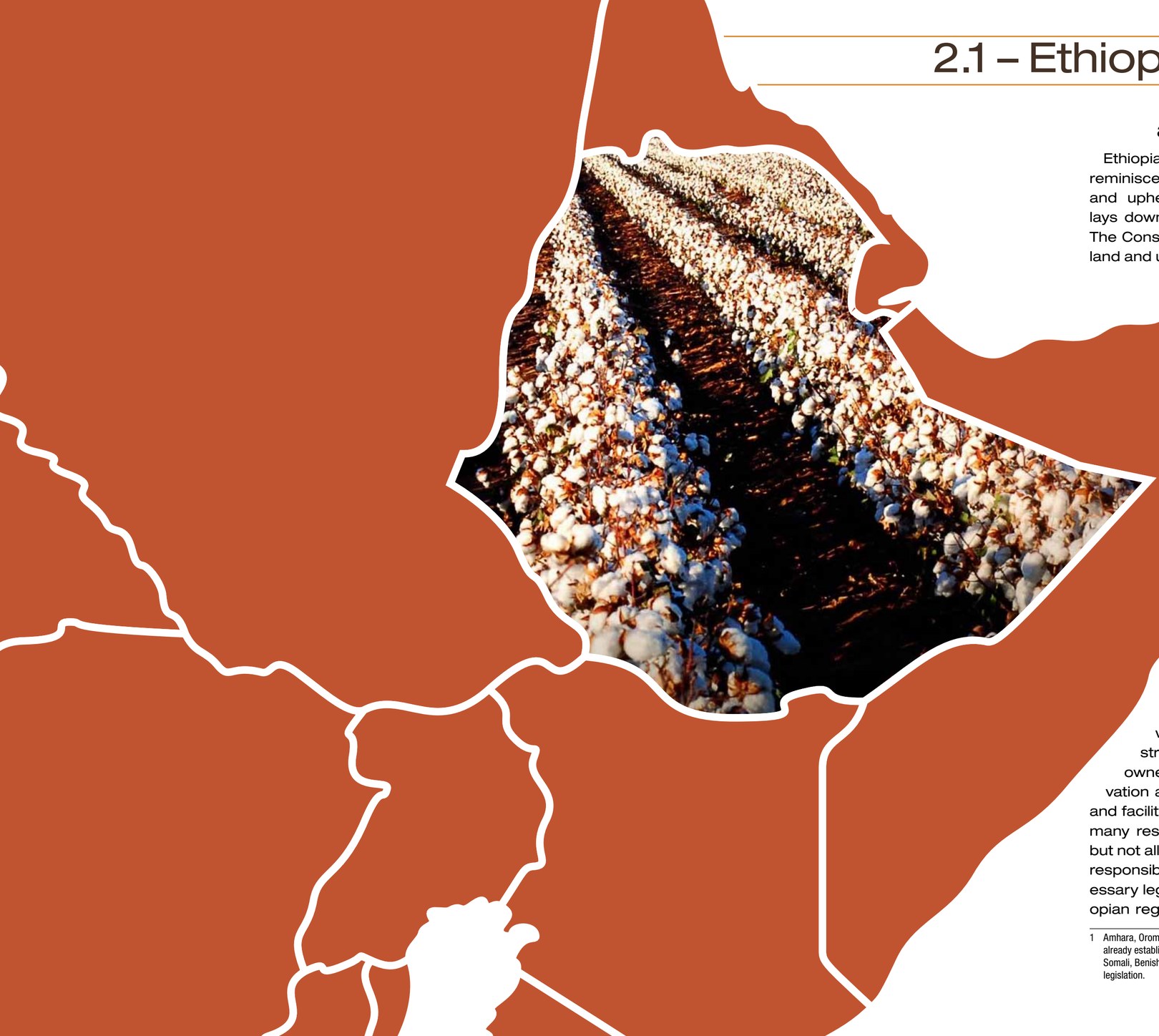
b) United Nations, Department of Economic and Social Affairs, Population Division (2008), World Urbanization Prospects: The 2009 Revision. CD-ROM Edition – Data in digital form (POP/DB/WUP/Rev. 2009).

c,d,e,) Central Intelligence Agency (n.d.) – The World Factbook. Available in https://www.cia.gov/library/publications/the-world-factbook/index.html



It is important to note that this study was based on available literature and not on a field investigation undertaken by PANGEA due to resource limitations, and therefore may present limitations. As there is not sufficient publically available material, this analysis had to be based on a few sources, particularly the Oakland Institute's research on land policy. Furthermore, the study includes only three countries and hence may not be representative of particular processes present in all Sub-Saharan countries. Still, it serves to illustrate the most common limitations of some countries' tenure systems and aims to highlight common themes and bring to the attention of investors potential areas that might require special attention. For this reason, this investigation is for information purposes only. Any investor considering investing in the countries included in this study should perform extensive due diligence before embarking on any projects. In order to ensure success of a project, it is important that investors feel reassured that there will not be social pressure and resentment, as this can ultimately lead to the failure of the project.[55]

2.1 – Ethiopia – East Africa (Horn of Africa)



a. Institutional framework:

Ethiopia's current land tenure system is reminiscent from the Derg regime (1975-1991) and upheld by the 1995 Constitution, which lays down the legal framework for land rights. The Constitution recognises state ownership of land and universal access for cultivation to peasants in the form of usufruct rights. This arrangement does not recognise any form of private or communal ownership of land and precludes any sale or other means of exchange[56]. Therefore, all federal and regional subsidiary laws, including land administration laws must follow the Constitutional provisions of land ownership.

In 1997, the states started implementing the landholding rights provided in the Constitution. In 2005, the Federal Rural Land Administration and Land Use Proclamation No. 456/2005 was enacted; the aim of which was to strengthen tenure security and private ownership, improve sustainability, conservation and development of natural resources and facilitate land administration.[57] It designates many responsibilities to regional governments, but not all states have yet enjoyed their devolved responsibility and have yet to implement the necessary legislation. Only four out of the nine Ethiopian regional states[1] have so far implemented laws to regulate certification of use rights and conditions for leasing qualifying lands.[58]

b. Land Rights

In Ethiopia, the State owns all the land, with landholders enjoying only usufruct rights. Usufruct rights exclude the right to sell or mortgage land, but allow for it to be transferred through inheritance, gifting, divorce or rent[59]. Additionally, investors can lease land from the government for commercial farming[60]. Article 40 of the Federal constitution "provide[s] that peasants and pastoralists have the right to acquire use rights over rural land free of charge and without time limit including the protection against eviction from their land except for public purposes subject to the payment of advance compensation commensurate to the value of the property. Apart from this, any private individual or entity may have the right to acquire land on the basis of payment and for a fixed period of time to be determined by regional laws."[61]

The government has the right to remove landholders from their land, upon payment of compensation, if the land is needed for public purposes[2] or if investors, cooperative societies and other public or private entities can increase the land's productivity. In addition, the use of the land largely depends upon the holder being in residence in a woreda or kebele (locality or subdistrict), as well as personal commitment to the management of the land, amongst other conditions, and non-compliance is subject to penalties as severe as the loss of their right to the land. For resulting in land idle for three or more consecutive years could lose their right of use. Tamrat et al (2010) point to the vagueness of definition of public good potentially allowing authorities leeway on the designation of projects in the public interest, but more importantly, there

1 Amhara, Oromia, Tigray and Southern Nations, Nationalities and People (SNNP) have already established legal framework to implement the Constitution's mandate. Afar, Somali, Benishangul-Gumuz, Gambella and Harari are yet to define implementation legislation.

2 "Article 2(5) defines the term "public purpose" as "the use of land defined as such by the decision of the appropriate body in conformity with an urban structure plan or development plan in order to ensure the interest of the people to acquire direct or indirect benefits from the use of the land and to consolidate sustainable social economic development." Tamrat et al (2010)

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is no provision to give prior notice of the existence of the public purpose or that landholders have the right to challenge it.[62]

According to the Oakland Institute, land certification is mainly a regional effort and is under way in the regions of Oromia, Amhara, Tigray, and SNNPR and Benishangul – Gumuz region should start land registrations in 2011. All other four regions continue to rely on traditional forms of tenure.[63]

c. Investments

Land use planning[3] efforts are part of the land administration framework divested onto to the regional states. In the instances where the Constitutional framework has been properly implemented land planning efforts are under way, however in the regions where the framework implementation has not taken place, land use is determined on an ad-hoc basis.[64] Still, as attested by an Official in Amhara state and reported by Tamrat et al (2010), the lack of comprehensive land use planning means 'land is allocated not based on the suitability of land for a specific investment purpose but simply on grounds that the land is not currently utilised.'[65]

According to research by the Oakland Institute, land deemed suitable for investment is selected at federal level based on soil and water suitability, and lack of human settlement. The assessment of lands is done at a regional level, and if the land is found to be suitable, it is placed in a federal land bank and made available for investors. Land deals above 5,000 hectares for foreign investment are negotiated at the federal level, whilst smaller deals are negotiated at the regional level. Although the research did not go into detail regarding acquisition at the federal level, the findings point to a lack of communication between the different departments involved in deals under regional jurisdiction. Furthermore, the researchers noted lack of integration between key agencies such as the ones responsible for handling Environmental Impact Assessments, ensuring Food Security and the ones that in fact process the lease deals.

Environmental Impact Assessments (EIA) and community consultation are required throughout the land acquisition process, however according to Oakland Institute researchers, EIA requirements are rarely carried out or enforced. Community consultations can be either part of the EIA; the socio-economic impact assessment, but there was evidence of such studies only for large parcels of land transferred to the federal land bank; or the village officials could include them on leases they grant, still there was no evidence they were carrying out such consultations. Finally, monitoring and reporting of project progress is required, but seldom carried out or enforced.[66] Tamrat et al (2010) found similar evidence: "[i]nterviews with experts at both the Federal and Regional levels has also confirmed that EIA and social impact assessment are not a routine requirement for large-scale agricultural investments."[67]

Evidence points to lack of involvement and coordination between respective agencies to enforce the mandate of impact assessments.[68]

3 'Land use planning is the process of identifying the most appropriate land uses spatially. It ensures that various types of land uses are accommodated throughout the landscape, whilst at the same time taking into account the needs and requirements of interested stakeholders.

2.2 Mali –West Africa

a. Institutional framework

Mali's legal system is based on codes inherited from colonial France as well as laws based on post-colonial reforms.[69] Due to this combination of modern and colonial laws, land and natural resources are regulated by several different pieces of legislation. Those laws influenced by the French colonial laws confer ownership of land to the state, while others which have already been reformed, place greater emphasis on decentralization and private property. In addition, there are still some customary laws dating to pre-colonial times, with traditional leaders responsible for allocating usufruct rights in a communal approach to land and resource exploration.[70]

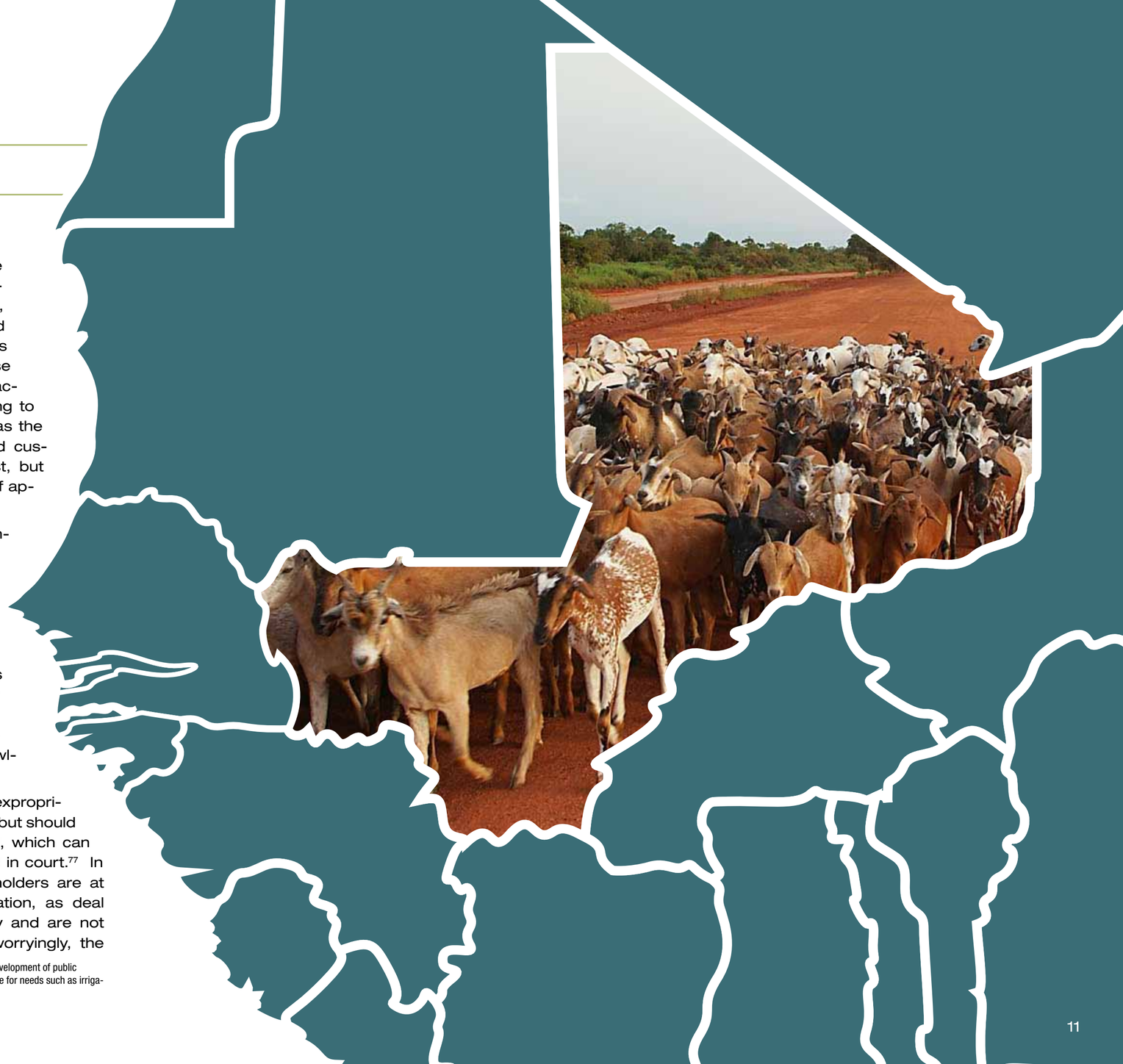
As a result of uncertainty surrounding the legal system and the high costs of registration, the majority of land in Mali is still not properly registered, with many land transactions happening on the informal market. These informal deals are in many instances certified by officials or have customary approval, but they are not valid substitutes to transactions involving registered land.[71]

b. Land Rights

The Constitution of the Republic of Mali provides citizens with the right to own and transfer property; however "access to land natural resources is governed by several different pieces of legislation."[72] The 2000 Land Code recognises several types of ownership, including: state land, land owned by individuals and entities, land use-rights, and customary land held by groups and individual group members. Reports indicate that customary law still governs land rights in much of Mali, particularly in the rural areas.[73] The myriad and inconsistency of laws governing land tenure leaves involved parties at risk: smallholders are at risk of expropriation, women are vulnerable as they hold no right to land, and large investors without proper assurance of lease terms could find themselves losing access to the land.[74] Finally, according to the Land Code, the government has the right to expropriate registered and customary lands in the public interest, but this is conditional to the provision of appropriate compensation.[75]

The informal market involves unregistered parcels of land and consequently rights are not properly recognised. Some parties with interest in the land may not be included in the negotiations leading up to the transaction or the transaction itself, for instance rights holders (i.e. family members) or people who depend on the access to the land for their livelihoods (normally women), may not have knowledge or influence in transactions.[76]

In general, the government can expropriate lands if it's in the public interest[1] but should provide compensation for the land, which can be agreed by the parties or settled in court.[77] In the Office du Niger region, smallholders are at particular risk from land expropriation, as deal negotiations have no transparency and are not subject to public scrutiny. More worryingly, the



1 Under the Land Code of 2000, "Public interest" includes the development of public works, preservation of forests, and the creation of infrastructure for needs such as irrigation and drainage.

2.2 Mali –West Africa

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government seems to discount the rights of local peoples, characterising them as squatters if the land they are occupying is under consideration for land deals.[78]

c. Investments

The government of Mali has initiated the process to map and define land use to inform the public of development plans. Law No. 95-034 AN-RM of 12 April 1995 gave local governments the tasks of land-use planning and development, but the process has not yet been completed due to lack of data and resources. Therefore the customary approach to defining land use is still widely used.[79]

According to research by the Oakland Institute, most land for agriculture development is located in the Office du Niger region. This area's semi-autonomous administrative office is responsible for selecting, acquiring and conceding leases. Land selection follows the office's mission to develop the area. If it results in the displacement of people, the state has a responsibility to compensate them, however all too often, the people's right to the land does not seem to be properly recognised (see section b above).[80]

There is little transparency in land deals in Mali. Based on research by the Oakland Institute including many land lease deals in Mali, details of leases are hard to obtain and therefore it was not possible to confirm if Environment Impact Assessments (EIA) were properly conducted or if community consultation was carried out. The research pointed, however, to many adverse impacts on the local community and resources as a result of these projects.

2.3 Sierra Leone -West Africa

a. Legal framework

The Constitution of Sierra Leone grants the right of enjoyment of property but it does not specify ownership of the land.[81] The formal laws governing land in Sierra Leone predate the 11-year civil war, which ended in 2001. They recognise private freehold land in areas such as Freetown and in the Western Areas, meaning these lands can be bought and sold.[82] The Provinces Land Act of 1961 governs the remaining lands in the Southern, Eastern and Northern Provinces under customary law with local Paramount Chiefs as custodians. Customary laws vary over time and by chiefdom,[83] imposing numerous, unclear, and frequently changing requirements on parties interested in acquiring land, especially if foreign.[84] Lands in the Provinces cannot be bought or sold and, according to the 1927 Protectorate Act, leases of these lands to foreigners cannot exceed 50 years, but may be extended for a further 21 years.[85]

The 2004 Local Government Act provides local councils with the right to acquire and hold land. They have the responsibility for the creation and improvement of human settlements and are responsible for creating development plans.[86] More recently, efforts to streamline and reform the land's legal framework have been put forward. Included in the draft legislations is the promotion of the use of land for commercial purposes as well as extending lease terms, introducing lease contracts that can be mortgaged and payments to tenants for improvements of the land.[87]

b. Land Rights

Land in Sierra Leone may be private, state owned or communal. Private freehold is more common in the Western area with the remaining land held as communal land with the chiefs as custodians. Communal land is held by extended families with use, access and rent rights. Sales of these lands are normally limited within families and communities, in most cases not recorded. In some instances, chieftaincy land cannot be sold and must be held within the community for its own use.[88]

According to the Constitution, the state can expropriate land in the instances when the land is "necessary in the interests of defense, public safety, public order, public morality, public health, town and country planning," and for "promotion of public benefit or public welfare." But if they do so, the Constitution provides that there should be "prompt payment of adequate compensation" to those who have lost access to land.[89] If land was taken because the owner failed to carry out required improvements to the land or if such improvements were not satisfactory, Constitutional protections do not apply.[90]

2.3 Sierra Leone -West Africa

>>> continued

c. Investments

The Oakland Institute's Sierra Leone Country Report considers land use data to be 'scarce, if not non-existent.' The report highlights the fact that many claims of land availability were based on dated figures (mostly from the mid to late 1970s). Therefore much of the land available for allocation or already allocated may not be accurate and may not reflect current availability given population growth and nutritional needs. The report also pointed to the lack of understanding by government officials and investors of the native smallholder system of cultivation,[1] which increases the chances of the assumption of 'unused' land to be inaccurate.[91]

There is a regulatory framework to guide large investments in land for agriculture in place, however the Oakland institute's investigation concluded the legislation is "weak and unclear". Much of the requirements are non-binding in many instances, including the provision on the preparation of an Environmental Impact Assessment. Additionally, government officials are at times unclear of the process's relevant requirements. Moreover, many investors are able to bypass government requirements if deals are negotiated directly with local leaders. The research also found it difficult to get hold of information regarding community consultations, as much of the information on deals are not disclosed both during and after negotiations.

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1 Sierra Leone's smallholder cultivation system is based on 'bush fallow system', where land is cultivated until fallow and then left to rest for about 10-15 years. This system is also known as shifting cultivation.

2.4 Identified Weaknesses

The three case studies show that despite their differences in domestic legal systems regarding land tenure, there are recurrent themes, which PANGEA considers to be weaknesses in the tenure system as a whole. These are highlighted in this section. It is important to note that this list may not be exhaustive and each country's system may present weaknesses that are not highlighted here.

2.4.1 Lack of Secure Land Rights

Even though the countries analysed do recognise land rights, the implementation, protection and enforcement of those rights is not always in place. It is important to notice that an analysis of which system may be more applicable is out of the scope of this work. Whatever the system the authorities agree on to define and secure rights, could work as long as it recognises stakeholders' relationship with the land, and that it is properly implemented and enforced.

The key issue identified in this analysis is that systems in place are not consistent. At times, they may place bargaining power in the hands of a few powerful individuals, and is open to manipulation. In Ethiopia, the lack of establishment of rights in the Constitution in some areas of land law creates a system of uncertainty. In Mali, unregistered land is openly transacted in the informal market, but as in many instances these lands are not registered with the proper authorities, landholders are at risk of losing access to land. In all three countries, the definition of what is "for the public good" and thus what can justify expropriation may adversely impact vulnerable groups, especially if too much importance is given to development strategies involving foreign investment.

Land certification and registration are paramount to the improvement of security of rights. They differentiate between traditional systems and the formal laws with regards to the way they recognise and officiate rights. The traditional systems leave individuals and groups at risk, as land may be expropriated for lack of record, even though landholders may have cultivated the land for years. For instance, the Oakland Institute's research in Sierra Leone found instances where the government refused to compensate landholders, as their rights were not recognised as official. Proper registration and certification will help close loopholes where systems overlap or are incomplete, helping landholders to ensure their rights.

2.4.2 Lack of a functional and consistent institutional framework

Even though the countries analysed do recognise land rights, the implementation, protection and enforcement of those rights is not always in place. It is important to notice that an analysis of which system may be more applicable is out of the scope of this work. Whatever the system the authorities agree on to define and secure rights, could work as long as it recognises stakeholders' relationship with the land, and that it is properly implemented and enforced.

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2.4.3 Lack of Transparency

Particularly in the cases of Mali and Sierra Leone, evidence shows that there was a consistent lack of transparency in land deals. In the Research by the Oakland Institute, the difficulty in obtaining documentation regarding deals was evident. Lack of access to documentation and terms of deals renders public scrutiny impossible. Without a clear process of auditing and accountability conditional requirements are worthless.

2.4.4 Lack of consistent community consultation

The case studies illustrate that there is a distinct lack of community consultation requirements. Although some of the countries require community consultation, there is in many instances no evidence that those have been carried out. It is not clear if the statute, when in place, offers guidelines to help investors carry out the consultations, especially as social structures can be particular to each place.

In Ethiopia, the constitution of the Federal Democratic Republic of Ethiopia 1997 Environmental Policy stipulates that there should be a public consultation process when land is transacted. However, the Oakland Institute study on Ethiopia indicated that in the cases they investigated there was no evidence of community consultation. Thus even when there are policies requiring public consultations prior to approval, there are still instances where they have not been performed.

2.4.5 Lack of Environmental Impact Assessments (EIA) and/or Environmental and Social Impact Assessments (ESIA)

Even though EIAs and EISAs are statutorily required, research shows the requirement is not consistently enforced. In Ethiopia, the Constitution requires that a full environmental and social impact assessment be conducted on large land projects, however requirements for smaller projects are at the discretion of local governments. In the states where the Constitutional mandates have not yet been implemented, there is no guarantee they will form a prerequisite for approval. The lack of transparency and public scrutiny of deals in Mali and Sierra Leone shows that even if such assessments were carried out, there is no way to verify if findings were followed.

3. Making the System Work – Responsibilities of Stakeholders

Based on the tenure systems' weaknesses identified in section 3, PANGEA recommends steps that stakeholders may take to ensure successful deals. The recommendations are aimed at the three main stakeholder groups directly involved in the deals: the host government, the investor and the host community.

3.1 The Host Government

It is responsibility of governments to ensure that tenure systems properly regulate the relationship of its citizens to the land. The analysis showed that the systems included in this study fail to properly achieve this goal. Based on the weaknesses identified in this study, PANGEA puts forward the following recommendations to authorities:

Strengthen the country's tenure system:

Current and comprehensive land use planning: in order to make sure land allocated to commercial investments does not adversely impact local's livelihoods and overall food security. Authorities should align commercial investment policy – including incentives and developmental conditions – to reflect land availability and community needs.

Strengthening land rights via land certification and registration: formalise individuals' and communities' relationship with the land to protect rights. Remove barriers to registration – such as cost and bureaucracy – so registration can be accessible. Promote education and awareness of registration benefits. Align registration process with traditional and customary laws as to avoid conflict and reduce instances of resistance.

Improve monitoring and enforcement of laws and investment requirements:

Laws present only in paper are of no use. The legal framework must be enforced fairly and equitably, projects must be monitored with progress being measured against clearly defined objectives and sanctions must be in place in case terms are not followed. In case governments lack the institutional capacity, authorities may subscribe to international certification schemes and demand that projects be certified as a condition for approval.

Transparency and public scrutiny:

Governments should be held accountable for following an institutional framework. This can only be achieved if deals are transparent and public scrutiny is allowed.

Accountability:

Governments should be accountable to the people they represent. Good governance principles should not be ignored in land tenure systems.

3.2 The Investor

Investors looking to invest in developing countries must take into account the costs of benefiting the host community into their investment plans. They have a responsibility to bring social and economic development to vulnerable areas and this should not be divorced from the projects' objectives. In order to avoid bad press that comes with being labelled a 'land grabber', the investor should embrace the commitment to the local community it is influencing and should:

Understand the local tenure system, including its weaknesses: there is no excuse for not understanding or ignoring local laws to increase its own benefit. This opens the project to local backlash, it turns international public opinion against it and it can compromise the success of the project.

Conduct inclusive and extensive social and environmental assessments and follow the recommendations of these assessments. Additionally, investors must understand that often the most vulnerable groups may not have a voice, therefore it is important to identify and account for all groups that benefit from the land and resources in question.

Sign up to recognised certification schemes to make sure the product was produced sustainably and has contributed to the development of the host community. Consumers are increasingly demanding that the products they consume are not negatively impacting communities, the environment and future generations. Guaranteeing a sustainable product is not only beneficial to the environment, locals and the future, but may also allow for premium branding.

If the costs of sustainable and fair production are not economically viable, then perhaps the project should not be carried out.

3.3 The Host Community

In most instances, the host community is the most vulnerable of the stakeholders due to its lack of voice and representation. In many cases these groups are victims of their own government or of traditional laws. It is responsibility of the Civil Society to help empower these groups. This can be achieved through the following:

Non-Governmental Organisations (NGOs), local or international, and any other support groups must continue to work with local groups to help inform, educate and support their claims to land and to make sure they have representation.

Create incentives for skill transfer – legal, representative – so locals can advocate on behalf of vulnerable communities.

It is necessary that local communities embrace their voice and capacity to influence deals. Change must also come from within.

5. Conclusion

Global food security concerns and growing demand for liquid biofuels have lead to an increase in competition for fertile land. Resource poor and economically rich countries look to resource rich and economically poor countries in order to acquire land to supplement their resource needs. In many instances, these land acquisition deals seem to happen to the detriment of the vulnerable communities who depend on the land. Many have used the term land grabbing to describe concerns about the rights of the people impacted by these land deals.

This paper identifies steps that stakeholders may take to compensate for weaknesses of land tenure systems and recommends means to improve the quality of land deals. Ultimately, it is the responsibility of the host government, the investor and the host community to work together to make sure that the commercial exploitation of land does not negatively impact the environment, local communities and future generations. It is the responsibility of the government to improve and strengthen tenure systems and to be accountable to the people they represent; it is the responsibility of the investor to respect and include all parties involved in the decision process and to understand opportunities and limitations of proposed projects; and it is the responsibility of the civil society to make sure local communities find their voices and participate in the decision process.

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