Chapter 7

Investment promotion agencies and access to land: Lessons from Africa

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1. Introduction

Securing access to land is a key step in the implementation of most investment projects. Commercial ventures in sectors as diverse as agribusiness, manufacturing and tourism all depend on the identification and acquisition of suitable land to host the investment project. Yet for outside investors with few reliable in-country contacts and limited knowledge of local institutional arrangements, gaining access to land may prove a difficult challenge involving long and cumbersome procedures, unclear and insecure land rights, and corruption.

Recent surveys of firms investing in Africa have identified gaining easy access to land as a critical factor in investment decisions. For instance, in a survey from Mozambique, 27 per cent of the sample firms identified land access as a major problem. According to the survey, the average time for acquiring land was 12 months,

and the average total cost US$18,000. These constraints on land access were considered to be a major reason why potential investors shy away from Mozambique.[1] Similarly, a recent World Bank survey found that 57 per cent of the sample firms in Ethiopia and 25 per cent in Kenya reported access to land as their main obstacle.[2]

At the same time, in much of rural Africa land constitutes a major livelihoods source for the majority of the population, as it provides the basis for both subsistence and market-oriented agricultural activities. In addition, land is much more than a production factor; it is a source of political power, a basis for complex relations of alliance and reciprocity, and a central component of social identity. In many parts of Africa, population pressures and other factors have resulted in greater competition for land, while socio-economic change has, in many places, eroded the customary rules and institutions that traditionally administered land and managed conflict.

This context creates the need for institutional arrangements to accompany prospective investors in their efforts to gain access to land, while ensuring that investors' acquisition of land does not occur to the detriment of the land claims of local groups. Where local land rights are infringed, local groups may be deprived of the land they have used from time immemorial, with negative consequences for their land-based incomes and livelihoods.

Investors may lose out too, particularly when dispossessed and disenfranchised local people resort to protest or even sabotage to defend their land rights. For instance, research from Ghana has documented the resistance strategies deployed by farmers who lost their land to large-scale investment projects since the 1980s – strategies ranging from court action to crop damage.[3] On the other hand, prompt and secure land access for investors coupled with effective protection of local land rights may result in win-win situations in terms of both commercial viability and equitable benefit-sharing with local groups.

IPAs thus must address the challenge of helping investors gain access to land while ensuring that local land users benefit from the investment. Several IPAs in Africa have sought to address this challenge – to varying degrees and using different legal and institutional models. As this experience is relatively recent, there is limited empirical research documenting how these different models have been implemented on the ground, and to what effect.

This chapter analyses experiences concerning the role of IPAs in land access. It focuses on sub-Saharan Africa, drawing on countries such as Ghana, Mozambique, Senegal and Tanzania. The chapter is based on an analysis of relevant legislation and on a review of information available on the official websites of several IPAs and in the (rather limited) literature. The purpose of the chapter is to map out issues and pave the way for further research, rather than to offer definitive policy recommendations –

1. Nasir *et al.*, 2003:30.
2. World Bank, 2005.
3. Amanor, 2005.

although some implications are identified for the work of IPAs.

The next section briefly sketches some of the key features characterising land tenure in Africa. Section 3 compares the role played by different IPAs in land access, while section 4 focuses on the procedures to obtain land access, including the safeguards that may be built into them in order to protect local land rights. Section 5 analyses the nature, content and duration of the land rights that investors may be vested with in different countries. Finally, a conclusion summarises key findings, identifies areas for further research, and outlines some implications for the work of IPAs in Africa.

2. Land tenure in Africa

Much legislation in sub-Saharan Africa provides the state with a significant degree of control over land. After independence, many African governments nationalised or otherwise took control over land, often following the colonial model. This was justified as a means to promote agricultural development on the one hand, while ensuring government had control of a valuable asset and a source of political power on the other.

For instance, land was nationalised in Burkina Faso (under the *Réorganisation Agraire et Foncière* 1984), Mozambique (at independence in 1975, and more recently under the 1990 Constitution and the Land Act 1997), Nigeria (where the Land Use Act 1978 vests land ownership with the governor of each federated state) and Tanzania (after independence and more recently under the Land Act 1999 and the Village Land Act 1999).

Other countries promoted private property. Kenya, for instance, has long had a land titling programme to register private property, converting customary land rights into freehold. In Ghana, part of the land is owned by the state but most of it belongs to private entities, such as customary chiefdoms, extended families and individuals.[4]

In the 1990s, political democratisation and economic liberalisation brought about law reforms introducing, or strengthening, protection of private land ownership in several countries that had previously nationalised land – for instance in Burkina Faso (revisions to the *Réorganisation Agraire et Foncière*, in 1991 and 1996).

However, in most cases, the state remains the key player in land relations. With important exceptions (e.g. Kenya), private land ownership tends not to be widespread even where it is formally recognised – particularly in rural areas. This is due to the long and cumbersome procedures required to establish private ownership, particularly land registration. The World Bank estimates that, across Africa, only between 2 and 10 per cent of the land is held under formal land tenure; and this mainly concerns urban land.[5]

4. Kasanga and Kotey (2001:13) estimate that 80 to 90 per cent of all undeveloped land in Ghana is held under customary tenure.
5. Deininger, 2003:xxi.

With much control over land vested in the state, and with limited spread of private ownership, many people enjoy land use rights so long as they put land to productive use, for instance under "*mise en valeur*" requirements found in the legislation of much of Francophone Africa (e.g. Cameroon, Chad, Mali and Senegal). In these cases, land management institutions may be mandated to monitor productive use, and to reallocate land to third parties in case of non-use. Where land use rights are withdrawn, compensation is paid for loss of "improvements" (crops, buildings) but often not for loss of land rights as such (e.g. Cameroon, Senegal).

This legal regime, along with a lack of clear definition of what constitutes "productive use" plus the ensuing broad discretion of government officials responsible for monitoring fulfilment of this requirement, may open the door to abuse, and undermines the security of local land rights. This is particularly so for those groups whose resource use is often not considered as "productive enough" due to widespread (mis-)perceptions – particularly of pastoral production systems.[6]

In much of rural Africa, lack of financial resources and of institutional capacity in government agencies, lack of legal awareness and, often, lack of perceived legitimacy of official rules and institutions all contribute to limit the outreach of state legislation. On the ground, much of the rural population continues to access land through local tenure systems. These systems are based on usually unwritten rules founding their legitimacy on "tradition", as shaped both by practices over time and by systems of belief. Because of this, they are usually described as "customary". In reality, they have changed profoundly over time as a result of cultural interactions, population pressures, socio-economic change and political processes.[7]

According to the dominant, if somewhat stereotyped, view of customary resource tenure systems in Africa, land is usually held by clans or families on the basis of a diverse combination of group and individual rights. Land is accessed on the basis of group membership and social status. In reality, customary resource tenure systems vary considerably depending on the context. Important differences exist, for instance, between pastoral and farming contexts, and between patrilineal and rarer matrilineal systems.

In farming contexts, for instance, customary systems usually entail collective landholding by the family lineage or wider clan, and the allocation of farming rights over specific plots by the land management authority (e.g. the "chief") to smaller family units. The nature of these smaller units and of the farming rights they hold vary considerably from place to place. In many cases, farming rights are conditional upon the continued use of the plot. And, while such rights are often inheritable, restrictions usually exist on sales (especially to outsiders), although certain transactions may be allowed (gifts, loans, etc.).

While in the eyes of local groups "customary" rights may be real and legitimate, these rights tend to enjoy little formal legal protection. However, several countries

6. Hesse and Thébaud, 2006:17.
7. On these aspects, see Cotula with Neves, 2007.

have recently taken steps to strengthen protection of customary rights – even where land is state-owned or vested with the state in trust for the nation. Customary rights are, for instance, protected – to varying degrees – under Mali's Land Code 2000, Mozambique's Land Act 1997, Namibia's Communal Land Reform Act 2002, Tanzania's Land Act and Village Land Act 1999 and Uganda's Land Act 1998.

As a result of the limited implementation of state legislation at the local level and of the continued application of customary rules, several systems – statutory, customary and combinations of these – tend to regulate land rights in the same territory (a phenomenon referred to as "legal pluralism"). In this context, the boundaries between the "customary" and the "statutory" are very fluid: rather than a dichotomy between opposing extremes, local reality more commonly resembles a continuum combining both customary and statutory.[8] This situation often results in overlapping rights, contradictory rules and competing authorities.

3. The role of IPAs in land access

The nature, role and powers of IPAs vary substantially across countries. This diversity reflects broader differences in political orientation on issues such as foreign investment and the role of the private sector and of government regulation. For instance, while in Mozambique all investment projects (whether foreign or national) require government approval (under the 1993 Regulation to the Investment Act), in Ghana no such approval is required outside the mining and petroleum industries (although foreign investors are required to register with the Ghana Investment Promotion Centre under the Ghana Investment Promotion Centre Act 1994).

With specific regard to land access, the role of IPAs ranges from facilitating investors' dealings with government land agencies, to a more direct role in allocating land to investors. In Senegal, for instance, the *Agence Nationale Chargée de la Promotion de l'Investissement et des Grands Travaux* (APIX) acts as a one-stop-shop, accompanying investors in the rather complex and cumbersome process to obtain land from relevant government agencies.[9]

Similarly, in Ghana and Mozambique, IPAs act as one-stop-shops, facilitating the acquisition of all necessary licences, permits and authorisations. Their direct role in facilitating land access seems focused on helping investors in their dealings with other agencies. In Mozambique, for instance, while investment legislation makes no explicit mention of the role of the *Centro de Promoção de Investimentos* (CPI) in facilitating land access, the application form for prospective investors to seek government approval of the investment projects does mention, among possible areas where CPI assistance is sought by the investor, the "identification and licensing of land."[10]

A somewhat more "hands-on" role is played by Tanzania's IPA, the Tanzania

8. Benjaminsen and Lund, 2003.
9. APIX website.
10. CPI website.

Table 1: Tanzania's "land bank"		
Currently available land for investors	**Parcels**	**Area (ha)**
Agriculture	386	1,100,398.00
Housing estate	21	1,469.47
Industry	156	537,880.60
Mining	11	445.80
Ranching	49	238,939.20
Tourism	127	711,027.80
Grand total	743	2,590,161.00

Source: TIC website

Investment Centre (TIC). Under the Tanzanian Investment Act 1997, the TIC is mandated, among other things, with identifying and providing land to investors, as well as with helping investors obtain all necessary permits (Article 6). This entails identifying land not currently under productive use, and directly allocating it to investors. Under this arrangement, the land is vested with the TIC, and transferred to the investor on the basis of a derivative title (see section 5 below).

In order to perform this function, the TIC has set up a "land bank" – it has identified some 2.5 million hectares of land as suitable for investment projects.[11] The breakdown of this land area is provided in Table 1 above.

4. Land access procedures and safeguards for local land rights

In several African countries, the procedures for securing access to land are long and cumbersome. This issue emerged in several World Bank "Doing Business" reports, which identified cumbersome land access procedures as a significant constraint for business.[12] For example, Table 2 summarises the time and costs of registering property in sub-Saharan Africa, in comparison with other parts of the world. It shows the wide disparity in cost and the uncertainty associated with securing access to land for business.

These data mask significant cross-country variation, however. Although the hurdles in some African countries are extreme, others, such as Botswana, Kenya, South Africa and Uganda, have shorter, less costly and more efficient procedures (as shown in Table 3).

Procedures for accessing land may perform a useful role in establishing safeguards for local land rights. These safeguards aim to ensure that, at a minimum, local groups are not arbitrarily dispossessed of their land as this is made available to investors.[13]

In this regard, a particularly interesting example is provided by Mozambique, where investors are legally required to consult "local communities" holding rights in

11. TIC website.
12. World Bank, 2005.
13. For a comparative analysis of different approaches to establishing these safeguards, see Cotula (2007).

Table 2: Time and cost to register property		
Number of days	**Region**	**Percentage of property value**
34	OECD high income	4.8
51	East Asia and Pacific	4.2
54	Middle East and North Africa	6.8
56	South Asia	6.1
62	Latin America and the Caribbean	5.6
133	Europe and Central Asia	3.2
116	Sub-Saharan Africa	14.4

Source: World Bank, 2005

Table 3. Time and costs to register property: selected African countries		
Number of days	**Country**	**Percentage of property value**
335	Angola	11.0
107	Burkina Faso	16.2
340	Côte d'Ivoire	10.2
382	Ghana	4.1
274	Nigeria	27.2
114	Senegal	34.0
69	Botswana	5.0
39	Kenya	4.0
20	South Africa	11.3
48	Uganda	5.5

Source: World Bank, 2005

the land area sought for the investment project (Article 12 of the Land Act 1997 and Article 27 of the Land Act Regulation 1998).

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

This model constitutes an interesting approach to facilitating investors' access to land while protecting local land rights – both of which were explicit objectives pursued by the National Land Policy that preceded the adoption of the Land Act. However, shortcomings in the design and implementation of the community consultation process have been reported in the literature.[14] The system is centred on a one-off consultation between the investor and the community. This is at odds with the long-term duration of land allocations and forest concessions.[15] In practice, several agreements between communities and investors emphasise one-off compensation for loss of land rights rather than long-term benefit sharing, and usually involve very small payments compared to the value of the forest concessions acquired by the investor.[16]

In addition, there are no established mechanisms to monitor compliance with the agreement on the part of the investor. No effective sanctions exist in case of non-compliance – non-compliance does not affect the concession.[17]

The implementation of these provisions has been riddled with difficulties. In many cases, consultation processes only involve a few community members, usually customary chiefs and local elites who also monopolise the benefits.[18] In some cases, the consultation did not take place at all – or at least there is no record of it.[19] Even where consultation takes place as required, communities lack the bargaining power and technical skills to negotiate with foreign investors on an equal footing.[20]

Recently, government authorities have taken steps to reduce what are perceived as constraints on investors' land access. For instance, in October 2002 a government decree set a 90-day time limit for the processing of investor land applications (including community consultations).[21] The tightening of the legal regime of local consultation processes is putting pressure on the quality of these processes. The period of 90 days may seem long, but meaningful consultation of large communities in contexts characterised by significant power asymmetries between private companies and local groups would require sustained investment in time and effort in order to build local capacity to engage in consultation and negotiation exercises.[22]

Government interventions to ease the requirements and time set aside for community consultation came partly from the assertion that such requirements impose an excessive burden on investors, and may therefore discourage firms from investing in Mozambique. However, while land access for investors is indeed perceived as an issue by many firms in Mozambique (see the results of the survey referred to in section 1 above), much of the burden perceived by investors is linked to

14. Johnstone *et al.,* 2004; Norfolk, 2004; Chilundo *et al.*, 2005; Durang and Tanner, 2004.
15. Johnstone *et al.*, 2004; Durang and Tanner, 2004.
16. Norfolk, 2004; Durang and Tanner, 2004.
17. Johnstone *et al.*, 2004; Durang and Tanner, 2004.
18. Norfolk, 2004; Durang and Tanner, 2004.
19. As documented by Norfolk, 2004, and Johnstone *et al.*, 2004.
20. Johnstone *et al.,* 2004; Durang and Tanner, 2004.
21. Kanji, *et al.,* 2005.
22. Kanji, *et al.*, 2005.

bureaucratic red tape imposed by government agencies (e.g. concerning investment approval requirements) rather than by local consultations per se.

Despite the shortcomings in the design and implementation of local consultation processes under Mozambique's Land Act 1997, the very existence of a legal requirement to consult is a promising feature that differentiates Mozambique from several other African countries.

Another country where on paper local groups have a say in decisions to allocate land to outside investors is Senegal. Here, the exact nature of this say varies depending on the legal status of the land in question – whether it belongs to the central state, to private actors or to the "*domaine national*", a land area held by the central state and the bulk of which ("*zones de terroir*") is managed by local governments ("*communautés rurales*"). Where land belongs to the central state (or to parastatal agencies established, for example, to promote the development of a particular area, such as the Société d'Aménagement et de Promotion des Côtes et Zones Touristiques du Sénégal (SAPCO)), state agencies can directly allocate land to investors without much local consultation. On the other hand, local governments have a say in the allocation of land within the "*zones de terroir*", over which they hold considerable powers.

The extent to which local governments have the skills and confidence to resist an investment project enjoying central government backing, and the extent to which they have been able to use their legal powers to influence the distribution of the costs and benefits generated by the project, deserve closer attention.

5. The nature and content of investors' land rights

The nature, scope, content and duration of the land rights that investors – particularly foreign investors – are vested with varies across countries. This diversity reflects diverging political orientations with regard to land tenure – particularly as to whether private land ownership is allowed, and whether non-citizens may gain access to it.

In Mozambique, for instance, all land is vested with the state under the 1990 Constitution (Articles 98 and 109) and the Land Act 1997. Foreign investors and local groups alike may not own the land, but may enjoy long-term use rights ("DUAT"). However, while for local groups these land use rights are of indeterminate duration, investors (foreign or national) may be granted use rights of up to 50 years, subject to their complying with a production plan.[23]

In Ghana, while nationals may own land, foreigners may not – they can only acquire land leases of up to 50 years (Article 266 of the 1992 Constitution). Similarly, in Tanzania (where land is vested with the President in trusteeship for the nation), foreign investors face restrictions on the land rights they can hold. In particular, under the Land Act 1999 (Article 20(1)), foreigners cannot own land, and may acquire long-

23. Investors are granted a provisional land allocation of two years (if foreigners) or five years (if nationals), and a "definitive" allocation if they comply with the production plan within that period (articles 28-30 of the Investments Act Regulation 1993).

term use rights only for the purposes of investment under the Tanzania Investment Act.

Under Tanzanian legislation, these long-term use rights usually entail land being vested with the TIC and then allocated by the TIC to the investor on the basis of a derivative title (under Article 19(2) of the Land Act 1999). After the end of the investment project, the land reverts back to the TIC (Article 20(5) of the Land Act).

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

6. Conclusion

In recent years, several African countries have taken steps to facilitate investors' access to land. IPAs play a role in this – a role that varies significantly across countries and ranges from accompanying investors in their dealings with other government agencies to more direct involvement in identifying and providing available land. The procedures for investors to obtain access to land and the nature, content, scope and duration of the land rights that investors may obtain also vary.

A key challenge in much of rural Africa relates to facilitating access to land for investment while ensuring that this does not happen to the detriment of local groups. This challenge is particularly pressing given that land registration in rural Africa remains very rare, and most local resource users obtain access to land through local ("customary" but continuously evolving) resource tenure systems that may have only limited legal protection. Policy, legislative and institutional approaches to tackle this challenge have been developed (e.g. Mozambique's mandatory consultation process), although shortcomings in design and implementation have affected the outcomes of these approaches.

Given the limited literature publicly available, there is a need for empirical research to document how different legal and institutional arrangements are working on the ground – for instance, whether and to what extent they are effective in helping investors gain access to land as well as in protecting local land rights. This need is particularly acute with regard to documenting "successful" experience, analysing the conditions that made it possible and the extent to which such experience can be replicated elsewhere.

While this greater body of empirical research is in the making, the scoping analysis undertaken already provides some insights for the work of IPAs, particularly in Africa.

First, the limited information publicly available on how IPAs handle land access issues calls for greater efforts on the part of IPAs to disseminate information. Providing clearer information on the websites of IPAs would be an obvious first step.

This would help investors better understand institutional roles and procedures, thereby making it easier for them to acquire the required land. It would also make procedures and land allocation decisions more transparent, thereby strengthening safeguards for local land rights.

Second, the diversity of institutional arrangements documented here highlights the need for exchange of experience among IPAs as well as other stakeholders as to the different options that can be used to help investors gain access to land. Lesson sharing would enable IPA officials to learn from each other's experience, and generate insights on what arrangements work better where and under what conditions.

Third, the land access issues relating to investment projects are not limited to facilitating investors' acquisition of land. Investment projects may have long-term impacts on the land claims of other stakeholders, including local groups. In performing their land access facilitation role, IPAs must take full account of these impacts. There is a need to devise institutions and processes that can reconcile competing land claims, and facilitate investors' land access while protecting local land rights. Creative thinking and lesson-learning from the wealth of existing experience are important ingredients of this.

References

Amanor, K.S. (2005), 'Night Harvesters, Forest Hoods and Saboteurs: Struggles over Land Expropriation in Ghana', in Sam Moyo and Paris Yeros (eds), *Reclaiming the Land – The Resurgence of Rural Movements in Africa, Asia and Latin America*, Zed Books, London and New York: 102-117.

Benjaminsen, T.A., and C. Lund (eds) (2003), *Securing Land Rights in Africa*, Frank Cass, London.

Chilundo, A., B. Cau, M. Mubai, D. Malauene and V. Muchanga (2005), *Land Registration in Nampula and Zambezia Provinces, Mozambique,* IIED, London.

Cotula, L. (2007), *Legal Empowerment for Local Resource Control: Securing Local Resource Rights within Foreign Investment Projects in Africa,* London, IIED.

Cotula, L., with B. Neves (2007), 'The Drivers of Change', in Cotula, L. (ed.), *Changes in "customary" land tenure systems in Africa*, IIED, London.

Deininger, K. (2003), *Land Policies for Growth and Poverty Reduction,* World Bank, Washington DC.

Durang, T. and C. Tanner (2004), *Access to Land and Other Natural Resources for Local Communities in Mozambique: Current Examples from Manica Province*, presented to the Green Agri Net Conference on 'Land Administration in Practice', Denmark, 1-2 April 2004.

Hesse, C., and B. Thébaud (2006), 'Will Pastoral Legislation Disempower Pastoralists in the Sahel?', *Indigenous Affairs* 1/06, IWGIA: 14-23.

Johnstone, R., C. Boaventura and S. Norfolk (2004), *Forestry Legislation in Mozambique: Compliance and the Impact on Forest Communities,* Terra Firma Lda, Maputo.

Kanji, N., L. Cotula, T. Hilhorst, C. Toulmin and W. Witten (2005), *Can Land Registration Serve Poor and Marginalised Groups?* Summary Report, IIED, London.

Kasanga, K., and N. A. Kotey (2001), *Land Management in Ghana: Building on Tradition and Modernity,* IIED, London.

Nasir, J., G. de Barros, D. Wagle, M. Kedia Shah, C. Leechor, P. Srivastava, A. Harding, V. Ramachandran (2003), *Pilot Investment Climate Assessment – Mozambique Industrial Performance and Investment Climate 2003*, CTA, CPI, FPED, Africa Private Sector Group, World Bank.

Norfolk, S. (2004), *Examining Access to Natural Resources and Linkages to Sustainable Livelihoods: A Case Study of Mozambique*, FAO LSP Working Paper No. 17, FAO, Rome.

World Bank (2005), *Doing Business 2005: Removing obstacles to growth*, Oxford University Press, Oxford.

Website references

APIX www.investinsenegal.com
CPI www.cpi.co.mz
TIC www.tic.co.tz, particularly at
http://www.tic.co.tz/TICWebSite.nsf/2e9cafac3e472ee5882572850027f544/729d4c075f2b03fc432572d10024bea6?OpenDocument