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

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

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

## 1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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