



CHAPTER FOUR

The Policy, Legal, and Institutional Framework

The discussion thus far suggests that land potentially suitable for rain-fed agriculture (both currently cultivated and not) where investment could generate considerable benefits is available in some countries but also that such investment invariably entails high risks. Experience highlights that policies are needed to ensure that private sector decisions properly account for potential external effects. It also suggests that, therefore, the extent to which available potential will be realized—and the associated benefits accrue to local populations and contribute to poverty reduction—will depend on the policy and institutional environment.

A good policy, legal, and institutional framework can minimize risks and maximize benefits from large-scale investment involving land and related natural resources. It can help avoid involuntary permanent losses of rights that could have negative consequences, be instrumental in attracting technically competent investors able to generate significant economic benefits in line with a country's longer-term development strategy, and encourage the sharing of benefits with local land users who may lack capacity for negotiating with outsiders. But a good framework will also require adherence to social and environmental standards. A broad consensus exists that, to do so, it needs to facilitate recognition of rights, ensure voluntary land transfers, promote openness and broad access to relevant information, be technically and economically viable and in line with national strategies, and comply with minimum standards

of environmental and social sustainability. There is broad agreement that an appropriate framework will, at a minimum, include the following elements:

- **Rights recognition:** For local people to benefit from investments, but also for investors to enjoy a level of tenure security that encourages them to make the needed long-term investments, rights to land and associated natural resources need to be recognized, clearly defined on the ground, and enforceable at low cost. This includes both ownership and user rights to lands that are managed in common areas, state lands, and protected areas.
- **Voluntary transfers:** Transfers of land rights should be based on users' voluntary and informed agreement, provide them with a fair level of proceeds, and not involve expropriation for private purposes.
- **Technical and economic viability:** For investments to provide local benefits, ways to ensure technical and economic viability need to be in place, consistency with local land use plans and taxation regimes be ensured, and effective ways to transfer assets of nonperforming projects be available.
- **Open and impartial processes:** Information on prices, contracts, rights, and ideally land use plans should be publicly available, with parties fully aware of and able to enforce any agreements they entered and with public agencies performing their functions effectively.
- **Environmental and social sustainability:** To prevent investments from generating negative externalities, areas not suitable for agricultural expansion need to be properly protected from encroachment, environmental policies clearly defined and adhered to, and social safeguards (including provisions on gender and worker welfare) defined and implemented.

To assess the extent and effectiveness of relevant country-level regulations in addressing these broad areas, we designed a structured questionnaire for assessment of the policy, legal, and institutional framework (PLIAF) that builds on the methodology of the World Bank's land governance framework (World Bank 2010) and used it in 14 countries.¹ A total of 42 dimensions of the policy, legal, and institutional framework for land-related investment were assessed in a multistakeholder process with three main steps:

- A country coordinator collected data necessary to rank each of the dimensions (indicators) and circulated this information to experts recruited to assess indicators grouped into panels.
- Panels of experts assessed individual dimensions based on the background data.
- The initial assessments made by the panels of experts were revised based on additional feedback and complementary information. The implementation of the PLIAF in Peru provides an illustrative example of how this tool was applied within the country context through a multi-stakeholder assessment (box 4.1).

Box 4.1 Implementation of the Policy, Legal, and Institutional Framework Assessment in Peru

Selection of experts. Taking into account that forestry sector governance regulations and institutions are significantly different from those in the agro-industrial sector, it did not seem feasible to organize a single panel to address the indicators from both perspectives. Consequently, two thematic sessions were organized, one for forestry and another for agribusiness. A total of 13 specialists met in the two sessions. The three government specialists were identified taking into account the relevance of their government agencies' involvement in the issues discussed by the respective panel. The ten private sector experts included lawyers, economists, engineers, and representatives from industry and nongovernmental organizations with a track record in this issue.

Preliminary work. Two preliminary documents compiled relevant data and information for the survey. One provided specific information on forestry and the other on agro-industrial activities. Both documents compiled data and information about institutions related to the promotion and follow-up of investments and their legal contexts. The services of two renowned consultants on forestry issues and large-scale land purchases were retained. Both experts reviewed the preliminary document, attended the panels' reunions, assisted in gathering complementary information and reviewed the final document.

Panel discussions. Panel participants were asked to rank each dimension. They were also asked to suggest ways to provide statistical or documentary support for each score as well as examples that would illustrate the situations described in their answers. Several panelists contributed specific sources of information that had been overlooked in preliminary surveys and that could be used by the study's coordinator to provide support for the indicators.

Feedback. To validate the discussions' findings, aide-mémoires for each session were drafted. The aide-mémoires summarized the debates' findings and posed specific questions to panelists as a complement to the information gathered in the panels. After the aide-mémoires had been circulated, we gathered complementary information and analyzed the findings under each dimension. This information was consolidated in a report circulated among panel members for their feedback.

Source: Authors, based on Endo 2010.

Doing so allowed us to identify good practice in some key areas but also points to wide variation across countries. It suggests that, in many of the countries reviewed, shortcomings in the legal and regulatory framework, together with weak capacity for implementation and enforcement, reduce the extent to which land-related investments provide local benefits and contribute to broader development. Instead, they foster conflict and reduce a country's attractiveness for serious investors.

Existing (informal) rights, especially to common property resources or fallow land, are often presumed to belong to “the state” rather than to local communities. This distinction makes it easy to appropriate or transfer common property areas to investors against the will of local rights holders or without proper consultation or compensation. Inability to determine existing rights holders—because rights are not recognized, not identifiable on the ground, not recorded, or contested—encourages processes that bypass formal channels entirely. These are often biased in favor of investors, difficult to monitor, and susceptible to corruption. Even where rights are recognized, processes to be followed by investors and criteria to be met for projects to be approved are often vague. Responsible institutions often lack the capacity to make informed decisions and monitor compliance and cannot ensure that standards are adhered to. These are often exacerbated by centralization, unclear delineation of responsibilities, limited interinstitutional coordination, and weak accountability. In many cases, addressing these gaps in well-sequenced steps will be both desirable and feasible.

RESPECT FOR EXISTING PROPERTY RIGHTS TO LAND AND ASSOCIATED NATURAL RESOURCES

Clearly defined rights to land and associated natural resources are important for a variety of reasons. First, investments seldom occur on a blank slate. In almost all cases, land and associated natural resources targeted for investment is subject to existing and often overlapping rights held by communities, individuals, the state, or some combination of the three. Understanding and respecting these rights is important if investments are to be socially legitimate and legally secure. Failure to do so can lead to conflict and strife that will negatively affect the economic viability of land-related investments.

Second, failure to map and record land rights, even if only at the community level, makes it difficult to identify boundaries and legitimate owners as a basis for engaging in mutually agreed to land transfers. Recording rights provides outside investors with “somebody to talk to,” a legitimate and authorized partner to negotiate on the nature of investments and on compensation. A formal record is also very much in investors’ interest as it reduces the scope for fraudulent transactions and the need for costly inquiry to prevent the surfacing of possible undisclosed prior claims or overriding interests (such as land use restrictions).

Finally, only if rights to cultivated land are recognized and demarcated on the ground will it be possible to identify protected areas and design strategies to prevent encroachment. This will be critical to help countries manage and preserve land that provides environmental benefits, such as forests, in a way that ensures continued provision of local or global environmental benefits.

Recognition of Long-Established Rights

In many areas recently of interest to investors, rural land is sparsely populated and outside demand for it has traditionally been low. Such areas have frequently been governed at the community level through customary arrangements that have uncertain official recognition at best. With higher values and thus greater demand for land and associated natural resources, the lack of legal recognition may make such rights vulnerable to challenges from outside the community or even from within it.

Historically, many countries have considered land and associated natural resources not formally registered as property of the state, which government could dispose of at will, often without considering the actual status of occupation. The tendency to neglect existing rights often derives from a legal framework inherited from colonial days—reinforced or more deeply entrenched postindependence—that presumes any unclaimed or unregistered land to be “empty” and thus available for transfer with few safeguards (Government of France 2008, 2010). This bias can take many forms, including the recognition of rights only to land currently cultivated (that is, excluding fallow land) or stipulations preventing registration of common property (Alden Wily 2010).

In Zambia, for example, customary rights of land and natural resources can be neither registered nor surveyed, and the law allows for registration only of individual rights. Thus, although most of the country’s land is managed according to customary rules, the associated rights are impossible to register formally. In such a context, a gradual and organic evolution from communal to more individual rights is impossible. Such restrictions have tended to favor well-informed and well-connected individuals and, especially where land is appreciating, have given rise to land concentration and inequality. In Sudan, the 1970 Unregistered Land Act transferred all land not previously registered by landowners to the government by deeming it to have been registered in the government’s name. Although this act was repealed in 1984, subsequent legislation upheld the *de facto* abolition of customary land rights and simultaneously prohibited judicial recourse against land allocation decisions by the government.

In Indonesia, about 70 percent of the country’s land area is classified as “forest estate” (even if not covered by trees) and owned *de jure* by the state (represented by the Forest Department). The state can award concessions with little regard for those who have occupied or used such land. This legal distinction effectively eliminates the traditional land rights of indigenous and other local people who occupied these lands, possibly for generations. The ambiguous legal status of inhabitants on such land makes them vulnerable to displacement if policy makers decide to convert forest from customary to industrial plantation management by investors, something often done without proper consultation.

There is also significant legal debate in Liberia over whether customary lands enjoy formal recognition. The fact that many government officials and

investors interpret the law in ways that deny customary land recognition facilitated the transfer of these lands to outsiders without compensation, with affected communities being notified only *ex post*.² Land assigned to companies was thus often occupied, causing violent clashes and conflicts. Similar issues continue to affect customary landholders in other parts of Sub-Saharan Africa and Asia, including Cambodia, Indonesia, and Madagascar.

Past decades have witnessed significant advances in the legal recognition of indigenous land rights and customary land tenure systems. Legal reforms in Benin, Indonesia, Mali, Mozambique, Niger, Tanzania, and Uganda, among others, led to recognition—or provision of ways to recognize—customary land rights that are of relevance to the majority of the population. Most of the relevant laws recognize that a community's relationship with land is more than just an aggregation of individual plots but extends to land-based resources used in common, such as pastures, forests, and water. Legal protection in principle thus extends beyond cultivated or inhabited parcels. But to make this effective, land rights will need to be documented.

Public Recording of Relevant Rights

In many countries with areas of low population density, rural land rights are recognized as existing independent of whether they are formally registered. This is important for ensuring that recognition of such rights will not depend on action by an often slow and inaccessible bureaucracy. But absence of written documentation can make it more difficult to defend such rights against challenges by outsiders or the state. In Cambodia, for example, rights over land exist by virtue of meeting occupancy criteria established in the law (essentially possession for a certain period of time). In practice, those with formal documents evidencing their rights have been better positioned to defend or transact those rights than those relying only on general statutory recognition. In Indonesia, where customary land ownership (*adat*) is recognized in principle, it is often not eligible for title in practice. Households in the state forest estate thus often lose rights to investment projects with few options for recourse.

Experts have long debated the pros and cons of registering land rights if customary systems still function relatively well. Titling and registration programs have tended to focus on defining and registering individual parcels and, not least because of their high cost, were often ill-equipped to capture the full range of rights land users may have by custom, including secondary rights and group rights to use common pool resources (Deininger 2003). If done poorly, formalization of land rights can indeed provide an opportunity for sophisticated and well-connected elites to grab land from those less well-equipped to navigate this process by asserting private control over forests and pastures that by custom were held in common.

Recent years have witnessed the emergence of low-cost and participatory tools that allow the tailoring of registration to more faithfully reflect local

perceptions of existing rights rather than impose outside conceptions of property rights. The purpose of doing so would not be the much-vaunted ability to use land as a collateral to access credit—a possibility that will be beyond the reach of most rural areas in Sub-Saharan Africa for a long time. Rather, registration can be used to document and secure existing rights, often only by defining community boundaries rather than individual plots, and establish an accountable and representative structure for administering them locally. As land becomes more valuable, the need for such tools will increase.

To obtain the full benefits from one-time adjudication of rights through low-cost mechanisms, it will be important to ensure the following:

- It is possible to register group rights in a way that allows for community management of basic land administration processes (such as allocation of individual rights, updating of registries, and other internal affairs, according to given bylaws).
- Boundaries are recorded and a clear internal governance structure (with internal control structures) is established to allow interaction with outsiders.
- Records are integrated with those used in the regular land administration system to prevent double-allocation of land, to allow land users to enter into joint ventures with investors, or to allow groups to gradually individualize land rights if desired.
- Relevant secondary rights, including use rights to land and associated natural resources, such as those held by pastoralists, migrants, and forest dwellers, are recorded and protected, rather than eliminated or ignored, for example, by documenting them in land use plans that identify cattle tracks, seasonal grazing areas, and watering sources.

Some countries have made progress toward designing such registration systems. Tanzania's 1999 Village Land Act establishes local land management structures. Once villages agree on perimeter boundaries with neighboring villages and the boundaries have been demarcated and surveyed, villages receive a certificate of village land. This document in turn allows issuance of certificates of customary rights of ownership to individual landholders within the village on demand. The 1995 Land Policy in Mozambique recognizes customary land rights, and the 1997 Land Law extends the status of statutory rights to customary rights (held by 90 percent of the rural population) as well as to good faith occupation. The 1998 Regulations and Technical Annex provide voluntary mechanisms for registration of such rights and the issuance of land certificates (*direito de uso e aproveitamento da terra*, or DUATs) in the name of the community.

One advantage of registering community land at the group level is that, compared to individual titling, mechanisms to do so can quickly cover large areas, be tailored more flexibly to local needs, and be linked to local land use plans to provide documentary evidence of secondary rights. The potential

impact is illustrated by Mexico, which in slightly more than a decade registered rights to more than 100 million hectares (ha) of rural *ejido* land, two-thirds of it managed by communities and one-third by individuals. Every household receives a certificate to three types of land: the house plot, one or more parcels of individually cultivated land (which can be transferred within the community but not to outsiders unless the whole *ejido* decides to join the private property regime), and a proportional share of communal land. This process also established an open and accountable internal structure for the *ejido* that entails a clear separation of powers, supervised by a specially formed office of the agrarian ombudsman.

Mexico's reforms demonstrate not only that it is possible to register property rights on a large scale and in a fairly rapid way, but also that doing so can help to resolve long-standing conflict on a massive scale. Moreover, there is evidence that doing so encouraged investment and provided a basis for joint ventures with outside entrepreneurs, with the government acting as a broker to provide investors with information on land access opportunities. To date, this has resulted in some 3,000 contracts, often with large firms (Gordillo 2010). In some cases, nongovernmental organizations (NGOs) help to manage contracts, facilitate input access, and provide technical assistance. Case studies of such arrangements in Chiapas point to very positive results, with maize yields of about 5 tons per ha, more than twice the state average.

By contrast, in many Sub-Saharan African countries innovative legal reforms have not yet been widely implemented on the ground, and local populations are often unaware of the content of such laws or of how to apply them. For example, more than a decade after passage of the Tanzania's Land Acts, only 753, or 7 percent, of the country's 10,397 registered villages have received a certificate of village land. Even where such certificates were issued, pastoralist rights continue to be neglected. In Mozambique, only some 12 percent of the 70 million ha estimated to be controlled by communities have been mapped, almost all with technical assistance from NGOs and donor financing. Investor interest, together with land demand from other sources (for example, environmental benefits), increases the urgency of adopting a systematic process to record land rights, making this a high priority for outside support.

Accountable and Representative Structures for Local Decision Making

Even if local rights are recognized and boundaries demarcated, local elites may try to capture the benefits from expected land appreciation and in some cases may even use efforts at land to strengthen their claims. To prevent this, structures are needed to make decisions about such rights in a way that is understood locally and represents the interests of all rights holders. Two options for doing so are through (ideally elected) local governments in a

broader context of decentralization or through decision-making bodies that are specific to land, as for Mexican ejidos. The case of Mexico illustrates that, in addition to increasing clarity in demarcating boundaries, systematic delimitation of community land can help establish more accountable structures of local governance in rural areas. This is particularly remarkable because, before the 1992 reforms, ejidos were generally considered to be a highly politicized and often corrupt source of reliable votes for the ruling party (Zepeda 2000).

Mexico's *Procuraduría Agraria*, office of the agrarian ombudsman, has reduced widespread conflict. With representation in all states and at the local level, it legally represents agrarian subjects in court, promotes the conciliatory solution of disputes related to the agrarian law, monitors the observance of the agrarian law, provides legal counsel on legal and economic matters, and implements the program of land regularization and local land use planning. Support from the office has helped resolve a large number of land conflicts and jump-start local capacity building. Similar structures, including community assemblies or peasants' civil squads (*rondas campesinas*), administer justice for people too far from the formal system in Peru.

In contrast to the clearly demarcated rights and representative structures that govern ejido lands in Mexico, community lands in Mozambique can legally be transferred to investors by a quorum of just three to nine community members. This creates a risk that rights by less vocal groups, especially women, pastoralists, and internally displaced people, may be neglected. In one case study, communities in Gaza Province ceded to outside investors access to forest and water resources critical to the livelihoods of ex-combatants and women. Without having their rights documented or safeguards to ensure inclusive decision making, these groups could not make their concerns heard and, as a result, lost part or all of their traditional livelihoods.

Increasing land values and demand by outsiders can weaken customary leaders' accountability to their community and give rise to behavior inconsistent with their traditional obligations, such as the sale of community land for personal benefit. In Indonesia, there are many reports of custodians of customary natural resources (*ninik mamak*) making deals with companies that are well beyond the scope of their traditional authority and that contravene customary law (which prohibits selling of traditional lands). In Ghana, 80 percent of land is formally vested in traditional communities as allodial (absolute) owners, with chiefs or family heads who manage its use and allocate it on behalf of the community. Especially in areas with high investment potential and on the periphery of cities, chiefs have begun to perceive themselves as landowners in their own right, often reducing their subjects to lessees. Reports abound of chiefs striking deals with investors, in essence engaging in the privatization and sale of community lands that are by custom considered to be common property, fallows, or reserved for community expansion.

VOLUNTARY AND WELFARE-ENHANCING NATURE OF LAND TRANSFERS

Although involuntary means, in particular expropriation, are widely used to transfer land to investors, doing so suffers from three weaknesses:

- It is inappropriate conceptually and, by eliminating joint ventures from consideration outright, it unduly narrows the range of options for negotiation.
- In many of the countries of concern, regulations for implementing expropriation suffer from deficiencies (for example, lack of consultation or mechanisms for appeal).
- It implies a high level of centralization that is likely to divert attention from the technical determinants of viability, encourage rent seeking and political meddling, and create a temptation to impose below market values on communities without a clear justification or tangible benefits.

No Land Expropriation for Transfer to Private Interests

In some countries, including China, Ethiopia, Sudan, Tanzania, and Zambia, governments do not allow direct transactions between local people and investors without first having expropriated (or, if land is implicitly or explicitly considered state property, “taken back”) the land. Purported advantages of this approach include the following:

- Compulsory acquisition, in theory, “cleanses” the land of existing rights and encumbrances, thus compensating for weaknesses of land administration systems that may be unable to provide conclusive information about the absence of competing claims.
- Compulsory acquisition allows the assembly of large land tracts to pass on in a single conveyance to the investor, possibly reducing transaction costs.
- By acting as an intermediary, the state may protect ill-informed landowners from predatory investors and negotiate on their behalf.

In each case, better and less draconian ways to achieve the objective exist, for example, by improving land administration, encouraging market-based transactions, or educating local groups about their rights. Conceptually, expropriation is justified only as a last resort against moral hazard and holdouts by private owners where the public good is at stake and alternatives are not available (a planned road, for example, cannot be built just anywhere). Its use centralizes decision making and may encourage corruption and rent-seeking. Moreover, even if it ensures the legality of land acquisitions, it cannot provide legitimacy for processes seen as contradicting local norms. Investors who acquire land that has been expropriated may see the viability of their investment

jeopardized if they are unable to take possession of the land in question or find themselves exposed to a legacy of conflict due to long-standing disputes and unresolved claims.

Still, expropriation as a precondition for transferring land to investors remains widespread. In Ethiopia, more than a third of expropriations, not necessarily all for large-scale land acquisition, benefited private investments rather than the public. There are also concerns about conflicts of interest, as members of the executive who decide on expropriation also often sit on the commission that hears appeals to these transactions. Even if some compensation is paid, the fact that land cannot be sold implies that those who lost land will be unable to obtain land somewhere else even if monetary compensation is paid. Thus, the state may seriously undermine its authority by being seen as taking the side of one party, especially if amounts or modes of compensation are disputed.

The case of Peru illustrates that acquiring the land needed for a vibrant agricultural industry is not contingent on expropriation and may be easier without it. In this case, constitutional rules tightly circumscribe when expropriation can be used to prevent abuse of power by the state. Expropriations are void unless the state is the direct beneficiary. Public scrutiny and debate of individual expropriations are ensured by the requirement that every expropriation be authorized by the legislature in a law spelling out the future use of expropriated land. To ensure impartial and realistic valuation, property values have to be determined in a court proceeding. Expropriated owners can demand cash payment of the land's market value plus remedies for any damages.

Peru's process also has clear time limits; congressional expropriation orders automatically lapse after six months if the judiciary process has not started; and after 24 months if court proceedings are not concluded by then. Moreover, if within one year of the conclusion of the court process the expropriated property is not used for its planned purpose, it automatically reverts to the original owner. These strict limits have not inhibited agricultural growth—quite to the contrary. Peru's agro-exports have been expanding by about 8 percent a year, making it one of the largest exporters of agricultural produce in the world. More than 70 percent of the land used by the sector has been acquired through auction rather than expropriation, in many cases by investors with little experience in agriculture (Hernandez 2010).

The ability to appeal compulsory acquisition decisions varies widely across countries, and protection of local interests is often weak. In Nigeria and Sudan, the amount of compensation can be appealed but the expropriation decision itself cannot. Eviction orders are often given before a final judgment on appeals has been made and conflicts of interest are frequent, making it more difficult to uphold existing rights. So, even where complying with the letter of the law, expropriations may lack legitimacy, leaving investors open to what local people might consider justified acts of sabotage and pilfering that can significantly increase operating costs.

Procedural weaknesses and insufficient protection of existing rights are a concern in Tanzania, as well, given the country's long history of expropriation to acquire community land for subsequent transfer to private interests, often with delayed or insufficient compensation and in a highly regressive policy that is often perceived as pushing out poor indigenous landowners to provide land cheaply to the rich. This has led to concern about potential abuses of state power to transform unused village land into general land. At the same time, another concern of the concept of the "land bank" for transfer to investors, to be amassed by expropriating village land, is that it lacks provisions for joint ventures that would facilitate more active participation by villagers in the investment and provide an opportunity for transferring technology and skills.

Another disadvantage of relying on expropriation as the primary means of making land available to investors is that this makes land supply subject to capacity constraints in the public sector and runs the risk of embroiling investors in political disputes that may have little to do with the issues at stake.³ As long as landowners can be identified and a regulatory framework to guide the process and uphold basic standards is in place, the private sector will often be able to negotiate more flexibly and quickly than the government. This can provide advantages if delays in the ability to put the land to productive use are costly financially. It will be advantageous to focus public sector efforts on creating the basic institutional framework, and to inform those affected of their rights, ensure fairness of the process, and create a level playing field.

Broad-Based and Effective Consultation

Consultation of affected populations is often required by law, especially if property rights are not formalized. However, laws are often insufficient for ensuring that consultation is meaningful and results in agreements that can be enforced. Even if consultations are mandatory, their usefulness may be limited by a lack of clarity about who must participate, what information needs to be made available beforehand, and whether the output of such meetings is formally recognized or enforceable. To be effective, consultations must be undertaken before approval, with clear rules on who has to attend, what type of information has to be available in advance, and how outcomes are to be recorded and enforced. To improve the chances of a meaningful process and resultant benefit sharing, local stakeholders need to enter consultations with a clear understanding of their legal rights, the issues at stake, and the rules of engagement.

In Mozambique, for example, the usefulness of consultations was limited by limited participation and lack of prior information about the nature of the investment (for example, a map identifying areas that would be planted) to allow local residents appreciate the potential impact on their livelihoods. Discussions were mostly general ("the investor will bring jobs" or "both sides hope that relations will be good") and the absence of district officials cast doubt on

the procedural validity of many of these consultations. In many cases, investors had obtained approval before soliciting the views of the community, and their plans lacked detail or timelines that would have allowed monitoring. Not a single agreement was formally notarized or recognized in a way that could give it legal validity in a court should any party wish to pursue a claim. The government is now developing a manual of regulations to help address these deficits.

Access to legal information is often a key constraint. In some of the country studies, inability to see the texts of laws and regulations—even by lawyers and officials expected to adjudicate disputes at the local level—had a negative impact on communities’ ability to understand the agreements they were about to enter. Innovative ways will be needed to bridge such gaps (for example, by ensuring that independent third-party advice will be available to potentially affected communities). In Liberia, stakeholder consultation is considered part of the implementation of a concession—that is, local communities are informed about decisions and presented with a *fait accompli* rather than asked for their input before the investment is shaped. In principle, requirements governing consultation in other sectors could be applied to land acquisition for agriculture.⁴

Given cultural and capacity gaps between investors and local communities, there is large scope for misunderstanding. For example, in Indonesia, *adat* (indigenous) communities on oil palm estates often interpreted money given as compensation for transfer of use rights only, whereas companies consider making payments to transfer ownership rights. In Liberia, investors in the forestry but not the agricultural sector are required to negotiate legally binding social agreements with affected communities. In some cases, such negotiations have provided considerable benefits to communities, including the right to 30 percent of the revenue from land rental fees plus fees for logs harvested, the construction of infrastructure (roads, concrete culverts, bridges, schools, and facilities), and employment opportunities.

If done well, consultation, both before project initiation and during implementation, can greatly increase the sustainability of investments by providing a space for seeking out mutually advantageous solutions. In one case from Mozambique, consultation about the rights of shifting cultivators resulted in a participatory mapping that allowed farmers to move their fields to an area outside the proposed concession in return for support in the form of inputs and assistance in land clearing. In Ukraine, investor interactions with local farmers, often intermediated by local government, provided a basis for identifying areas for technical and marketing support, as well as avenues for providing public goods that increase welfare and food security.

Fairness and Targeting of Proceeds from Land Transfers

Low valuation is common in situations where land either is state owned or has to be expropriated before it can be transferred to investors. This is despite the

fact that the way in which loss of land, whether voluntary or involuntary, is compensated is critical for livelihood outcomes and the asset position of those affected. If they depend on land access for their income, compensation in land rather than cash to allow displaced owners to maintain their livelihoods at a comparable level is desirable. Compensation should, at a minimum, cover the loss of land, buildings, and other improvements, as well as the disturbance or loss to livelihoods. It should include not only owners but also those with secondary rights to these resources. Although this notion of compensation is often accepted in principle, implementation may not take these considerations into account. Compensation should ensure that those whose rights are affected benefit from the transaction or are at the very least not disadvantaged by it. This requires either a comprehensive valuation of affected people's current livelihoods/income streams or a voluntary decision (and market transaction) based on adequate information and their agreement to exchange their land in ways that protect their livelihoods and food security.

In Ethiopia, land-for-land compensation is available in some standard expropriation scenarios but not when investors who will gain access to the land are responsible for compensation. Although this arrangement reportedly facilitates timely payment of compensation, it has also contributed to landlessness of communities that find that they have few options to use the money they receive to purchase land elsewhere. Various approaches exist for regarding compensating customary rights in the countries studied. In most cases, however, especially where rights are not formalized, users receive little compensation. In Zambia, compensation is usually in the form of resettlement on alternative land, support through community projects, and inputs or compensation for dwellings and crops. In practice, such arrangements are often made without a clear and complete identification and understanding of the customary rights being displaced. As a result, some rights—especially those of groups that may not be considered part of the “community,” such as pastoralists and migrants—are abrogated without compensation. In Tanzania, where pastoralism is an important rural livelihood strategy, compensation is paid only to landowners, not to holders of secondary rights, such as those related to grazing and access to forest products. There has also been concern that even registered village lands might be incorporated easily into urban expansion through processes that involve minimal compensation, calling into question the protective benefits of obtaining village land certificates.

Where land is leased and nominally state owned, rents charged are often set administratively with little regard to the land's potential and not transferred back to original landowners. Mozambique's lease payments for DUATs are symbolic (US\$0.08/ha/year for livestock and game ranching; US\$0.60/ha and year for rainfed agriculture). With weak information systems and limited capacity, the perceived costs of collection often exceed the benefits, especially as almost none of the lease payments are collected.⁵ In Liberia, leases for agricultural concessions are US\$0.50–US\$2.00/ha a year subject to an inflation

adjustment. In both countries, payments go to the central government as the *de facto* land owner. Local governments have no discretion in setting lease rates, which are either negotiated with the investor by the central government (as in Liberia) or set administratively (as in Mozambique and Ukraine). In Ukraine, where a moratorium on agricultural land sales prevented the development of a formal land market, the minimum land rental fee is set at 1.5 percent of the normative land value, or about US\$20/ha, much lower than the rents paid on land with similar quality and infrastructure access in Argentina (some US\$230/ha). Monopsonistic land markets (many landlords, each one with very small parcels of land, and few spatially concentrated operators who lease in land) depress land rents.

Undervaluation of land has not only negative distributional consequences, but also encourages projects that would otherwise not be viable, in addition to possibly fostering rent-seeking. As a result, land users may receive less than the benefits they derived from the land earlier, making them objectively worse off. This was reportedly the case in Tanzania, where compensation (some US\$10/ha) paid by an outside investor was much less than the US\$35/ha estimated to be the value of the annual harvest of nontraditional forest products (Sulle and Nelson 2009). In Ethiopia, some large investors not only received land and water free of charge, but also got tax benefits. This gave them an advantage over local smallholders who had to pay land taxes and various other fees but, to the extent that compensation is paid only for improvements rather than land itself, also constituted a regressive subsidy from the poor to the rich.

ECONOMIC VIABILITY AND FOOD SECURITY

Economic viability is necessary but by no means sufficient for realizing positive social impacts. Indeed, even if a project is viable, social impacts need not be positive if local land rights or livelihoods are disrupted, net employment generation is low, or if unequal distribution of benefits creates social tensions. At the same time, as it is impossible to find nonviable projects that generated sustainable social benefits, attention to the economic viability issue is critical.

Technical Feasibility and Economic Viability

Although the commercial risk associated with success or failure of specific projects is an investor responsibility, an independent and rigorous check on economic feasibility could, in many cases, be appropriate. Why? Because of the high transaction costs involved in negotiating a deal; the irreversibility of many of the actions (for example, clearing natural vegetation); the fact that government often has a direct or indirect interest in the land involved; and the communities' limited capacity to evaluate the technical feasibility of proposed investments.

Recognition of the critical nature of economic viability prompted some governments to aim to evaluate the economic feasibility of investments, partly

as an input into land price negotiations. While a positive first step, ensuring its effectiveness will require that reviews focus on substance rather than administrative details; that the implications (rejection or resubmission) are clearly laid out, and that responses can be monitored at the proposal and implementation stages.

Doing this effectively will in many cases require drawing in resources from outside government, such as investors with a proven track record of agricultural investment in other countries. Making results from such reviews publicly available could improve understanding of the opportunities and constraints to large-scale agricultural investment. It would also allow better assessment of the opportunities for transferring existing technology between countries.

Rather than focusing on projects that have been submitted by investors, rigorous and in-depth evaluation of “model projects” in line with the areas of interest to investors would be an ideal way of informing a country’s broader investment strategy and establishing benchmarks that can then set the bar for subsequent investment proposals.

Competitive Processes for Approving Projects

As long as adherence to minimum technical requirements can be ensured, properly designed auctions are a low-cost mechanism to get agents to reveal their willingness to pay. In isolated cases, such as Peru, they have been applied to land with considerable success (box 4.2). Part of this impact is due to the fact that the auction process was complemented by a high-powered and independent technical committee comprising top executives from the private and the public sector. This example illustrates that, while there is no point in governments trying to second-guess private investors, attention to economic and technical viability, in addition to environmental and social viability, of proposals can be a very worthwhile investment even if it does not directly affect the price that can be charged for a piece of land.

Three aspects make the Peru case interesting. First, the requirement of a significant down payment eliminates speculators and ensures that only serious investors apply. Second, making business plans public generates positive externalities by quickly disseminating information on the profitability of agricultural ventures, information that can be very costly for potential applicants to acquire. Third, project proposals are reviewed by technical specialists from the private and the public sector, building capacity. Results are very encouraging: the mean payment for auctions realized since 1995 was some US\$440/ha for land plus US\$2,500/ha in investment.

Auctions have been effective in increasing public information and scrutiny in other cases, as well. In Ukraine, auctions were mandatory for leasing state land and an important mechanism for price discovery but were then abolished. Ethiopia’s Amhara region had achieved positive results from a competitive process to allocate rural land to investors before more centralized mechanisms,

Box 4.2 Using Auctions To Transfer Public Land

Peru's national investment promotion agency, ProInversión, helps decentralized levels of governments attract investments. The mechanism to divest public lands for investment projects depends on whether the project is initiated by the government or by a potential investor seeking to buy land rights.

In the first case, a government agency (a ministry or a regional or local government) identifies the desirability of carrying out a project and asks ProInversión to start promoting the project. ProInversión then initiates a process of regularizing any land rights to determine the nature of preexisting claims that may need to be respected or cleared and the type of land rights that can be granted to the private investor. The intention to divest the land is then published in the official gazette, local and international newspapers, and a government Web site. The terms of bidding (that is, the minimum investment required and the minimum bid price for the land) are published for a minimum of 90 days (longer if the project is more complex).

Before the auction, bidders must prequalify by posting a bond amounting to at least 60 percent of the minimum bid price plus the intended amount of investment on the land. Bids are ranked by the price offered and the amount of projected investment, monetary offers are presented, and a winner is declared. Before the land is transferred through the signature of a contract, payment has to be made and a letter of credit covering the amount of the proposed investment deposited with the government.

In the second case, the potential investor is required to present a business plan that details the value of the proposed investment and the price for the land to a board composed of public and private sector specialists, including representatives of the responsible line ministries, especially if irrigation is involved. If the proposed project is considered viable and not in conflict with existing regulations, the proposal is published for a minimum of 90 days to allow other potential investors to present offers. If any investor comes forward, the public bidding process above is initiated (with the original investor receiving a discount equivalent to the cost of elaborating the proposal). If no other investor shows interest in the project during the 90-day publication period, the initial investor can proceed.

Source: Based on Endo 2010.

which in some respects were less clear, took its place. Public tendering and auctions are more advanced for concessions in the forestry sector, as in Liberia or Mozambique.

The auction mechanism also allows the incorporation of social concerns as part of the technical proposal. For example, the Piura regional government in Peru approved a US\$32 million investment project for the production of ethanol on 10,800 ha of public land. As part of its obligations, the investor

implemented a program to help local farmers switch from rice to sugarcane on 1,250 ha. The program, which included financing, technical assistance, and contracts to buy the smallholders' produce, had very positive outcomes for participating farmers.

Given the lack of information about the true value of a piece of land, the most appropriate technology to use on it, or the potential of infrastructure enhancing land values over time, flexibility to adjust contractual terms over time will be advantageous for communities. In Mexico, where short-term lease contracts allow adjustments over time, the parties either gain agricultural experience or move out of the sector. By contrast, many recently observed transfers are characterized by rather rigid conditions.

For example, 25-year lease contracts in annual agriculture, as in Ukraine, are likely to limit landowners' ability to adjust rents over time. Given that in some countries (including Liberia, Mozambique, and Sudan), large-scale leases have terms of at least 50 years, flexible contracts are even more crucial where public land is transferred to private use, potentially removing it from serving the public interest for generations. Although investors will want contracts to be long enough to allow realization of returns from fixed investments, ways exist for compromise (for example, by indexing rental fees to values of other lands). A one-time payment for land implies that any appreciation of the land will be captured by the investor. To prevent this, policy makers may prefer to contribute the land to a joint venture, as is generally done in Mexico.

Consistency with Local and National Visions for Development

Which agro-industrial activities are in line with existing opportunities and needs will depend on a country's endowments with different production factors and the size and speed of expansion by the nonagricultural sector. A strategy for promoting investment in large-scale agriculture based only on *ad hoc* decisions by often ill-informed investors may not correspond to a host locality's best interest in the long run. It may be advantageous to integrate such investments into a national strategy for agriculture or rural development. Such a strategic approach will be particularly important because providing complementary public services and infrastructure can significantly increase the benefits and attractiveness of such investment.

Adopting a well-reasoned national strategy for promoting investments also opens up the possibility of addressing food security by setting priorities for the expansion of particular land uses over others. Although many countries emphasize that investments need to be consistent with national objectives, the stated objectives are often not sufficiently operational and lack thresholds for approving or rejecting certain projects. Instead, they are formulated in generic terms ("job creation," "improved productivity") that make it difficult to determine whether specific projects should be approved or rejected. Earlier discussion suggests that, by setting minimum criteria and guidelines for private

investment, local government can prevent priorities being set by investors *ad hoc* with poor consideration of broader goals.

Even in countries that lack elected local government structures, potential outside investment provides an opportunity to put in place structures that can institutionalize participation and create the preconditions for the emergence of democratic structures by creating revenue at the local level. The ability to collect taxes from local ventures has traditionally been a key mechanism to encourage local support to investments. Taxes on land and property are one of the best sources of self-sustaining local revenue.

Land taxation will be more attractive if local governments can retain a large part of the revenue they collect and if technical guidance is available. Local governments that benefit from taxation revenues will have a greater interest than outsiders in selecting investments that are profitable to the locality and generate tax proceeds that can be used to provide public goods (for example, physical and institutional infrastructure) that may improve the economic viability of these investments. Studies suggest that annual state and local revenues from the formal forestry sector in the Democratic Republic of Congo, which totaled just US\$1.2 million in 2002, could increase to US\$20 million to US\$40 million over the next 5 years to 10 years (World Bank 2007), providing provincial authorities in the main forest provinces with some US\$500,000 a year to support local development.

The ability to feed them into development planning at the local level is greatly enhanced if documents are public. While Liberia has made tremendous progress in improving land and forest governance, original concession agreements were often not publicly available, making it difficult to assess the potential impacts of plantation development or resolve border disputes. In the Democratic Republic of Congo, Indonesia, Liberia, and Mozambique, unclear and nonbinding contractual arrangements resulted in community disputes over concession boundaries and benefits.

The fiscal tool may also increase local governments' bargaining power in negotiations with investors and help them overcome informational imperfections (for example, by hiring consultants to advise on proper technology) and enforcement difficulties. In addition, it will provide the basis for localities to compete with one another in attracting economically viable investments, possibly enhancing the efficiency of project allocation across localities.

In thinking about the potential for local revenue generation, two potential problems must be avoided. First, unless local governments or beneficiary representatives are able to retain a significant share of tax receipts from outside investors, their incentives may be biased toward the short term. This bias could align local administrations' incentives with those of short-term investors rather than landowners or their broader constituents. Second, financial incentives such as tax rebates and exemptions established at the central level may significantly limit the revenue at the local level. In Ghana, far-reaching tax breaks imply that even profitable companies will pay almost no taxes,

reducing the ability and incentive of local governments to provide complementary public goods.

Although establishing mechanisms for local taxation of land does not pose insurmountable technical challenges, the process may be resisted by parties who would be subject to significant taxation.⁶ In the past, political considerations have often implied that the local fiscal instrument is not used to its full potential, encouraging speculation through, say, idle landholding in anticipation of large capital gains. The scope for speculation needs to be carefully considered when drafting country-specific regulations

IMPARTIAL, OPEN, AND COST-EFFECTIVE MECHANISMS TO IMPLEMENT INVESTMENTS

Governments can level the playing field and ensure that all parties, including local communities, have access to relevant information. Doing so requires that institutional responsibilities be clear, that administrative requirements be justified and enforceable at reasonable cost, and that reliable information be publicly available. A focus on the speed of completing processes or their cost should not distract from the need to focus on the quality of outcomes.

Assignment and Effective Performance of Institutional Responsibilities

In many countries, investment applications by foreigners have to go through an investment agency and a sector ministry. Objectives and processes between these institutions are often not fully aligned. Investment agencies try to increase outside investment, while line agencies aim to exercise due diligence in vetting proposals. Although the differing goals can give rise to constructive tension, if coordination remains ill-defined, it can create confusion and red tape that allows investors to play one agency against the other to ensure that proposals are approved, even if they do not fully meet legal requirements or comply with relevant safeguards.

Most target countries apply a graduated process of project review in which small projects can be reviewed locally while larger ones require ministerial, parliamentary, or presidential approval, usually depending on thresholds that vary. Requests for land allocations in Mozambique of 1,000 ha or less can be authorized by the provincial government, requests of 1,000–10,000 ha require Ministry of Agriculture approval, and land allocations of more than 10,000 ha require authorization from the Council of Ministers. In the Democratic Republic of Congo, investors wanting to acquire land must apply to provincial authorities before forwarding to the central administration for final approval at the ministerial level (for projects that exceed 1,000 ha), by a law (for projects that exceed 4,000 ha), or by the president (for projects that exceed 12,000 ha). In some cases, “bunching” of projects just below the cutoff point is observed.⁷

Although there may be room for scaling back unnecessary government approval processes that introduce opportunities for rent-seeking, great care should be taken to not cut out safeguards that are essential to ensure proper diligence, reduce risks, and inform all parties of their rights and obligations in a misguided desire to make property transfers “simple” and “easy.” Such failure to apply due diligence may increase investment but come at a high cost in trying to unwind failed transactions that, with proper checking and safeguards, could have been avoided in the first place. In fact, in many countries the desire of central and local government agencies to attract investment is reported to have resulted in approvals of projects before the proper clearances (say, for environmental impacts) were obtained, signaling to investors that such regulations can be ignored with impunity.

Case studies suggest that the “urgency” of approving to avoid losing out on supposedly unique investments can lead to serious neglect of existing safeguards that can end up creating large damage in an environment of weak institutional capacity. Many countries establish time limits for certain administrative processes to make approval the default in cases where these procedures require additional time to complete. As this rushed approval process may well preclude due diligence assessments, hastily approved projects may abrogate local rights without proper safeguards and are thus not desirable.

In many cases, the transfer of rights to investors involves quasi-judicial processes that require public notice to provide an opportunity for interested parties to register claims. These processes are often designed more out of concern for investors than local people. In Sudan, if no objections are raised within 15 days, the local government authority issues a “free of rights” certificate, essentially transferring land to the investor. In the Democratic Republic of Congo, if processing a concession application takes more than six months, the regional authority can grant occupancy rights to the investor as requested in the application. The interests of both investors and landowners would be better served by instead taking measures to provide the capacity needed to ensure timely completion of the necessary review processes.

The absence of proper structures at the local level has led several countries to rely on highly centralized processes for project review. These processes rarely seriously consider whether the information needed for central decision makers to make informed decisions is available or how to strike a proper balance between local and central decisions and incentives. In Tanzania, all land transactions, regardless of size, require approval by the commissioner of lands (acting on behalf of the president) in the capital. Although it is unclear how much substantive improvement this step adds, it led to a large backlog of cases and significantly slowed the process.

A highly bureaucratic process also introduces incentives for investors to facilitate faster processing or to circumvent the established procedures entirely. For example, most investors in Tanzania either acquired land through informal transactions with local communities or previous investors or instead pursued an

outgrower model (which is not possible according to legislation) thereby avoiding the land acquisition process altogether. District authorities in Liberia are typically excluded from investment screening and are informed by central government authorities about the investment after the fact. Such lack of participation complicates local development planning and prevents authorities from identifying opportunities for investment as well as potential conflicts with existing uses. But considerable capacity building may be needed to fully decentralize investment screening to the local level.

Enforcing Agreements and Contracts with Incentive Recipients

Many of the countries studied consider agricultural investment strategic and thus eligible for certain incentives and benefits in return for the social benefits it presumably provides. A danger in this context is the tendency, observed in several of the case study countries, to try and offload the cost of such subsidies to local landowners by providing land for free to investors without any compensation for the loss of existing rights to local communities. Instead, incentives should be simple, nondistortionary (that is, available to any investor), applied impartially, in line with prudent financial management, and linked to benefit provision as much as possible.

Some types of incentives may end up attracting speculative investment or undermining governance. This can happen if either of two conditions prevail: incentives are not given in return for provision of productive infrastructure or other goods that create positive externalities beyond the project area, or incentives are awarded in a discretionary process, with local rights holders rather than the general public bearing the associated cost of using public assets (that is, when land is given away). To benefit from incentives, the investor usually has to show that the project will create jobs, meet minimum levels of investment, and bring new technology. In Ethiopia, incentives for investors are clearly specified, but various privileges are often discretionary and thus may have negative impacts on the incentive scheme. In Sub-Saharan Africa, another drawback of incentives may be to attract projects that are not economically sound as many investors engaged in land-extensive projects indicate that subsidies and incentives play a major role in ensuring the viability of their ventures. In addition, because many of these incentives are given up-front (in the form of cheap land, for example) rather than *ex post*, there is very limited potential to enforce compliance with eligibility conditions.⁸

Public Disclosure of Relevant Information

In many contexts, the reliability and truthfulness of information provided by investors was identified as being open to doubt, and few countries have rigorous ways of assessing the aspects most relevant for future performance, especially those related to financial issues. Financial information from investors is often rudimentary, not checked, and not available to other parties or to the

public. In Peru, 60 percent of the purchase price plus the value of anticipated investment has to be deposited at the time of making a bid. This simple mechanism seems to have screened out parties who lack the financial capacity for implementation.

Many countries are working to make information on potential land for investors available publicly as contemplated, for example, in Ghana and Tanzania. But public information rarely extends to information on key parameters of the investments, land prices paid, and other commitments by the parties. Making this information available publically could reduce mistrust, and gradually eliminate severe informational imperfections. For auction-based transfers of public land in Peru's Pacific coast, the fact that details on business plans and proposed payments for land are available from auction records can act as a price discovery mechanism in an environment where land markets do not exist. If business plans are published, the technical details in them can also point governments toward the need for private sector support in technology, market development, and other public goods that could increase the attractiveness of a location for outside investment.

In many cases, institutional fragmentation reduces the scope for data sharing and integration by different institutions. At best, fragmentation increases transaction costs for investors; at worst, it creates insecurity of property rights and may make successful investment applications subject to extortion by rent seekers. In virtually all the countries reviewed for this study, land information is scattered across various agencies and levels of government and kept in incompatible formats that make data sharing difficult.

In Zambia, for example, different and incomplete land information is collected by local authorities; land tribunals; the ministries of land, tourism, environment and natural resources; and other bodies. The data are maintained in different formats, of different scale, accuracy and extent; they are often damaged or missing; and they are kept in poor storage conditions with inadequate indexing. In postconflict settings, many records have been destroyed, and there is insufficient capacity to reconstruct the lost information. In the Democratic Republic of Congo, information on investments is held separately by all the institutions that have some authority over land and natural resources, and land titles are held only at the district level. The limited data sharing caused by these overlaps can be problematic when institutions grant licenses for exploitation of different resources without notifying one another.

In many countries, maps to identify land allocations are either unavailable or inaccurate. The limited ability to cross-check land allocations enables local chiefs or other people with privileged access to records to "sell" the same plot several times to different parties or to renege on earlier contracts—practices found in Ghana, Indonesia, and Liberia, for example.⁹ Double allocation of the same land is also reported in Sudan, where foreign investors have in some cases been allocated land from local governments, the national Ministry of Finance and Planning, or local chiefs.

Monitoring Implementation

Monitoring is relevant for two reasons. First, it is not very effective to expend large amounts of resources in negotiating agreements without effective mechanisms to ensure that whatever was stipulated will indeed be adhered to. Second, even in the best of circumstances, investments of the type considered here will be risky and failure of at least a share of them can be expected. In order to not tie up potentially valuable resources, it will be critical to ensure that land assets of nonviable enterprises can be transferred to others who might be able to make effective use of them in an expeditious manner that does not create incentives for speculation. To guard against this risk, legal or contractual provisions often require putting land into use within a specified period and may prohibit subleasing or sale of the land to others.

Provisions that allow the cancellation of concessions that are not performing are expected to ensure that monitoring has real impact. For example, in Ethiopia, the government is entitled to cancel a concession if it is not implemented within six months. In the Democratic Republic of Congo, the concession must be occupied within six months of the contract's signing, and the land must be put to productive use within 18 months of signing. In Mozambique, an investor has 120 days after project authorization to start implementing the project and, according to the law, the provisional state land use right (DUAT) granted for investment purposes is nullified if the investment's business plan is not implemented after two years.¹⁰

In practice, however, such provisions lack bite because of three reasons. First, the public sector's capacity to monitor is severely limited. Second, criteria that could be monitored (for example, amounts of investment or job generation) are rarely laid down unambiguously or publicized. Finally, the processes that are envisaged to be used, for example to cancel concessions, are not well laid out and often cumbersome, implying that even if evidence on project performance were available, it would be difficult to quickly act upon it.

As a result, large amounts of what is often a country's most productive land may be unutilized. For example, in the Amhara region of Ethiopia, field visits confirmed that only 16 of 46 projects in the inventory of large-scale agriculture projects (see chapter 2) were used as intended (Tamrat 2010). In other projects, the land was either used for other purposes (such as forest clearance) or simply rented out to smallholders in explicit contravention of contract. In Mozambique, virtually all DUATs remain provisional, and a recent audit of a subsample of DUATs revealed that fewer than half complied with their investment plan. Similarly, although data are not available for agricultural concessions, a systematic review of forest concessions in the Democratic Republic of Congo pointed to extraordinarily high levels of noncompliance and led to the cancellation of 163 contracts that covered a total of 25.5 million ha. Moreover, the recent cancellation of a significant investment project in Mozambique suggests that effective monitoring can overcome strong vested interests and produce results.

There is also a need for publicity of investment details and public education. Given the barriers that a lack of information imposes on the ability to identify suitable technology, value land, and monitor performance, public access to basic information on land deals is likely to be one of the most effective ways to improve project quality, structure players' expectations, help understand business models, and facilitate a convergence of land values to a "fair" price. It can also dispel notions of secrecy and distrust surrounding this issue and, by allowing users to check the accuracy of their information, make it much easier to discover and possibly correct any gaps. And it can be combined with voluntary publication of such information by industry leaders and independent third-party verification. Competitive processes and performance bonds can thus significantly reduce the need to monitor and be combined with fiscal incentives.

Mechanisms for implementation will therefore need to be incentive-compatible, monitored at low cost, and subject to dispute resolution. Using recent satellite images to monitor investment implementation in Zambia reveals three interesting facts. First, land seems to have been allocated in an area already used by smallholders. Second, even though the image was taken four years after the land had been transferred, there is no visible sign of large-scale cultivation. Third, the land seems to have been given with scant attention to physical or other features.

A quick check of land use through satellite imagery, although informative, cannot substitute for local mechanisms to ensure compliance with agreements, especially for social and environmental issues. One way of jump-starting such local mechanisms adopted by some countries is establishing a community fund that would use all or part of the compensation obtained for land to provide social and other public services to benefit the entire community. Different forms for managing it exist, with the option of sharing responsibility among the local government, the investor, the representatives of those affected, and civil society, now being piloted in the Democratic Republic of Congo and Mozambique. Other efforts to ensure more effective monitoring include the recent publication of manuals and standardized checklists to allow local monitoring by provincial delegations of the investment authority.

ENVIRONMENTAL AND SOCIAL SUSTAINABILITY

Unless proper regulation is in place, negative social and environmental externalities arising from land transfers that are desirable for individual parties may outweigh or reduce the social benefits from such transactions to the point where they become undesirable. For example, transfers between parties may widen preexisting social inequalities, produce greenhouse gas emissions, or reduce local access to water because of toxic runoffs. In some cases, poor people displaced from their farms migrate to the frontier, where they cut down the

forest to cultivate virgin land. Regulation at the national and project level will be needed to align the incentives of private agents with the public interest. Increased awareness of the importance of environmental issues has led to increased emphasis on environmental safeguards in national laws and in voluntary schemes promoted by industry associations (such as the Forest Stewardship Council).

Protection of Areas Unsuitable for Agricultural Expansion

Earlier analysis suggests that there is no need for area expansion into land that is currently being deforested. Still, such expansion continues apace in many countries, largely because the private benefits from such behavior can be high and existing mechanisms to identify or protect forest areas are ineffective.

In most of the reviewed countries, inventories of public land either do not exist at all or, if they do, not unambiguously identify boundaries of such land. Moreover, responsibility for managing public land is often dispersed among local authorities, sector ministries, and public agencies. The situation is complicated by fact that in many cases categorization of areas as public removes them from community ownership and management. Significant uncertainty prevails about boundaries of government land in Cambodia, Indonesia, Liberia, and Tanzania. Many countries have large swaths of their national territory under protection: 30 percent in Tanzania and 20 percent in Ethiopia. But lack of boundary demarcation often implies that it is difficult to enforce such protection on the ground. In Ethiopia alone, less than 10 percent of state forest boundaries have been mapped, and very few claims to rights over forestland have been identified and registered. This makes it difficult to protect public lands with high environmental value.

Having an inventory of economically valuable state-owned land that includes boundary identification and clear assignment of management responsibility is essential for proper asset management and enforcement. The absence of such an inventory provides opportunities for well-connected individuals to establish land rights through informal occupation and squatting, often with negative environmental impacts. In addition, information on revenues received from public lands—and costs to manage it—should be open to public scrutiny, requiring adequate staff capacity.

Legal frameworks also often encourage agricultural incursions. In much of Latin America and the Caribbean, land rights can be established by clearing forests and implementing “productive” use of the land, a doctrine that continues to have significant impacts on behavior. In the Brazilian Amazon, agriculturalists and ranchers take on large-scale squatting in the expectation that their occupancy will eventually be formalized. This occurs at the expense of both the forest and the indigenous communities. Recently, a law (11952/2009) regulated an estimated 67.4 million ha of land previously occupied (and deforested) by squatters with holdings of less than 1,500 ha

before December 2004. Holdings of up to 300 ha (95.5 percent of the total) are to be regularized within three months and without physical inspection. Up to about 100 ha of land will be given for free; between 100 ha and 1,500 ha, a direct sale at highly subsidized rates and with credit will be undertaken; and above this will require returning some land. Sales are not allowed for a 10-year period for holdings below 300 ha and for four years for the remainder. Although the need to provide tenure security to encourage investment and reduce conflict is widely recognized, this law could encourage speculative land occupation and deforestation in expectation of future regularization. To prevent this and ensure that the land is not subject to traditional claims, the government issued Decree 9662/2009, which defines the procedures for registering land holdings in the land cadastre, including mandatory field verification for landholdings larger than 400 ha and prior consultation with environmental and indigenous agencies.

Although community land rights are recognized in Peru, a lack of boundary demarcation makes it difficult for communities to exercise their rights and defend them against settlers (*colonos*). These settlers can then illegally log the land and eventually apply to rezone the land, creating a loophole for large-scale agriculture in previously intact forests. Speculators and private firms are also said to “plant” settlers in areas identified for public investment, in areas where private investors received concessions, or as a strategy to deforest the area and have it adjudicated as agricultural land. This has led to loss of natural resources and serious violence.

Enforcement of Environmental Policies and Standards

The general picture from the case studies is a failure to articulate, implement, and enforce environmental regulations. This is possibly caused by stakeholders’ desire not to let what is perceived as petty environmental concerns prevent them from capitalizing on what they view as a possibly short-lived bonanza of profitable investments. To avoid a race to the bottom—where eagerness to attract investors leads to neglect of essential regulations, consistently implemented national standards will be important.¹¹ This is particularly true regarding the lack of consideration given to indirect effects on the land, and the neglect of risks associated with standard agriculture projects.

In many cases, shortcomings in the application of environmental impact assessments (EIAs) or omissions of this requirement prevent effective implementation of environmental regulations and legal frameworks. In Mozambique, the investment and environment laws require investors to submit an EIA when seeking approval for their proposal. But few agricultural land applications had a comprehensive EIA, even if environmental issues were clearly at stake. This is attributed largely to the limited resources of public environmental agencies. EIAs in Ethiopia, though required, are often waived as sunset clauses for project approval. Although an EIA (which includes a social

assessment) is required in Tanzania, only about half the required EIAs had been carried out according to the inventory of large-scale projects (see chapter 2). Even where EIAs were implemented, their quality was weak, and they were not publicly available. In Ghana, companies are registering their land at the Lands Commission before having acquired necessary environmental permits (Obidzinski and Chaudhury 2009).

Such problems are exacerbated if environmental agencies delegate functions to agencies in charge of investment promotion. In Ethiopia, the mandate of requiring or reviewing agricultural EIAs has been passed to the Ministry of Agriculture and Rural Development or respective regional bureaus, which lack the technical capacity and motivation to make compliance with EIA regulations a priority. Often the definition of situations that require environmental assessments is not clear or open to manipulation. And in cases such as Sudan, where insistence on far-reaching EIA requirements is justified,¹² it will also be important to think about ways in which their quality and implementation can actually be enforced in a resource-constrained environment.

In Latin America, some countries established a category of crimes against the environment, prosecuted by a separate entity. In Mexico, while the federal criminal law defines crimes against the environment, the institution specialized in investigating such crimes is part of the Attorney General's Office and replicated in the offices of the State Attorneys. A special agency, the Procuraduría Federal para la Protección al Ambiente (PROFEPA), receives and acts on any kind of claims, apparently quite successfully.¹³ The environment law guarantees hearings (*audiencias*), which are becoming very important for land use changes, tourist developments in coastal ecosystems, the infrastructure of natural protected areas, and so on. With adjustments in implementation and disclosure, this could be a powerful tool.

Another mechanism for enforcing compliance is the prospect of legal action by affected groups, which under some national laws may publicize environmental violations. In Mexico, the environment legislation is the only type of legislation where the law allows a type of class action. This mechanism, which allows injunctions (*recurso de revisión*) to interrupt land use changes by any citizen, provides an incentive for investors to obtain local agreement before submitting the legally required documentation for the environmental impact assessment.

Adherence to Social Standards

Social issues arise in three areas: investors' failure to adhere to agreements that were entered into, distributional issues, and labor issues. All of these should be identified in social impact assessments or consultations.

Failure to adhere to social agreements, which can be caused by lack of economic success, can lead to significant negative direct and indirect social impacts. For example, in Liberia, a rice investor initially promised not to

cultivate the fertile lowland areas that were crucial for local food production. However, after failing to develop the allocated lands, which were not as fertile, the investor reneged on the agreement and began cultivating the wetlands. This forced 1,000 farmers (30 percent of the local population) to relocate to nearby areas, and put a further 1,500 at risk of being displaced by continuing expansion.

Even when property rights are well defined, there may still be effects on third parties attributable to a project. To address this, Brazil has legal rules requiring the consultation of local people and protection of land tenure rights by indigenous people and *quilombola* communities (descendants of former slaves). Clear regulations respect secondary land tenure rights of occupants and rural laborers. And any economically significant investment project has to also comply with Brazilian labor legislation. These laws set maximum labor hours and minimum wages, weekly resting days, and yearly vacations, while guaranteeing collective representation and social security benefits and protecting against abuses of women's and child labor.

Distributional issues are likely to emerge if there is no correspondence between actual land users (which may involve secondary ones) and the property rights taken into account in investment-related decisions. For example, existing procedures for transferring the land may not take into account the full spectrum of rights (such as temporary rights by pastoralists). Or they may provide compensation to individuals who may not be the actual users of the resources (for example, men rather than women). When property rights are identified, this is less of an issue. But where investors have to make arbitrary judgments about the existence and legitimacy of claims, this can increase transaction costs and moral hazards significantly. A notable phenomenon in some of the case studies was for groups at the margins of affected communities (for example, charcoal producers in Mozambique) to be completely excluded from processes of local consultation—with potentially negative consequences for their livelihoods.

To ensure that all community members are involved in investment decisions and that investment results in durable benefits, participatory land use planning has been applied with success in some parts of Tanzania. Existing regulations, if implemented in a participatory way, could provide a basis to not only demarcate land rights by villages and their populations but also to recognize secondary rights by pastoralists. Similarly, Mozambique is planning to use recently passed regulations for the 2007 Territorial Planning Law, along with community land delimitation, to define rights and identify the suitability of specific types of land for investment. In 2008, the federal government in Brazil adapted the Ecological Economic Zoning framework to limit what can be planted to sugar in the state most affected by expansion. This is complemented by an industry-led boycott of all beef produced on pastures recently deforested, monitored with satellite imagery, following a Greenpeace campaign (Greenpeace 2009).

Finally, projects may not be socially sustainable if companies are perceived to treat employees, contract laborers, or contract farmers in ways that are illegal, inequitable, or do not conform to the original understanding of the contract on the part of the community. For example, a rubber plantation in Liberia employed most of its labor on a contract basis (day labor) with unclear terms and conditions. Considerable resentment was generated because different individuals received different levels and types of payment. By contrast, the formal employees received not only protected benefits but also free access to health and education services. Another issue frequently undermining relationships between communities and investors is the failure to deliver on initial expectations—either for employment or the provision of infrastructure or services. In Mozambique, communities gave up access to common property forest resources in the expectation that jobs and services would materialize—but this has not happened (and some of the “promises” were of dubious credibility). Clearer frameworks are needed for specifying standards, responsibilities (for communities and investors), and the mechanisms for monitoring and enforcing them.

In the case studies, there was a general lack of clarity about social standards applying to investors or public institutions involved in oversight. The country’s overall framework of labor laws was in principle relevant, and in some countries procedures or norms had been established governing community consultation (such as the social agreements in the forest sector in Liberia and the more general provisions in Mozambique). But a range of significant social issues were generally not covered by any formal public standards—including all the key issues relating to livelihoods or equity. In no case was a dedicated social assessment carried out to provide detailed information on the impacts of the proposed investment on different social groups.

In 2004, to enforce labor regulation, the Ministry of Labor in Brazil created a national list of employers who have been convicted of using forced labor. Enterprises on this list, which is public and updated every six months by the ministry in collaboration with social organizations, cannot obtain public loans and other benefits. As an additional measure, Brazil launched the Pact for Eradication of Forced Labor as a public-private partnership in 2005. The pact now includes 250 companies, commercial associations, and social organizations that aim to avoid commercializing products and bar suppliers who used forced labor.

From the perspective of all the key stakeholders (including the investors), there would thus be considerable benefits to gathering a detailed understanding of the social and political context before designing details of the investment. Understanding the impacts by social group (including by gender, age group, ethnicity, and other significant fault lines) is critical to determining the social sustainability of operations and their distributional impacts. Strengthening practice in this area is therefore a major priority.

CONCLUSION

Review of key aspects of the legal, policy, and institutional environment suggests that a lack of success of a large number of investments can partly be attributed to the fact that the institutions tasked to process these ventures were ill-equipped and ill-prepared to deal with the sudden influx of interest. This points toward an urgent need to adjust processes as needed and build the capacity to implement them in practice. This is an important area for assistance by donors as well as investor countries.

Many of the policy measures needed to deal with the weaknesses in the institutional and policy framework can be addressed in the short term, with potentially significant multiplier effects. For countries with significant amounts of unused land, five steps are essential to move in this direction:

- Identify areas and crops where investment can provide the highest benefits (for example, by adapting the agro-ecological zoning methodology) and use this to establish parameters (for example, minimum size of investment and employment generation) to be included in any application by investors. Systematically map and document existing rights, and educate local populations about the opportunities available to use the land at their disposal, as well as the contractual options available to them (including model contracts and the amount of compensation based on potential land rental).
- Regulate consultation requirements, decentralizing them as much as possible, and ensure that participation and results are documented and widely publicized (including on the Internet) to allow enforcement and opportunities about learning for communities and investors alike.
- Take proper measures (including reviews by private sector experts or practitioners engaging in large-scale farming elsewhere) to scrutinize and publicize projects' technical viability and establish a competitive and incentive-compatible process with an up-front declaration of projected capital investment and job generation and a proportional deposit.
- Improve the public sector's capacity for processing of investment applications, reduce red tape, and ensure that subsidies, if deemed necessary, are clear and distributionally neutral (not in the form of an implicit subsidy on land), nondistortionary (that is, come in the form of public investment that will benefit all investors and be useful irrespectively of the success of any specific investment) and incentive-compatible (that is, focus on the start-up phase rather than on tax credits that may kick in once a project is up and running).
- Put in place a regulatory framework with appropriate mechanisms for enforcement to ensure that private or short-term benefits from any given investment will not be outweighed by negative externalities in terms of the environment, the way in which resources are distributed, or welfare of future generations.

NOTES

1. An assessment of the policy, legal, and institutional framework was carried out in Brazil, the Democratic Republic of Congo, Ethiopia, Indonesia, Liberia, Mexico, Mozambique, Nigeria, Pakistan, Peru, Sudan, Tanzania, Ukraine, and Zambia.
2. Although not required by law, recent land acquisitions in Liberia included provisions for compensation because companies had adopted Corporate Social Responsibility principles of their own.
3. One example that has received great publicity is the attempt to acquire land for building a Tata car factory in West Bengal. As expropriation proceedings became highly politicized, the project failed to materialize. Tight limits on expropriation in Peru are supported by entrepreneurs who prefer to directly negotiate with land users rather than having the public sector drag out the process.
4. The Democratic Republic of Congo's 2002 Forest Code, for example, provides a number of innovations regarding forestry concessions, including maintenance of all traditional use rights, including those held by indigenous people; establishment and implementation of forest management plans; the right for local communities to manage forests under customary rights; mandatory implementation of social responsibility contracts and consultation with local people before assigning a forest to conservation or production; publically open allocation of production forests; and stakeholder involvement in management decisions through national and provincial forest advisory councils that include the private sector and NGOs. Consultation for forestry projects needs to be accompanied by public information about the proposed concession in many forms and in the local language, so that the public can be fully informed about the project before it enters into consultation. The impact of this code remains to be seen, as it has been applied only rarely, and customary authorities are generally bypassed in the allocation of concessions.
5. Less than 30 percent of total taxes are collected with payments highest in tourism concessions (US\$8.00 per hectare per year).
6. Provisions in this respect are often fairly well specified in forestry laws. For example, the Democratic Republic of Congo's Forest Code specifies how taxes and fees have to be shared in principle. Proceeds from the area fee (*la redevance de superficie concédée*) is split between administrations in the exploitation area (25 percent to the province and 15 percent to the local government, all to be used exclusively for basic infrastructure development) and the public treasury (60 percent). Proceeds from the felling tax are split 50/50 between a national forestry fund and the public treasury. All proceeds from export taxes go to the public treasury. Proceeds from the deforestation tax are split 50/50 between the national forestry fund and the public treasury. All proceeds from the reforestation tax go to the forestry fund.
7. In Mozambique, one forestry project involved simultaneous submission of six land applications for a total of 28,000 ha to avoid the need for authorization by the Council of Ministers. In the Democratic Republic of Congo, there have been reports of multiple land allocations of up to 1,000 ha each so as to meet the requirements of a single investor without obtaining the requisite approvals.
8. Indonesia requires that at least 75 percent of an investment be undertaken before any incentives can be claimed, but it provides large implicit subsidies for oil palm development by charging little if anything for forested land intended for oil palm development.
9. The government of Ghana has since recognized that the incomplete nature of acquisitions carried out several decades ago has left significant portions of land, and the people who live on that land, in a legal limbo that needs to be resolved.

10. The period can be extended by another 120 days by depositing 5 percent of total investment value, up to US\$500,000.
11. Efforts to formulate and implement principles for agricultural investment can be justified by noting that similar arguments apply to competition for investment between countries.
12. The requirements include studying the implications of drainage systems for water-borne diseases, assuring that crop mix and rotations do not have detrimental effects on soils, and ensuring rational use of chemicals, among others.
13. According to PROFEPA's Web site (<http://www.profepa.gob.mx>), in 2008, 99.5 percent (8,111 of 8,149 complaints) regarding environmental matters were addressed, researched, and responded to. Of the total, 44 percent relate to irregular forestry exploitation, 12 percent to soil erosion, 11 percent to natural habitats, and the remaining 33 percent to flora deterioration, contamination, and other natural resource issues.

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