



Focus Section D

Policies Regarding Land Tenure and Water Rights

The increase in world food prices since 2008, the growing demand for biofuels, and the increased interest among African governments in attracting additional private investment into agriculture have led to widespread interest in acquisition of land and water rights in the region by private nationals and foreign entities. Concerns about the resulting land acquisitions, dubbed “land grabs” by their critics, have become highly politicized and have spotlighted the critical importance of policies governing land tenure and water rights in West Africa. Insecurity of tenure, however, is a broader issue than just the current concerns about large-scale land acquisitions, as it creates fundamental impediments to development of Agriculture in the region. Indeed, ECOWAP identifies insecure land tenure as a factor contributing to low investment and productivity in West African agriculture and as a potential cause of violent conflict (e.g. between herders and agriculturalists). Since land and water are highly complementary inputs, particularly in irrigated systems, it is difficult to deal with them independently. There are also important gender dimensions to land and water tenure issues, as in many customary tenure systems in the region women’s rights to own, use, inherit land or to hold onto it once investments have been made on it that increase its value in production (e.g. irrigation improvements) are often weaker than those of men.

Apart from helping to avoid or reduce conflicts among resource users, more secure and exchangeable rights to water and land create incentives for public and private investment in land improvements and make these investments more profitable. Secure land tenure can allow land to be used as

collateral for loans, improving farmers’ access to capital, while a reliable land registry allows national and/or local governments to use land taxes as a source for efficient financing of critical public services. Tradable rights to water and land also facilitate the access to these resources by those most able to use them efficiently and allows those who cannot fully exploit the land (e.g. because of lack of sufficient household labour or knowledge) to receive income for their land to enable them to engage in non-agricultural income-earning activities (Deininger and Jin, 2006; Mathieu et al., 2003). A large body of research from many parts of West Africa has documented the emergence of land rentals and sales within local tenure systems – practices that were previously considered to be incompatible with customary tenure (Delville et al., 2001). Research has also shown that local land tenure systems effectively enforcing land rights can provide adequate tenure security and strengthen incentives to invest in improving land productivity (Sjaastad and Bromley, 1997). In high-value land areas, monetised land transactions are mushrooming. This includes the monetization of customary forms of land transfers and the emergence of new types of land transactions such as sales. These changes in customary tenure systems seem to confirm the basic tenets of the so-called “evolutionary theory of land rights”, whereby demographic growth and agricultural intensification tend to push towards greater individualization and commercialization of land rights (Cotula, 2007; Boserup, 1993).¹⁵³

One of the key challenges in land tenure in West Africa is providing a system to meet the

¹⁵² Maintaining national markets that are not integrated creates rents caused by price differences across borders in excess of transport costs, so those in a position to appropriate those rents (e.g. agents controlling the border crossings) have an incentive to resist implementation of moves to create a more integrated market.

¹⁵³ It should be noted, however, that empirical evidence from many parts of Africa shows that the picture is often more complex than the linear process described by this theory. For instance, intra-family individualization processes may co-exist with the continuation or reinterpretation of the collective dimensions of customary land tenure, in order to reaffirm the primacy of the land rights of locals vis-à-vis groups outside the extended family (Cotula, 2007).

needs of pastoralist groups, which rely on common property resources and mobility. Pastoral livelihood systems have developed to cope with and adapt to climatic uncertainty in drylands. Such systems depend on flexibility in land use and management, with the need to negotiate the use of land on a seasonal basis with other users. Potential conflicts may arise, particularly where farmers encroach onto the arid rangelands or into northern wetlands (such as the Interior Niger Delta in Mali) that are vital to Sahelian pastoralism (Cotula, 2006). The past decades have seen a promising shift by several West African governments to recognise and protect pastoralists' rights of access to natural resources. 'Pastoral laws' have been passed in Guinea (1995), Mauritania (2000), Mali (2001) and Burkina Faso (2002), and Niger (Cotula et al., 2004). Management of shared resources across borders, including land and transhumance corridors, is a major focus of ECOWAP, with activities plan to establish transhumance corridors and grazing pastures in cross-border areas. ECOWAS has also adopted a programme for the sustainable management of pastoral resources and the management of transhumance in West Africa. Its action plan recommends monitoring pastoral resources and assessing their environmental and socio-economic impacts at the regional level.

The importance of clear and transparently enforced rules regarding land and water rights will become increasingly important in the coming years, as population pressure, high prices of agricultural products, and climate-induced population movements lead to increasing demand for agricultural land and potential conflicts between resident populations, new migrants, pastoralists and outside investors. In West Africa, this is a regional as well as a national issue, as these pressures will likely lead to substantial population movements across borders. Under Article 27 of the ECOWAS treaty, citizens of any member state are free to undertake industrial or commercial enterprises in any other member state, but lack of clarity about land tenure rules will likely discourage intra-community investment in agroprocessing enterprises that require access to some land as a complement to the processing plant.

West African land tenure systems are characterized by legal pluralism – the co-existence of systems of rules based on different principles – based on the overlay of rules based on European principles of ownership derived from the colonial experience with systems of customary tenure and in some cases rules based on Sharia. An example is Senegal, where customary systems held that land belongs to the community, lineage or family, but never to an individual. In some communities, Islamic inheritance rules were grafted onto these systems to govern how use rights were transferred across generations. Colonial administration introduced private property and land registration, but by independence only 3% of the land in Senegal had been officially registered. In 1964, the current land tenure law, the *Loi sur le Domaine National (LDN)*, vested ownership of all unregistered land to the nation, to be administered by the state. Subsequently, as part of Senegal's process of decentralization, administration of the LDN was delegated to rural councils, under the supervision of the state. The local councils have the right to attribute land to local residents and adjudicate land disputes among them, based in part on local custom. In principle, they are not to allocate land to those outside the local community (Faye et al., 2011).

It is important that a clear set of procedures and mechanisms exist by which land-related conflicts may be solved in order to avoid long and protracted disputes, which can lead to disinvestments in agriculture and may eventually develop into violence. Registration and titling have been promoted as a means by which to increase security of tenure for land users and thereby promote increased investment in agriculture (Winter and Quan, 1999). Yet such registration procedures often involve complicated administrative processes that are difficult for many rural people to meet, thereby increasing the likelihood that current occupants can be dispossessed by better informed and educated (often urban) people who understand how to work the system to get legal title to the land. Based on failure of early attempts to replace customary systems with modern systems of land tenure and acknowledging the dynamics of local tenure systems, it is now more widely recognized that land policies and laws must build

on local concepts and practice. This entails, among other things, legally recognizing local land rights.

Legal pluralism in land rights in itself is not necessarily a problem. More than the co-existence of different tenure systems, it is the lack of transparency in the administration of the rules, the splintering of the system of authority and the unregulated plurality of arbitration bodies that are the source of opportunistic behaviours, “forum shopping”, and weak capacity to resolve conflicts.¹⁵⁴ For example, in Senegal, investors have obtained land through a combination of requests for land to local councils, direct negotiations with individual villages, appealing to central government (which subsequently put pressure on local councils) and rental from those holding title to land. Sixty-one percent of the large land acquisitions identified in 2010 by Faye et al. went to Senegalese nationals (mainly members of the political and religious elite), with the remaining acquisitions by foreign entities often also involving a Senegalese partner. These acquisitions were actively encouraged by central government through its programmes to expand agricultural production such as the Grande Offensive Agricole pour la Nourriture et l’Abondance (GOANA) and the biofuels programme (Faye, et al., 2011).

A number of countries in West Africa have undertaken reforms in their land laws, aimed at strengthening customary claims to land and simplifying procedures for land registration. Yet, as in so many areas, the gap between stated policy and implementation remains large, as the examples cited above for Senegal illustrates. Furthermore, even if land tenure rules are clarified and land transfers are legally permitted, problems will remain if the general atmosphere of overall contract enforcement remains weak. For example, if it becomes legal for farmer to transfer his land to an outside investor in exchange for certain considerations, such as promises of future employment, but those commitments subsequently are not met and the farmer has no way to enforce the agreement, the clarification of land tenure rules will have simply facilitated his or her loss of land.

A potential role for ECOWAS is to push for clarification of land rights by developing regional standards for the transferable rights of land rights, based in part on the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (FAO, 2012c). Similar guidelines for securing water use rights are needed, which unfortunately the Voluntary Guidelines do not address.

¹⁵⁴ Forum shopping is the practice of approaching more than one system to resolve a land dispute.