The future of land: commercial pressures and the case for systemic law reform to secure rural land rights

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Introduction

A few years ago, I travelled to central Ghana, in the fertile farmlands west of Lake Volta. A global land rush was in full swing: large agribusiness plantation deals were announced at a dizzying pace in many low and middle-income countries. This transition belt between Ghana's forest zone and the northern savannah proved popular with international agribusinesses, and I came to understand the local impacts of the deals.

One day I spoke with a farmer who, until then, had made a living growing maize and yam. Shaded by a rough straw hat, the grey-bearded man retraced how a jatropha plantation took much of his land. He thought the compensation was not enough to get land elsewhere and felt too old to establish a new farm anyway – or take a job with the plantation. He had some land left but knew they would come for that too. When that happens, he concluded, he would just stay at home.

I asked him how he felt about these developments. "I am unhappy about what happened", he replied, "but there was nothing I could do". As a long-term migrant, he did not own the land: the power to allocate land rested with the traditional chief, who signed a lease with the company. Behind the farmer's experience lay not only the growing commercial pressures on land and resources, but also the way law structures property, territory and decision-making power. Confronting these issues alone seems impossible: it calls for a systemic reform agenda to secure rural land rights.

The farmer's response illustrates the ways in which many people across the global South experience dispossession. One is the tangible dimension associated with setting up a large investment project – in this case, an agribusiness plantation. A contract is signed, transferring control over a piece of land to a commercial operator. The land is cleared, and industrial monoculture displaces a diverse mosaic of small-scale farms.

But the deals also exposed far-reaching changes in property systems, both longstanding and recent. 'Customary' systems evolve over time (Peters 2004; Cotula and Cissé 2006; Lavigne Delville 2007; Amanor and Ubink 2008; Chimhowu 2019). In Ghana, political elites since the colonial era have redefined customary rules to advance their own interests, often strengthening the powers of traditional authorities and dispossessing rural people (Amanor and Ubink 2008). Around the world, there have been extensive developments in national and international law – from business-friendly land law reforms to trade liberalisation, all the way to the negotiation of international treaties protecting

From: African Development Bank, "Rethinking land reform in Africa: new ideas, opportunities and challenges", edited by Cosmas Milton Obote Ochieng, African Natural Resources Centre (2020)

foreign investment.

These two dimensions – the tangible and the intangible – reflect different time horizons: the tangible dimension is partly linked to short-term, cyclical factors such as fluctuations in commodity prices that create new incentives for commercial cultivation, or policy forces that promote transitions in land use; while evolutions in property systems are more closely related to longer-term processes of socioeconomic and political change. But the two dimensions are interlinked, because evolutions in property systems can facilitate land clearances.

Worldwide, the wave of agribusiness plantation deals over the period 2005–2015 was one manifestation of a global commodity boom and bust, and many deals in low and middle-income countries have since failed. But while narratives of resource scarcity can be used and sometimes abused for political ends (Scoones et al. 2019), most analysts expect demand for commodities to increase longer term, driven by global population growth, changing consumption patterns and expectations, and compounded by public policy choices.

We need to understand these commercial pressures in their diverse and evolving tangible manifestations in order to draw lessons from their impacts, and on possible strategies for responding to the anticipated demand for natural resources in the coming decades. But we also need to explore the more intangible processes that drive the deals and their impacts, and the structural features of governance frameworks that favour large-scale commercial interests over the rights of rural people. Only this holistic analysis can sustain a more informed and ambitious reform agenda to secure rural land rights in the longer term.

The commodity boom and bust

Let us start with the tangible dimensions. From the early 2000s, public policies and market forces sustained a wave of investments in low and middle-income countries across the natural resources sectors. While the exact figures are contested, partly due to methodological challenges (Oya 2013; Edelman 2013; Locher and Sulle 2014), evidence indicates that the global food price hike of 2007–2008 fostered a surge in large-scale land transactions for plantation agriculture, particularly in sub-Saharan Africa, but also in Asia and Latin America, for a diverse and evolving range of fuel, food, agro-industrial and 'flex' crops (GRAIN 2008; Deininger et al. 2011; De Schutter 2011; Anseeuw et al. 2012; Scoones et al. 2013; Nolte et al. 2016; Borras et al. 2016).

In addition, global investment in metals exploration was estimated to have increased ten-fold between 2002 and 2012, and investment in fossil fuels to have doubled over the same period (Le Billon and Sommerville 2017). Petroleum and minerals extraction began in areas that had previously been marginal in commercial terms, and petroleum operations on new frontiers resulted in several low and middle-income countries becoming producers, including Ghana (Macauhub 2014).

Governments of different political stripes saw the wave of investments as an economic opportunity – to promote growth, create jobs and generate much-needed public revenues. But the deals were accompanied by widespread concerns about the development pathway being pursued, and how the costs and benefits from commercial investments were being distributed in practice.

A vast body of research documented land conflict and dispossession, at different scales and under diverse terms, associated with agribusiness plantation projects (Schoneveld et al. 2011; UNHRC 2012; Kenney-Lazar 2012) and with extractive industry operations (Kishi 2014; OCMAL 2015; Pichler and Brad 2016), producing differentiated impacts based on socio-economic parameters such as age, gender status and wealth (Behrman et al. 2012). Accusations of 'land grabbing' have become common currency in public discourses (La Via Campesina et al. 2010), and many commercial ventures found themselves at the centre of public contestation, and in some cases court litigation, with diverse social actors challenging the deals, or the underlying public policies, to seek better terms or demand their termination (Alonso Fradejas 2015; Gingembre 2015; Grajales 2015; Moreda 2015).

More recently, deal making slowed as a result of changing commodity prices. Following the oil price drop from mid-2014, the number of active rigs in Africa and Latin America decreased (World Bank 2016). In the mining sector, exploration budgets were halved between 2012 and 2015 (SNL Metals & Mining 2016). And while new agribusiness plantation deals continue to be signed, the pace of deal making has significantly slowed compared with the peak of 2008–2012 (Cotula and Berger 2017).

However, at the local level, the pressures on resources continue to be felt. In the agriculture sector, for example, abandoned projects left behind a legacy of difficult land disputes (Sulle and Nelson 2013; Schwartz et al. 2019), and those ventures that are still ongoing have now moved from contracting to implementation, so their land footprint has become more apparent (Nolte et al. 2016). In many contexts, shrinking political space for negotiating resource disputes is increasingly exposing activists to brutal repression and intimidation (Global Witness 2016; Oxfam 2016; RRI 2017).

Many governments continue to identify the natural resource sectors as a foundation for national development strategies; and most analysts expect that global population growth, rising incomes and changing consumption patterns will fuel demand for commodities. Therefore, pressures on land and natural resources are likely to grow, particularly in strategic hotspots where minerals, petroleum, fertile soils, freshwater and infrastructure are concentrated.

Other factors are also driving competition for valuable lands. These range from long-standing land concentration in the hands of elites, particularly in areas connected to growing urban markets (Mathieu et al. 2003; Djiré 2007; Jayne et al. 2014); to public policies promoting industrial and infrastructural development, including a renewed momentum for the establishment of special economic zones. These processes reflect profoundly different social

phenomena and raise distinctive land governance issues. But they have in common their potential to exacerbate a resource squeeze on socially or politically marginalised groups.

The spread of special economic zones

Take special economic zones. These are "demarcated geographic areas … where the rules of business are different from those that prevail in the national territory" (Baissac 2011, p.23). Broadly aimed at promoting investment to foster industrial development, special economic zones can have diverse objectives, focus and legal regimes – including export processing zones, free trade zones, industrial zones and agribusiness parks. In many middle or higher-income countries, special economic zones are used to stimulate industrial upgrading; while low-income newcomers often deploy these zones to kickstart manufacturing, including by promoting local processing of natural resource-based commodities (UNCTAD 2019).

Recent years have witnessed a new surge in the establishment of special economic zones. The United Nations estimates that there are nearly 5,400 of them in the world, more than 1,000 of which were established since 2014, with an additional 500 anticipated in the coming years (UNCTAD 2019). Existing policy initiatives may provide further momentum, with China's Belt and Road Initiative often cited as an example. A wave of law-making has accompanied these processes: UNCTAD counted some 127 special economic zone laws worldwide, of which almost 70 per cent were adopted since 2000, and nearly 40 per cent since 2010 (UNCTAD 2019).

The vast majority of special economic zones are in Asia but the zones have been spreading rapidly in Africa too. While several South and Southeast Asian states launched their special economic zone programmes in the 1970s–1980s, many programmes in Africa were adopted in the 2000s. Today, 237 such zones were reported to have been created in Africa, of which 51 were under development (UNCTAD 2019).

Special economic zone policies differ widely, as do their ultimate outcomes. Suffice it to say that evidence on economic performance is mixed, with UNCTAD finding that many programmes "fail[ed] either to attract significant investment or to generate economic impact beyond their confines" (UNCTAD 2019, p.128). Further, the development of such zones has been associated with negative social and environmental impacts, and with concerns that, where exceptional legal regimes depart from national law in areas such as land acquisition and labour rights, they can facilitate dispossession and exploitation (Cotula 2017; Cotula and Mouan 2018).

What is clear is that, at scale, the creation of special economic zones can compound pressures on land and other resources. In terms of aggregate land area, the land footprint of the zones seems smaller than that of very large agribusiness plantation deals: UNCTAD estimates that the land area of special economic zones ranges from less than a hundred to a few hundred hectares (UNCTAD 2019). But due to their inherent connectivity requirements, many zones are located in areas close to urban centres or transport infrastructure, and

thus in higher-value and possibly more densely populated areas, so their land impacts may be felt more acutely.

In practice, research has documented the ways in which the creation of special economic zones can foster more commercialised land relations, and profound transformations in land ownership structures, including through land speculation, rent-seeking and dispossession (Levien 2018). Many special economic zones have been associated with disputes over land acquisition or converting land from agricultural to industrial use or the expropriation of homes, farms and other economic, social or cultural assets (Sampat 2010; Bedi 2013; Cotula and Mouan 2018).

Understanding the legal structures of dispossession

The overall result is that commercial pressures on valuable lands are projected to increase, even though the nature of those pressures and the factors that underpin them will be changing over time. This raises questions about the extent to which governance frameworks can effectively and equitably manage the growing competition for land. These questions return us to the conversation with the farmer in Ghana; his sense of powerlessness in the face of livelihood disruption, and the more intangible dimensions of commercial pressures on natural resources – particularly how evolutions in property systems affect the ways in which different land claims are protected and reconciled.

While arrangements vary greatly, both between and within countries, recurring governance patterns tend to promote exclusionary outcomes. Law plays a central role in these processes. This is not only because, in general terms, legal technique is instrumental to converting natural resources into commercial assets (Pistor 2019). Land cannot be physically removed, but long-term, transferable land rights can be traded, as can shares in landholding companies.

More specifically, and beyond the extreme diversity of socio-juridical contexts, four recurring features of the law tend to facilitate resource allocation to commercial projects (Cotula 2016):

- The extensive land allocation powers of the state, and in some countries of traditional authorities, make it easier for companies to obtain concessions over vast areas claimed by large numbers of people. This applies where the state owns all or most of the land – but also where unchecked powers of eminent domain enable authorities to expropriate privately held resources and reallocate them to commercial operators.
- Many states have reformed their national laws to compete for mobile international capital, making resources available to companies on favourable terms – from land law reforms and tax incentives to 'stabilised' contractual regimes (Shemberg 2008).
- While evidence shows that many traditional land use practices are resilient and sophisticated, rural people's resource rights enjoy variable but often limited legal protection

– including in jurisdictions where legislation or the constitution formally recognises those rights (German et al. 2013). For example, many land laws condition protection to proof of 'productive use', and skewed notions of productivity undermine the resource claims of shifting cultivators, pastoralists and hunter-gatherers (Nguiffo et al. 2009).

- A global network of international investment treaties has emerged allowing foreign investors to bring arbitration claims against the state and seek compensation for state conduct adversely affecting their business (Coleman et al. 2018). Often described as instruments of the rule of law, the treaties can protect foreign investors' rights, and even their expectations, (Perrone 2017; Johnson 2018) against public action to withhold, reopen or revoke commercial concessions in the face of local opposition (Cotula 2015, 2016; Cordes et al. 2016).

Taken together, these features enable the state to transfer resources to businesses, and they can constrain measures that adversely affect business interests. This legal arrangement mirrors complex relations among the state, national elites and international capital: legislation that, continuing colonial legacies, vests land ownership with the state enables the elites who control state institutions to partner with businesses and capture benefits from resource extraction. Weak protection of rural resource rights facilitates these strategies, while investment treaties can protect exclusionary deals that favour international capital.

Where traditional authorities play a more prominent role, property systems are also grounded in history and political economy. In Ghana, for example, the land governance role of traditional authorities is rooted in arrangements dating back to colonialism (Amanor and Ubink 2008). While traditional authorities locate decision making closer to rural people, ruling elites have often relied on local power-brokers to harness rural votes, and the payments, jobs and contracts associated with commercial investments can be a way to share rewards after an election. Strengthening the powers of traditional authorities can be instrumental to these kinds of transactional politics (Boone 2003; Poulton 2014).

In other respects, the law does provide opportunities to secure land rights or obtain redress. The negotiation or ratification of international human rights instruments, for example concerning indigenous peoples' and peasants' rights, have established important parameters for enhancing local control over natural resources – if not always effective avenues for legal recourse. Many states have adopted legislation that, for example, recognises rural land rights and requires social and environmental impact assessments for development projects, and several reforms over the past three decades have augmented these protections.

In sub-Saharan Africa, a wave of land law reforms since the late 1990s, often adopted in connection with wider changes in political organisation, strengthened legal recognition and protection of customary land rights in several jurisdictions (Knight 2010). Innovative approaches include legislation that abolishes the presumption of state ownership for

customary lands and devolves land administration to local level, for example most recently in Mali (Djiré 2017). But more implementation time is needed to assess the outcomes. Also, relatively few reforms have changed the fundamentals, and many aimed to promote foreign investment as well as secure rural land rights – creating scope for trade-offs between different policy objectives (Alden Wily 2014).

In addition, 'progressive' reforms can create tensions between the formal social contract reflected in the law, and the informal socio-political processes that determine how authority is exercised in practice – so implementation is often undermined by a de facto policy thrust that hollows out from within any innovative legal concepts (Guevara Gil and Cabanillas Linares 2019). For example, while some laws establish specific arrangements for governments (or investors) to consult local landholders, implementation has often fallen short of expectations in the face of a perceived policy imperative to open up resources for commercial developments.

The case for reform

At root, the growing pressures on land, and the role of law in shaping the ways those pressures manifest themselves, embody tensions between different conceptions of land – as a commercial asset to be harnessed for economic development, and as a basis for livelihood activities, social identity, cultural value and the collective sense of justice. Many national legal systems present a misalignment between local perceptions of land relations, and the central role of small-scale rural producers in local economies and societies, on the one hand; and legal arrangements that – on paper or in practice – favour large-scale commercial operators, on the other.

When given an opportunity, small-scale rural producers have demonstrated to be effective and resilient, yet the law often places them at a disadvantage and exposes them to dispossession. In addition, local-to-global legal regimes are geared more towards facilitating transnational investment flows than they are towards ensuring that these flows respond to local aspirations, or that governance systems enable people to seize the right investment opportunities and to advance them in socially inclusive ways.

There is a compelling case for securing the land rights of rural people – not only to protect their livelihoods, culture and social identity in the face of growing land competition, but also, in more positive terms, to recognise and support their contribution as key actors in the development process. International soft-law instruments developed over the past ten years provide guidance with unprecedented granularity on what this might entail. Relevant instruments include the Voluntary Guidelines on the Responsible Governance of Tenure (VGGT), and in Africa the African Union Framework and Guidelines on Land Policy.

Many initiatives to implement these instruments have provided guidance for businesses on how to address land rights issues in their operations and supply chains. While this can fill gaps in the law, advancing a bottom-up perspective to the governance

of resources and of investments requires more systemic reconfigurations from local to global levels – building on recent reform initiatives and stepping up efforts to strengthen the policies, laws and institutions that underpin the governance of land and investment, both on paper and in practice.

Any reform needs to be tailored to context. But a few general pointers can be advanced. First, the interplay of local to global policy arenas requires concerted action at multiple levels. There is a need to secure local land rights at scale, but achieving sustainable results also requires addressing the global dimensions – including the international treaties and dispute settlement arrangements that protect foreign investors' landholdings. Similarly, ongoing debates about reforming the international investment regime must be informed by a fine-grained understanding of how this regime intersects with local natural resource relations.

Secondly, the pervasive vested interests and power imbalances mean that any reform effort cannot just rely on technical fixes. While old-school approaches to assist law reform focused on delivering expertise to inform legislative drafting, law reforms can only be sustained if they recognise the politics and proceed from the bottom up, by building on insights from the field, for example about the real-life challenges rural people face and the local responses they have developed; and by recognising that political choices are at stake and require the effective participation of social actors in law-making processes (CED et al. 2019). Given the often difficult politics of implementation, there is also a need for sustained investment in politically savvy action to translate legal norms into real change.

Thirdly, addressing commercial pressures on land requires tackling often neglected land policy issues. Recognising in law and protecting in practice rural land rights, including those based on customary tenure systems and the associated socio-cultural values of land, are key priorities. But these actions do little to secure rights if land can then be expropriated with little protection or safeguard, including for commercial investments. This creates the need to also strengthen safeguards in compulsory acquisition, by tightening up public-purpose and compensation requirements; and to reform the processes whereby public authorities approve land-based investments, including screening of investment proposals, environmental and social impact assessments, and arrangements to arrive at consensual solutions based on negotiation with local actors.

Moving forward

Since that visit to Ghana, many jatropha ventures in Africa have failed. The commodity boom and bust has largely run its course, and different forces are now driving commercial pressures on land. I have not seen that farmer again or learned how he, his family and community coped with the longer-term changes. But the policy imperative is more relevant than ever: strengthening the land rights of rural people so they can have greater control over land, livelihoods and processes of change.

Governments have a central role to play in addressing these issues – by conducting

holistic reviews of their policy, legislative and institutional frameworks governing land and investment; and by enacting and implementing tailored reforms of the most effective levers for securing rural land rights. International instruments such as the Voluntary Guidelines on Governance of Tenure and the African Union Framework and Guidelines provide useful reference points for this work.

Given the complex political economies associated with land governance reform, federations of small-scale rural producers and non-governmental organisations supporting them play an essential role both in promoting reforms and in advancing their implementation. Donor agencies can help by supporting both state and non-state actors in these efforts, and advancing investment models that recognise small-scale rural producers as development protagonists.

Research can sustain this action, not only by documenting what practical approaches are effective, and under what conditions, but also by critically interrogating the challenges and the deeper-level processes at work – recognising that identifying problems is the first step towards developing effective responses. The need for concerted action from local to global levels, and for managing the pervasive politics at play, calls for new collaborations between research and practice, and between actors capable of operating at different levels and places.

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